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Panel: *APO Rules: Protecting Business Proprietary Information while Striving for Transparency*
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Legal Underpinnings of Preservation of the Confidentiality Accorded by the International Trade Commission to Proprietary Information during Trade Remedy Investigations

Background

The International Trade Commission ("Commission") recently appealed to the U.S. Court of Appeals for the Federal Circuit ("CAFC") the Court of International Trade's ("CIT") decision to not retract a public opinion that allegedly contained confidential business proprietary information ("proprietary information") contained in the Administrative Record developed by the Commission during the underlying trade remedy investigation.[1] The CAFC's ruling on this appeal with respect to preservation of the confidential status accorded to proprietary information submitted by parties and non-parties (collectively, "participating entities")[2] in trade remedy investigations can significantly affect the Commission's ability to collect relevant information as well as the submitters' interests in ongoing and future investigations.

Without commenting on the merits of the appeal, this article reviews the legislative framework governing the Commission's authority to collect information, Commission practice with respect to the treatment of that information, the CIT's and CAFC's Rules pertaining to the issue on appeal, and the impact of this decision on participating entities in trade remedy investigations.

The statutory scheme and Commission practice balance the desire for transparency in decision-making with the need to ensure the confidentiality of participating entities' confidential information and build a comprehensive record by permitting disclosure of confidential information in only three limited circumstances: when the information can be disclosed without

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[1] *CVB. Inc. v. United States, Brooklyn Bedding, LLC, et. al.*, Court of Appeals Docket No. 24-1504 (Fed. Cir.); *Mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam*, USITC Inv. Nos. 701-TA-645 and 731-TA-1495-1501 (May 2021) (collectively "Mattresses").

[2] Although the relevant statutory language and legislative history typically refers to "parties" in a trade remedy investigation, the statute and Congress explicitly recognized that non-parties also play a key role in those investigations. Accordingly, the authors use the term "participating entities" to refer to all private participants in an investigation at the agency level – both parties and non-parties – to avoid unintended exclusionary inferences regarding the term "parties" where all participating entities share an interest in safeguarding confidential information. Note, however, that the term "participating entities" is intended to be construed narrowly in the context of disclosure of confidential information under a protective order, as the Commission's Administrative Protective Order ("APO") procedures effectuate legislative intent by allowing the disclosure of confidential information only to counsel for interested parties that have signed on to the protective order to prevent the disclosure of competitively sensitive information to company representatives. All uses of the term "parties" in quoted language have been retained as in the original.

revealing the individual operations of a company; when the information is disclosed under a protective order; or when the Commission receives consent of the submitter.[3] Participating entities rely on these protections to protect sensitive business information from competitors. Likewise, counsel for interested parties depend on participating entities' confidence in the system to obtain a complete record upon which they can effectively advocate for their clients. Consequently, the CAFC's ruling on appeal will greatly affect not only the ability of participating entities and counsel for interested parties to provide necessary information and present robust, factually supported legal arguments, but it will also impact the Commission's ability to carry out its statutory mission to administer trade law remedy laws.

Statutory Scheme

1. The Commission's Broad Authority to Collect Information

One of the primary missions of the Commission is to administer trade remedy laws and adjudicate whether a domestic industry is materially injured or threatened with material injury by reason of imports that are sold in the United States at less than fair value or that benefit from countervailable subsidies provided through foreign government programs.[4] To facilitate the Commission's execution of its statutory mandate, Congress authorized the Commission to collect and manage information relevant to the subject matter under investigation and necessary to carry out its functions and duties in connection with its investigations. Specifically, under 19 U.S.C. § 1333(a), the Commission has broad authority to collect such information from any person or entity engaged in the production, importation, or distribution of the article under investigation:

> (a) Authority to obtain information
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> For the purposes of carrying out its functions and duties in connection with any investigation authorized by law, the {C}ommission or its duly authorized agent or agents (1) *shall have access to and the right to copy any document, paper, or record, pertinent to the subject matter under investigation*, in the possession of any person, firm, copartnership, corporation, or association engaged in the production, importation, or distribution of any article under investigation, (2) may summon witnesses, take testimony, and administer oaths, (3) *may require any person, firm, copartnership, corporation, or association to produce books or papers relating to any matter pertaining to such investigation*, and (4) may require any person, firm, copartnership, corporation, or association, to furnish in writing, in such detail and in such form as the commission may prescribe, information in their possession pertaining to such investigation . . . .[5]

