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TO: VFX Soldier

FROM: Andrew W. Kentz
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RE: Feasibility Study on Subsidies to Film Production and Visual Effects

DATE: July 2, 2013

You have requested our opinion as to the feasibility of taking legal action with respect to the detrimental effects of subsidies in film production, and especially in the visual effects industry.

We believe that the U.S. countervailing duty (CVD) law is the most promising avenue for making progress in dealing with the harmful effects of subsidization in these industries. Applying the CVD law to digital products raises novel, and potentially controversial, legal issues and would not, in itself, provide a long-term, comprehensive solution to the subsidy problem. Nonetheless, we believe that the obstacles to invoking the CVD law are surmountable, and the prospect of even partially effective CVD orders could provide a substantial disincentive to the continued use of subsidies and create an environment in which it would be possible to negotiate a more comprehensive, enforceable international agreement to discipline subsidies in this area.

This memorandum sets forth, and explains the basis for, the following four conclusions:

1) Subsidies for film production generally, and visual effects in particular, are large, pervasive, and distortive of international trade.

2) These subsidies very likely violate existing international trade agreements, but those agreements are not readily enforceable.

3) The legal and practical complications of applying the CVD statute to address these subsidies are significant, but can be overcome.

4) An action plan to address the subsidy issue in stages can be developed.

I. Subsidies for Film Production Generally, and Visual Effects in Particular, Are Large, Pervasive, and Distortive of International Trade

For many years, governments in many parts of the world have been providing subsidies for film production and, more recently, for visual effects used in films, video games, and other products. There have been many governmental, academic, and industry studies of these subsidies and their effects, both positive and negative, on various players within the relevant industries. Because the subsidizing governments tend to compete actively with one another to incentivize the location of production activities in their territories, most of the programs are well documented and fairly straightforward. For example, the accounting firm KPMG publishes a guide to international tax incentives provided throughout the world to film and television production; the 2012 edition covers available subsidies in 35 countries and runs to 670 pages.

It is also evident that these subsidies play an important, if not decisive, role in decisions about where to locate production activities. Our conversations with participants in the industry, media accounts, and the more formal studies mentioned above universally attest that subsidies are a major factor in determining where production occurs. While those who receive the subsidies undoubtedly derive a benefit from them, the detrimental effect on companies that produce in unsubsidized jurisdictions and on professionals who live in such locations is equally beyond question. Moreover, many of the subsidizing governments themselves have called into question whether the benefits they receive from attracting production activities justify the cost of the subsidies to their taxpayers.

While the details of the subsidy programs vary from one jurisdiction to the next, the British Columbia (BC) Production Services Tax Credit can be taken as a paradigmatic example of the available incentives. This tax credit is available to BC-based corporations that own the copyright to a production being produced in BC, or contract with the copyright owner to provide production services with regard to the production. The tax credit is currently worth 33% of the BC labor cost, plus an additional 6% for certain work done in BC outside the greater Vancouver area (12% if done in a remote area), plus an additional 17.5% of the BC labor cost for certain digital animation or visual effects activities. This tax credit is refundable, meaning that if it is greater than the corporation's BC income tax liability, the balance is paid to the corporation in cash – meaning that the program effectively is a grant in the amount of one-third to one-half or more of the labor cost of producing films partly or completely in BC.

Thus, if a U.S. production company is making a film and decides to locate some or all of its production and post-production activities in BC, the company – or its BC-based vendors – will receive very large payments that offset much of its production costs. These payments are made through the BC income tax system, so the direct recipient of the subsidy will always be a BC taxpaying entity. Based on our conversations with people in the industry, it would appear that the general practice is that where a BC-based company is doing work on a U.S. production, it usually does not reduce its price to the U.S. production

company to reflect its subsidized production costs. Rather, the standard practice seems to be that the BC company charges a full (nominal) price to the U.S. production company, and then passes the tax credit back to the production company. We would speculate that this practice reflects the accounting methodology of the U.S. production company, as it allows the company to calculate a lower net profit for the production (calculated on the full cost of the BC activities) while recording the subsidy benefit in a separate account. (Such an accounting convention would also explain the practice, which was described repeatedly to us, of production companies insisting that certain activities be done in subsidized jurisdictions, even if a supplier in a non-subsidized jurisdiction is willing to match the net price.)