[3] *See* 19 U.S.C. § 1677f(a)(4)(A); 19 U.S.C. § 1677f(c)(1).
[4] Trade Remedy Laws Administered by USITC, United States International Trade Commission, https://www.usitc.gov/trade_remedy_laws.htm.
[5] 19 U.S.C. § 1333(a) (emphasis added).

As part of the Commission's broad authority to obtain information pertinent to the investigation, Congress has also given subpoena power to the Commission: "Any member of the commission may sign subpoenas, and members and agents of the commission, when authorized by the commission . . . ."[6] In accordance with this statutory authority, the Commission's questionnaires issued in trade remedy investigations may be issued as a subpoena; those questionnaires have the force and effect of a subpoena authorized by the Commission.[7]

With regard to the information obtained by the Commission during an investigation, Congress recognized that without access to confidential information, interested parties could not present effective legal arguments in trade remedy investigations, while at the same time, participating entities would be less willing to provide sensitive business information without effective safeguards—all of which would significantly reduce the Commission's ability to fulfill its obligations to administer the trade remedy laws and the ability of interested parties to present effective legal arguments on appeal.[8]

Accordingly, Congress prescribed how the Commission should manage and ensure the confidentiality of such information. In general, pursuant to 19 U.S.C. § 1677f(a), the Commission shall not disclose information designated as proprietary by the person submitting the information without the submitter's consent, other than to the Commission's personnel directly concerned with carrying out the investigation.[9]

To request proprietary treatment, the submitter is statutorily required to provide the Commission with further information, depending on the degree of confidentiality of the information perceived by the submitter: (1) a non-proprietary summary of the substance of the information or a statement that the information is not susceptible to such summary accompanied by a statement of the reasons and (2) a statement of whether the information may be released under the Commission's APO.[10] Consistent with this statutory requirement, the Commission promulgated 19 C.F.R. § 201.6(b), further elucidating the procedure for submitting business information in confidence.[11]

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[6] 19 U.S.C. § 1333(a).
[7] *See* 19 C.F.R. § 207.8.
[8] *See* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144, 187 (1979) (codified as amended at 19 U.S.C. § 1677f) (adding new Section 777 "Access to Information" to the Trade Act of 1930). *See also* S. Rep. No. 96-249 at 99-100 (1979); H.R. Rep. No. 96-317 at 77 (1979) (explaining congressional intent to cure the twin problems of lack of information for interested parties seeking to present effective legal arguments to the Commission and the importance of access to information at the administrative level, given that judicial review in trade remedy matters typically turns on the information in the administrative record).
[9] 19 U.S.C. § 1677f(b)(1)(A).
[10] 19 U.S.C. § 1677f(b)(1)(B).
[11] *See* 19 C.F.R. § 201.6(b).

2. Legislative Intent and the Commission's Definition and Treatment of Confidential Information

The legislative intent of 19 U.S.C. § 1677f was to grant the Commission "broad authority to frame such regulations as are necessary to ensure maximum possible access to information without impeding the ITC's ability to complete its investigations within the tight time limits for investigation provided by statute."[12] Accordingly, Congress "expect[ed] the ITC to adopt regulations and procedures to facilitate the provision of all eligible information to representatives of the parties on as timely a basis as practicable."[13] In addition, Congress specifically acknowledged that "the best insurance that the ITC will be able to obtain the information it needs for its investigations is *its reputation for strictly maintaining the confidentiality of information submitted to it*."[14]

As noted above, the statutory framework reflects this congressional intent and generally prohibits the Commission from disclosing confidential information except under three circumstances: (1) information disclosed in a manner which cannot be associated with or used to identify operations of a particular person;[15] (2) the information is disclosed to participating entities under a protective order for the proceeding the information is provided for;[16] and (3) the submitter of the information provides consent to the Commission.[17]