BC is certainly not the only Canadian province to offer such a tax credit, nor is it necessarily the most generous. The Canadian federal government also provides similar tax credits, and other countries – including Australia, New Zealand, and the United Kingdom, among others – provide substantial incentives along similar lines. We use the BC tax credit primarily as an illustration of how all of these subsidies work to distort production decisions, not because it is the only or even necessarily the most egregious such program.

There seems to be no question that subsidies dictate a significant part of the production decisions made by U.S. film production companies. Where live action films are shot, and where various post-production activities (including visual effects) are located, is dictated in large part by the subsidies that are available rather than by artistic capabilities or even costs in the more traditional sense. These subsidies, therefore, provide a disincentive for businesses and professionals working in nonsubsidized, or even less generously subsidized, jurisdictions and may adversely affect the artistic content of films as well.

II. These Subsidies Very Likely Violate International Trade Agreements, But These Agreements Are Not Readily Enforceable

It is generally recognized that subsidies, while not necessarily always harmful, can cause significant distortions in international markets. Thus, international trade agreements frequently include provisions that discipline the use of subsidies. The most important rules governing international trade trace their origin to the 1947 "General Agreement on Tariffs and Trade" (GATT), which evolved into the World Trade Organization (WTO), established in 1994. The WTO has 159 member countries, including all of the world's largest economies.

The WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) is the main agreement covering subsidized trade in goods. For our purposes, the SCM Agreement has three major provisions. First, it prohibits two of the most trade-distorting types of subsidies – subsidies that are contingent on "export performance," and subsidies that are contingent on "the use of domestic over imported goods." Second, it prohibits the use of "specific" subsidies (i.e., subsidies provided only or disproportionately to particular enterprises or industries) that adversely affect the interests of other WTO Members. These

first two provisions are enforceable through dispute settlement procedures initiated by WTO Member governments. Third, the SCM Agreement authorizes countries to impose import duties on subsidized goods from other countries if those imports cause material injury to their domestic industries. These "countervailing duties" (CVDs), in effect, require the repayment of the subsidy at the border as a condition of the goods entering the commerce of the importing country.

In the United States, WTO disputes are handled by the Office of the U.S. Trade Representative (USTR). Section 301 of the Trade Act of 1974 (19 U.S.C. § 2251) authorizes (but does not require) the President, through USTR, to impose trade sanctions on countries that violate trade agreements with the United States. In practice, trade sanctions for WTO violations are never imposed without going through the WTO dispute settlement process. The USTR, in consultation with the rest of the Executive Branch, has wide discretion on whether to bring a WTO challenge. Even when a WTO violation by another country is manifest, USTR may decide not to bring a WTO case for any number of reasons. While private parties may formally petition USTR to take action under Section 301, USTR is under no obligation to act.

In 2007, a coalition led by the Film and Television Action Committee filed a petition with USTR under Section 301 alleging that Canada's subsidies to film production were subsidies contingent on export performance and subsidies causing adverse effects to U.S. interests, both in violation of the WTO SCM Agreement. We have reviewed that petition, and we believe it makes a strong legal case that these subsidies are inconsistent with the SCM Agreement.

However, USTR declined to take action on the petition. Because USTR has broad discretion under Section 301, it did not have to give a full justification for its action. The reasoning underlying the determination not to act, accordingly, is unknown. USTR may have concluded that, because some U.S. companies benefit from subsidies provided by other governments, it might not be politically feasible to bring even a legally valid complaint even though other U.S. companies and workers are harmed. Alternatively, USTR may have had substantive concerns as to whether the SCM Agreement (which applies only to trade in goods, not to trade in services) could be applied to film subsidies.

Whatever the reason may have been, the landscape has not dramatically changed since 2007, and we believe it is unlikely that USTR would be willing to take this matter to the WTO in the foreseeable future. Groups that benefit from the subsidies are well organized, well funded, and likely to work actively against any meaningful action by the U.S. government in the WTO. Given the broad discretion that USTR has to take, or decline to take, action under the WTO agreements, even the most airtight legal arguments demonstrating that film subsidies violate those agreements are not likely to result in a WTO challenge by the United States.

However, the SCM Agreement also permits WTO Members, including the United States, to impose CVDs to offset injurious subsidies. This path also presents considerable difficulties, which we discuss in detail in Part III of this memorandum. As we explain below, we believe these difficulties are not insurmountable and that CVDs can be obtained to cover at least some of the subsidies at issue. We are aware that in 2001, a coalition also led by the Film and Television Action Committee filed a petition for a CVD investigation. This petition was withdrawn when it became apparent that the coalition would not be able to demonstrate sufficient industry support. As we explain below, developments in the law since 2001 lead us to believe that a more targeted approach to a CVD petition could succeed today, even though the prior effort was not successful.

While the CVD route has its disadvantages, the U.S. CVD statute differs importantly from Section 301 in one key aspect: It is mandatory in its application. If the conditions for imposing a CVD are met, the law as enacted by Congress does not grant the Administration discretion to decline to apply a trade remedy. Further, while the relevant agencies have considerable scope for discretion in administering these laws, they are accountable to the courts for that discretion and cannot decline to take action without explanation. Therefore, we believe that, on balance, the CVD law provides the better approach to addressing the subsidy issue.[1]

At the same time, we believe that the exercise of rights under the CVD law affords parties injured by subsidies with leverage over beneficiaries of the subsidy programs, even if the trade relief ultimately obtained is limited. First, even partial relief from the harmful effect of subsidies would represent an improvement over current conditions. In addition, the process of a formal CVD investigation may provide additional information about how the industry works that currently may not be widely known or available.[2] This may be useful in a variety of contexts, not necessarily directly related to subsidies or trade.

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[1] A large majority of CVD petitions are filed simultaneously with antidumping petitions alleging that the same merchandise is being sold at "less than fair value." However, we have not suggested that any CVD petitions on film subsidies be paired with antidumping petitions. While showing that imported film products are subsidized will be relatively straightforward, showing that they are unfairly priced would be far more complex and – unless they are sold in the United States for less than their (subsidized) cost of production – may not be possible to prove. As a general matter, we believe that including an antidumping component to a CVD complaint on film subsidies likely would add greatly to the complexity of a case without significantly improving the remedy. However, if it becomes apparent in preparing a specific CVD petition that an antidumping allegation could be made credibly in that particular case, making an allegation could be considered at that time.

[2] Some of the information gathered in a CVD investigation is proprietary and cannot be publicly disclosed. But in most cases, the public record will develop important

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Most importantly, if a CVD petition was even marginally successful, that development would change the way that subsidy recipients approach the issue. For example, groups that today would be completely opposed to any limitations on subsidies might become amenable to discussing an international agreement that would impose meaningful limits on subsidies in this sector, in return for lifting CVDs. Such an agreement could be more comprehensive than any individual CVD case and provide a longer-term resolution to the subsidy "race to the bottom."[3]

III. The Legal and Practical Complications of Applying the CVD Statute to Addressing These Subsidies Are Significant, But Can Be Overcome

Some form of the CVD law has existed since 1897, and the current version was enacted in 1974 (with substantial updates to reflect international agreements in 1979 and 1994). In other words, the CVD law was not designed with current film and visual effect production methodologies in mind. In fact, with one possible exception we discuss below, the CVD law has never been applied to digital products. We would expect, therefore, that the default position of the federal agencies responsible for administering the law would be to question whether the CVD law even applies in this context. However, as we explain below, the actual provisions of the law establish that it can and does apply.