Consistent with the statute and legislative intent, the Commission promulgated 19 C.F.R. § 201.6(b) to define what qualifies as proprietary information and establish a procedure for submitting business information in confidence.[18] In promulgating regulations, the Commission sought public comments through notice-and-comment rulemaking.[19] The Commission defined business proprietary information as follows:

> Confidential business information is information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership,

[12] S. Rep. No. 100-71 at 112 (June 11, 1987).
[13] *Id.*
[14] *Id.* at 114 (emphasis added) (endorsing the Commission's use of strong sanctions under section 1677f(c)(1)(B) against any person found in violation of an APO for the Commission's reputation for strictly maintaining the confidentiality of information submitted to the Commission).
[15] 19 U.S.C. § 1677f(a)(4)(A).
[16] 19 U.S.C. § 1677f(c)(1). *See supra*, note 2 (discussing how the Commission's APO procedures limiting the disclosure of confidential information to counsel for interested parties effectuate legislative intent).
[17] 19 U.S.C. § 1677f(b)(1)(A).
[18] *See* 19 CFR § 201.6(b).
[19] *See, e.g.*, Amendments to Rules of Practice and Procedure, 49 Fed. Reg. 32,569, 32,570 (Int'l Trade Comm'n Aug. 15, 1984) (explaining and clarifying that the term "other information of commercial value" may include certain materials).

> corporation, or other organization, or other information of commercial value, *the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of* the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information . . . .[20]

As such, the Commission has defined proprietary information primarily in connection with the Commission's efforts to balance its ability to obtain information for the statutory functions and the competitive interests of entities participating in an investigation.

The Commission also published guidelines on how proprietary information is treated in the context of AD/CVD investigation: *Antidumping and Countervailing Duty Handbook* ("*AD/CVD Handbook*")[21] and *An Introduction to Administrative Protective Order Practice in Import Injury Investigations*.[22] The *AD/CVD Handbook* provides a public, readily accessible document for practitioners and business entities involved in an investigation to learn about how the Commission defines and handles proprietary information, and when and how participating entities may request proprietary treatment of information they submit.

For example, as part of its efforts to balance its ability to obtain information and the participating entities' competitive interests, the Commission has treated information obtained through questionnaires as proprietary information; the information submitted through questionnaires commonly includes a company's market activity in connection with the product under investigation and is not usually publicly available.[23] Importantly, courts have also recognized the need for confidential treatment to protect the competitive interests of the companies that provide such information in trade remedy investigation.[24]

The wide range of information that the Commission treats as proprietary also reflects Congress' recognition of the different roles of the Commission and the Department of Commerce ("Commerce") in an antidumping and countervailing investigation. Congress recognized that the distinction between the Commission's APO requirements and Commerce's stems from the difference in the nature of the agencies'

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[20] 19 CFR § 201.6(a) (emphasis added).
[21] *See Antidumping and Countervailing Duty Handbook* (14th ed. June 2015) ("*AD/CVD Handbook*"), USITC Pub. 4540.
[22] *An Introduction to Administrative Protective Order Practice in Import Injury Investigations,* USITC Pub. 5280 (5th ed. Jan. 2022).
[23] *Id*. at II-26.
[24] *See, e.g., Akzo N.V. v. U.S. Int'l Trade Comm'n*, 808 F.2d 1471, 1482 (Fed. Cir. 1986); *see also Hyundai Pipe Co., Ltd. v. U.S. Dep't of Commerce*, 11 CIT 238, 243 (1987).

investigations; while "the significant information obtained by [Commerce] generally comes from parties to the investigation . . . pertinent information [obtained by the Commission in an injury investigation] is derived from a variety of sources, many of whom are not parties to the proceeding."[25] As such, Congress specifically considered the nature of the injury investigation conducted by the Commission to grant broad authority with respect to proprietary information.