In this Part, we first explain how the CVD law works in general. We then deal with what we believe are the three most important legal issues that a CVD petition in this field would raise – its applicability to "intangible" goods, the "scope" or product coverage of a CVD petition, and enforceability concerns.

A. The CVD Statute

The CVD law begins in Section 701 of the Trade Act of 1930, as amended (19 U.S.C. §§ 1671 *et seq.*). Section 701(a) provides:

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information with respect to how subsidy programs are structured and used and how they affect competition in the industry.

[3] Recent antidumping and CVD cases on solar cells from China have led to duty orders in both the United States and the European Union. Although the petitioning industries have publicly expressed frustration with what they view as defects in the relief they obtained, there has also been recent support voiced from leading U.S. lawmakers, as well as in the EU and China, for a comprehensive negotiated agreement addressing subsidies in that sector. We believe that the prospect of CVD orders addressing film subsidies could provide similar incentives to seek such an international agreement.

> If —
>
> (1) the [Department of Commerce] determines that the government of a country . . . is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported . . . into the United States, and
>
> (2) . . . the [International Trade] Commission determines that an industry in the United States is materially injured, or threatened with material injury . . . by reason of imports of that merchandise . . . ,
>
> then there shall be imposed upon such merchandise a countervailing duty . . . equal to the amount of the net countervailable subsidy.

19 U.S.C. § 1671(a). The term "shall be" indicates that the CVD law is mandatory; if the requirements for applying a CVD are met, Congress gives the Administration no discretion to decline to apply it. See, e.g., S. Rep. 93-1298 at 183 (1974) (describing "the clear and mandatory nature of the countervailing duty law").

There are several aspects of the statute that are worth describing at the outset. First, the statute applies to a "class or kind of merchandise imported . . . into the United States." In other words, it applies to a *specific product*, the "manufacture, production, or export" of which benefits from government subsidies. In other words, the CVD law does not provide remedies against "subsidies" as such, but rather against the deleterious effects of "subsidized merchandise" that is imported into the United States from one or more subsidizing countries.

Further, it must be shown that imports of the subsidized merchandise have caused, or threaten to cause, material injury to an industry in the United States. The relevant industry, for these purposes, is basically the industry that produces the "like product" to the subsidized merchandise. Further, the CVD case is initiated by a request from that domestic industry that must meet certain minimum thresholds of demonstrated support. That other U.S. industries (including upstream suppliers and downstream consumers) are injured, or benefit from, the subsidies generally is not relevant – it is the effect on, and support of, the U.S. industry producing the "like product" to the subsidized imports that matters.

Thus, the key threshold issue in applying the CVD law is to define the "class or kind of merchandise" that is alleged to be subsidized. If the definition is too narrow, then subsidy recipients can slightly alter their business practices so that the product at the moment it is imported into the United States falls outside the definition, and any CVDs imposed would be rendered ineffective. But if the definition is too broad, the corresponding "domestic industry" may include producers who do not compete with the subsidized imports. These domestic producers are unlikely to support the petition or to be injured by

the imports, and the CVD petition would fail on one of these grounds. Further, whatever is defined must constitute a single "class or kind" of merchandise, and it has to *be* "merchandise." All of these issues pose unique challenges to applying the CVD law in the case of film subsidies.

Before addressing these issues, however, a discussion of how the CVD law would work sets the stage for understanding the nature of these challenges and why they are not insurmountable. Assuming that a proper "class or kind of merchandise" has been identified, the CVD law is triggered by the filing of a petition with the Department of Commerce ("Commerce") and the International Trade Commission ("ITC"). The petition must identify the proposed "scope" (i.e., the definition of the "class or kind of merchandise" alleged to be subsidized) and the country providing the subsidy; if there is more than one subsidizing country, each one is the subject of a separate petition. The petition must include evidence of the subsidy programs that benefit the production of the merchandise, evidence of support from the domestic industry, and evidence of injury to the domestic industry.

Commerce reviews the petition and determines whether it meets the minimum evidentiary requirements, particularly with respect to domestic industry support. Commerce has 20 days to accept or reject the petition; in extraordinary circumstances this can be extended to 40 days. If the petition is accepted, both Commerce and the ITC begin investigations. Commerce investigates whether the merchandise is subsidized, and the ITC investigates whether the domestic industry is injured.

The first decision point following initiation is a preliminary injury determination by the ITC. This comes fairly quickly, within 45 days of the filing of the petition (i.e., 25 days after formal initiation). If the ITC determines that there is no reasonable indication of injury, it makes a negative determination and the investigations end. If the ITC finds a reasonable indication of injury, Commerce proceeds with its investigations. Commerce then makes a preliminary determination regarding subsidization and, if it finds that there are subsidies, establishes preliminary subsidy rates within 65 days after initiation. This period can be, and often is, extended to as long as 130 days after initiation. If the preliminary determination finds subsidies, then liability for paying CVDs can attach to imports on or after the date the preliminary Commerce determination is published. Commerce then has 75 days to make a final subsidy determination, and if it is affirmative the ITC has an additional 45 days to make a final injury determination. In all, the process takes about 10-12 months from filing the petition to the final determinations.

If the final determinations of Commerce and the ITC are affirmative, Commerce issues a CVD order. In the usual case, all imports of subject merchandise from the date of the preliminary Commerce determination forward are subject to the order. Importers are required to declare subject merchandise at "entry" (i.e., on the entry paperwork submitted to Customs and Border Protection ("CBP")) and to post a cash deposit equal to the subsidy rate most recently calculated by Commerce. Final duty assessment occurs retrospectively. Each year, any party – domestic industry, foreign government, foreign exporter, or U.S. importer

– can request Commerce to determine the precise amount of subsidy that was actually received for the merchandise actually imported, and for final duties to be assessed on that basis. If no review request is made, the cash deposit becomes the final duty. Every five years, both Commerce and the ITC review the order to determine whether it remains necessary – i.e., whether subsidies would continue and whether injury would recur if the order were to be revoked. The order remains in place until Commerce or the ITC find that the order is no longer necessary, or the domestic industry indicates it no longer has an interest in the order.

Final determinations by Commerce and the ITC are subject to court review. Appeals are made to the Court of International Trade, a federal district court of specialized jurisdiction located in New York, and from there to the Court of Appeals for the Federal Circuit in Washington. Theoretically, appeals are also possible to the Supreme Court, but it is exceptionally rare for the Supreme Court to accept a case involving the administration of trade remedies. Usually, final duty payment is delayed until all appeals are resolved. If the goods are from Canada or Mexico, a NAFTA panel of trade law experts sits in place of the U.S. court system, and its decisions are final. In addition, the exporting country may pursue a WTO challenge as to whether the CVDs were imposed in accordance with WTO rules.

As will be apparent from this brief description, the CVD law is complex and requires a great deal of involvement from domestic industry not only at the petition stage, but also well beyond it. Although the complexity of the law requires a reliance on trade professionals, especially where novel issues arise, the industry must always keep in mind that obtaining CVD duties is not an end in itself. Rather, the goal is the elimination of the adverse effects of subsidies. Therefore, domestic parties petitioning for relief must remain informed and involved in order to make use of any and all leverage created by a CVD petition.

B. Do Film Subsidies Benefit "Merchandise"?

As described above, the CVD law applies when subsidized "merchandise" is "imported" into the United States. Usually, the CVD law applies to tangible goods that are relatively easy to identify at importation – steel, lumber, refrigerators, etc.