3. The Balance between Transparency in the Commission's Decision-Making and Protecting the Confidentiality of Proprietary Information

As discussed above, the Commission's definition and treatment of proprietary information is designed to balance its statutory mandate to collect the information necessary to carry out its investigations with the business interests of entities participating in the investigation. The statutory scheme incorporates an innate awareness that those participants may be competitors in the marketplace and therefore balances the desire for transparency in decision-making with the protection of proprietary information. In addition, while interested parties may have a vested interest in providing information to the Commission in an investigation, other participating entities, such as foreign producers or purchasers of the subject products, may not share those incentives. Without the robust Commission safeguards provided to confidential information under the statute and the Commission's APO procedures, they would be less likely to provide confidential information about market trends that provide critical context for the Commission's determinations.

Generally, the Commission is required under 19 U.S.C. § 1677f(a) to disclose certain types of information including: "any proprietary information received in the course of a proceeding if . . . disclosed in a form which cannot be associated with . . . operations of a particular person, and . . . any information submitted . . . .which is not designated as proprietary . . . ."[26] To avoid compromising the confidentiality of such data, the Commission typically aggregates statistical business proprietary information and limiting public discussion of that aggregated information in certain circumstances. For example, the Commission treats aggregate data as confidential (1) if the data involve one or two companies, or (2) if the data include three or more companies, but where one company accounts for at least 75 percent of the total or two companies account for at least 90 percent of the total.[27]

In the interest of balancing the desire for transparency in decision-making with the protection of proprietary information, the Commission holds public hearings in trade remedy investigations and publishes public versions of its Staff Report and Views. Public hearings "allow interested parties to express their views and permit

[25] S. Rep. No. 100-71 at 112.
[26] 19 U.S.C. § 1677f(a).
[27] *AD/CVD Handbook at* II-26.

Commissioners to ask questions. . . ."[28] The Commission also independently researches publicly available information as it evaluates the legal arguments submitted by interested parties and the factual data provided by participating entities and includes its findings in the public versions of these publications. These publications provide the Commission's reasoning and incorporate statistical data to the extent possible, which allows counsel for interested parties in ongoing and future trade remedy investigations to perform research and survey the public data from past investigations to shape their legal strategy.

Consistent with the statutory framework and legislative intent to assist the Commission's statutory mission, the Commission adopted APO procedures to allow for more transparency in the Commission's decision-making as, prior to the adoption of the APO procedures, interested parties did not have access to information submitted to the Commission by opposing parties.

Specifically, the Commission is required to disclose all BPI presented to or obtained by the Commission during a proceeding, except privileged, classified, or other confidential information for which there is a clear and compelling reason to not disclose, to participating entities under a protective order.[29]

Under the APO procedures as well as the statutory framework, the Commission is required to disclose all business proprietary information submitted during a proceeding, except privileged, classified, or other confidential information for which there is a clear and compelling reason to not disclose, to participating entities who are parties to the proceeding under APO, regardless of when the information is submitted during a proceeding.[30] If the submitter of the proprietary information refuses to disclose it under APO despite the Commission's determination to the contrary, then the Commission is required to return the information as well as any non-confidential summary of it.[31]

Even in the cases where the Commission denies the access of the interested parties under APO to the proprietary information, the Commission is required to disclose the information if the Court of International Trade receives an application for the information from the party and, after "notification of all parties to the investigation and after an opportunity for a hearing on the record," finds that:

> (A) the administering authority or the Commission has denied access to the information under subsection (b)(1),
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> (B) the person on whose behalf the information is requested is an interested party who is a party to the investigation in

[28] *AD/CVD Handbook* at II-19.
[29] *See* 19 U.S.C. § 1677f(c)(1). *See also 19* C.F.R. § 207.7; Procedures for the Conduct of Investigations of Whether Injury to Domestic Industries Results from Imports Sold at Less than Fair Value or from Subsidized Exports to the United States, 44 Fed. Reg. 76,461 (Dec. 26, 1979) (adopting 19 C.F.R. § 207.7 as a final rule).
[30] 19 U.S.C. § 1677f(c)(1)(A).
[31] 19 U.S.C. § 1677f(c)(1)(E).

> connection with which the information was obtained or developed, and
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> (C) the party which submitted the information to which the request relates has been notified, in advance of the hearing, of the request made under this section and of its right to appear and be heard.[32]

Congress also recognized that the Commission must have the authority to determine, "on the basis of the nature and extent of the information or its availability from public sources, that designation of any information as proprietary is unwarranted."[33] But, even in that case, the Commission is statutorily required to *return the information* to the party submitting it unless that person persuades the Commission that the designation is warranted or withdraws the designation.[34]

Participating entities may appeal the Commission's approval or denial of parties' requests for confidential treatment.[35] An appeal may be made within 20 days of the Commission's approval or denial of a party's request for confidential treatment or whenever the approval or denial has not been provided within 10 days of the receipt of the request.[36] The Commission makes a decision on an appeal within 20 days after it receives the request, unless the Commission provides an extension notice in writing.[37] In the case of appeals from the Commission's denial of proprietary treatment, the justification as to an appeal must be limited to the justification presented to the Commission with the initial request.[38] If the Commission has denied a request for not providing adequate justification, additional justification can be provided as part of an "amended" request; the filing of an amended request tolls the 20-day period for an appeal, and a new 20-day period begins once the amended request has been denied or if the Commission has not provided an approval or denial within 10 days of the filing of the amended request.[39]

Through these processes and procedures, the Commission balances the desire for transparency in its written opinions so that the public can understand its analysis of the record evidence with the requirement that confidential information be protected vigorously so that participating entities have confidence that their information will not be revealed without notice and either their consent or ability to withdraw the proprietary information.

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[32] 19 U.S.C. § 1677f(c)(2).
[33] 19 U.S.C. § 1677f(b)(2).
[34] *Id.* (emphasis added).
[35] *See generally* 19 C.F.R. § 201.6(e).
[36] 19 C.F.R. § 201.6(e)-(f).
[37] *Id.*
[38] 19 C.F.R. § 201.6(e)(3).
[39] *Id.*

4. Rules Pertaining to Judicial Review of the Commission's Determinations

The statute governing judicial review of the Commission's determinations and the Rules of the CIT and CAFC also provide additional guidance regarding the treatment of proprietary information. As an initial matter, both the CIT and CAFC preserve the confidential status of papers filed with the Courts.[40] Meanwhile, 19 U.S.C. § 1516a(b)(2)(B) provides that:

> The confidential or privileged status accorded to any documents, comments, or information *shall be preserved in any action* under this section. Notwithstanding the preceding sentence, the court may examine, *in camera*, the confidential or privileged material, and may disclose such material *under such terms and conditions as it may order*.[41]

The statutory provision clearly mandates that courts preserve the confidential nature of proprietary information from the administrative record. Moreover, to avoid erroneous conclusions about the language in the second sentence of the provision, Congress further explained the statutory language "under such terms and conditions as it may order":

> Special provision would be made in subsection (b)(2)(B) for preserving the confidential or privileged status of any materials contained in this record, *including, where the court determines it would be appropriate, the disclosure of the privileged or confidential material only under the terms of a protective order*.[42]

This language indicates that Congress intended that courts disclose proprietary information only under the terms of a protective order, if at all. Importantly, Congress immediately followed this explanation by noting that *parties* may seek protection for the proprietary information from the reviewing court, even when the Commission has not determined confidentiality of such information:

> However, the lack of a determination during the administrative proceedings concerning confidentiality or privilege with respect to documents, comments, or information will not preclude a party from seeking protection for such material from the court.[43]

Read together, the language of the statute and the legislative history provide a clear picture of Congress's mandate for judicial treatment of confidential information in trade remedy cases: the confidentiality of proprietary information is to be guarded with the greatest of care, even when an agency has not granted that information confidential status, and although a reviewing court *may* disclose such material under "such terms and

[40] *See* CIT R. 73.2(c)(1); CIT R. 81(h)(3); Fed. Cir. R. 25.1(d)(2).
[41] 19 U.S.C. § 1516a(b)(2)(B) (emphasis added).
[42] S. Rep. No. 96-249 at 239 (emphasis added).
[43] *Id.*

and conditions as it may order," it should only do so under protective order to maintain the confidential status of proprietary information.