In the case of film and visual effects subsidies, the subsidized item that is produced in another country and brought into the United States can take several forms. First, a production (which could be a motion picture, television program, video game, commercial, etc.) could be produced entirely in another country and distributed from that country, in which case the item entering the United States would be a copy with a license providing for limited use by the purchaser. Second, a production could be produced entirely in another country for distribution by a U.S. distributor, and the item entering the United States is the original "master" of the production with the full copyright attached. Third, individual "shots" or visual effects could be made in another country and sent to a U.S. production company for incorporation into a production in the United States.

Regardless of the particular situation, the item that comes into the United States – whether a full production with a limited license, a full production with full rights, or individual shots – can be transmitted on a physical carrier medium (film reels, DVDs, etc.) or transmitted electronically as digital files. Our conversations with industry participants suggest that Internet transmission accounts for a substantial and growing share of cross-border transfers, especially for visual effects. An initial threshold question, therefore, is whether any or all of these items constitute "imports" of "merchandise" to which the CVD law would apply.

In 1989, Commerce initiated a CVD investigation of certain computer-aided software engineering products from Singapore that was alleged to benefit from subsidies to the software development process. The "scope" or product in that investigation was certain software products imported from Singapore on a "carrier medium" (at that time, apparently 5¼-inch floppy discs were the norm). Commerce reasoned that, while software originates as an "intangible idea," it must be incorporated into a tangible object in order for a computer to carry out the program. Because U.S. Customs considered carrier media (with or without content) to be "merchandise" subject to import regulations, software imported on a carrier medium is also merchandise, even though most of the value of imported software is in the intellectual property, not in the carrier medium. On this basis, Commerce concluded that "a tangible object which embodies intellectual property is merchandise." Certain Computer Aided Software Engineering Products from Singapore, 55 Fed. Reg. 1596 (Dep't Commerce Jan. 17, 1990).

In the final phase of its investigation, Commerce ultimately concluded that the software in question was, in fact, not subsidized. Therefore, there was no final CVD order and no actual CVD collection that might have triggered a court ruling on the legal question of whether the software in that case was properly treated as "merchandise" subject to the CVD law. Nor did Commerce reach more difficult questions, such as whether it would matter if the software was pre-installed on original computer equipment manufactured in a third country, or if the software was sent digitally to a third country or even to the United States for copying onto a carrier medium for commercial sale. There have been no subsequent CVD investigations in which these questions have arisen. However, there have been sufficient legal rulings in other contexts that lead us to conclude that such products would fall within the CVD law.

Importantly, the U.S. Customs Service (now U.S. Customs and Border Protection) issued a ruling in 1998 confirming that commercial digital products that are transmitted over the Internet are merchandise subject to the laws governing imports. HQ 114459 (Customs Sept. 17, 1998). Customs began with the definition of "merchandise" in 19 U.S.C. 1401(c) as including "goods, wares, and chattels of every description," and concluded that all "objects of trade and commerce" are included in this definition. Id. From this, Customs concluded:

> the transmission of software modules and products to the United States from a foreign country via the Internet is an importation of merchandise into the customs territory of the United States in that the software modules and products are brought into the United States from a foreign country. The fact that the importation of the merchandise via the Internet is not effected by a more "traditional vehicle" (e.g., transported on a vessel) does not influence our determination. The essential facts are that merchandise in a foreign country is brought into the United States.

Id.

However, Customs also concluded in this ruling that imports of digital products over the Internet are "telecommunications transmissions" which, pursuant to General Note 16(b) of the Harmonized Tariff Schedule of the United States (HTSUS) (later moved to General Note 3(e)(ii)), are not "goods subject to the provisions of the tariff schedule." Accordingly, Customs ruled that digital products imported over the Internet are imported merchandise, but they are not subject to the tariff schedule, which means they are exempt from the requirements of "entry" (i.e., the process of declaring imported goods to Customs) and the payment of ordinary Customs duties. Id.