Likewise, the rules of the CIT and the CAFC provide guidance regarding the treatment of proprietary information that is consistent with the statute and legislative intent. The CIT's rules instruct that the proprietary information accorded business proprietary status by the Commission must be filed under seal:

> any document, comment, or information that is *accorded confidential or privileged status by the agency whose action is being contested* and that is required to be filed with the clerk of the court, *must be filed under seal*. . . . For the purposes of this rule and Rule 81(h), the term "confidential information" includes business proprietary information as defined in 19 U.S.C. § 1677f(b).[44]

The CIT rules also ensure that "[t]he 'confidential' set of pleadings or other papers filed with the court will be available only to persons authorized to receive them and will not be made available to the public."[45] The CIT also has acknowledged that an agency's "investigatory needs must be balanced with a party's need for confidentiality . . . through proprietary information safeguards.[46]

Similarly, the CAFC rules instruct that "[i]n general, any portion of the record that was subject to a protective order in the trial court or agency *must* remain subject to that order on appeal or review," although the CAFC may *sua sponte* direct participating entities to show cause why a protective order should not be modified.[47] The CAFC further provides guidance on the materials in the record subject to a protective order of a lower court such as the CIT or agencies such as the Commission: that is, "[a] party or counsel for a party must be permitted to inspect and copy material contained in the record governed by a protective order of an agency in accordance with that order."[48] Moreover, in such cases where a party wishes to *remove* the confidential status of some portion of the record, the CAFC rules provide that "that *party* must seek an agreement with the other *parties*."[49]

The courts' emphasis on the importance of protecting the confidentiality of proprietary information against unilateral disclosure does not mean that they do not encourage judicial transparency. The CAFC rules, in particular, demonstrate how the court balances the interests of participating entities with the public interest in judicial transparency: the CAFC establishes word limitations on redactions in legal arguments, but those redaction limitations "do not apply to appendices; attachments; exhibits; and

[44] CIT R. 73.2(c)(1) (emphasis added).
[45] CIT R. 81(h)(3).
[46] *Kemira Fibres Oy v. United States*, 858 F. Supp. 229, 234 (Ct. Int'l Trade 1994).
[47] Fed. Cir. R. 25.1(c)(1) (emphasis added).
[48] Fed. Cir. R. 17(d)(2); *see also* Fed. Cir. R. 11(b)(2).
[49] Fed. Cir. R. 25.1(c)(2) (emphasis added).

addenda to motions, petitions, responses, replies, or briefs"[50]—the very locations where proprietary information is likely to be provided.

As demonstrated, the rules of the CIT and the CAFC are designed to implement the Congressional mandate to preserve the confidential status of proprietary information while also providing judicial transparency. By limiting the number of allowed redactions in legal arguments but recognizing that certain documents, such as appendices, attachments, and exhibits likely have significant proprietary information that the court should protect and only release to those under a protective order, the courts balance the public interest in judicial transparency with the private interest in protecting the confidential status of proprietary information.

Takeaways

The legislative framework for preservation of the confidentiality of proprietary information, together with the legislative intent behind those statutes, the Commission's practice, and the CIT and CAFC rules and previous rulings, shed considerable light on the issue on appeal at the CAFC: whether the CIT erred in denying the Commission's joint motion to retract the CIT's public slip opinion and accord confidential treatment to business proprietary information. The CAFC's decision on this issue will provide additional guidance on how proprietary information obtained during the Commission's trade remedy investigations will be treated on appeal, which inevitably will affect participating entities' willingness to provide sensitive business information in trade remedy investigations.

Without sufficient confidence that Commission procedures will protect the confidentiality of sensitive business information at both the agency level and on appeal, certain participating entities will be less inclined to provide such information. Gaps in the record will harm not only the interested parties in a given trade remedy investigation, but also counsel seeking to advise and advocate for their clients in future trade remedy investigations. Given the central role of confidential information submitted by participating entities in Commission determinations, the Commission's ability to compile and safeguard a comprehensive record serves both the interests of the participating entities and the public interest in the Commission's ability to fulfill its statutory mission administering U.S. trade law.

[50] Fed Cir R. 25.1(d)(1).