In its 1990 preliminary determination in the Singapore software investigation, Commerce generally deferred to Customs' view of what constituted "merchandise," but also stated that "telecommunications transmissions" and other items exempted from the tariff schedule are not "merchandise for customs purposes." However, the subsequent 1998 Customs ruling reversed Customs' earlier position and confirmed that Customs now *does* consider "telecommunications transmissions" to be imported merchandise, albeit imported merchandise not subject to duty or entry requirements. Because Commerce's 1990 determination was based on what it understood to be Customs' then-valid interpretation of the HTSUS, the current Customs interpretation would need to be taken into account should the question again be presented to Commerce.

Because the CVD law applies to "imports" of "merchandise," and not to "entries" of merchandise, 19 U.S.C. § 1671(a), the CVD law should therefore apply even to imports that are transmitted digitally over the Internet. The absence of any entry requirements for these imports does create some difficulties with respect to the administration and enforceability of any CVD order to digital imports, as discussed further below. Nonetheless, the CVD law by its terms would apply even to digital imports.

Although this conclusion has never been tested with respect to the CVD law, other statutes involving imports have been applied consistently with the 1998 Customs ruling and the analysis we have just set forth. For example, the Department of Labor initially denied a claim for trade adjustment assistance (TAA) benefits filed by software professionals who lost their jobs as a result of competition from software written overseas, and sold in the United States after being transmitted digitally over the Internet. Labor concluded that

software was an intangible product that could not be an imported "article," so the TAA statute did not apply. The Court of International Trade – the same court that reviews Commerce's application of the CVD law – reversed Labor's conclusion, holding that software code does not have to be contained on a physical carrier medium in order to be considered an imported article. Former Employees of Computer Sciences Corp,. v. Sec'y of Labor, 414 F. Supp. 2d 1334 (Ct. Int'l Trade 2006). On remand from the court, Labor reversed its position and concluded: "Software and similar intangible goods that would have been considered articles for the purposes of the Trade Act if embodied in a physical medium will now be considered articles regardless of their measure of transfer." Notice of Revised Determination on Remand, 71 Fed. Reg. 18,355, 18,355 (Dep't Labor Apr. 11, 2006).

Likewise, the International Trade Commission – the same body that carries out the injury investigations required under the CVD law – includes digital imports in its application of Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), which provides a remedy for imported merchandise found to infringe on intellectual property rights granted under U.S. law. When the ITC finds that imported goods violate U.S. intellectual property rights and issues a "cease and desist" order prohibiting imports of the infringing goods, this order is applied equally to electronic Internet transmissions. See, e.g., Certain Systems for Detecting and Removing Viruses or Worms, Components Thereof, and Products Containing the Same, Inv. No. 337-TA-510, USITC Pub. 3936, at 41 (July 2007) ("[F]or a cease and desist order not to cover electronic transmissions would allow for an obvious method of circumvention such that the cease and desist order would be rendered 'meaningless.'"); Certain Hardware Logic Emulation Systems and Components Thereof, Inv. No. 337-TA-383, USITC Pub. 3809, at 28-29 (Mar. 1998) ("[A] cease and desist order that did not prohibit electronic transmission would be meaningless …."). However, if the Commission issues an exclusion order for Customs to administer, it does not include electronic transmissions out of deference to Customs' inability to enforce such an order against transmissions that are not otherwise subject to Customs entry requirements. E.g., Certain Biometric Scanning Devices, Components Thereof, Associated Software, and Products Containing the Same, Inv. No. 337-TA-720, USITC Pub. 4366, at 22 (Feb. 2013).

These conclusions by sister agencies and the Department of Commerce's reviewing court further confirm that Commerce should apply the CVD law to subsidized imports of film products, even those that are imported digitally.

Further, it is worth pointing out that any subsidy beneficiaries who might oppose a CVD petition would face interesting risks if they objected to these conclusions. For example, major U.S. film distributors clearly have an interest in ensuring that U.S. laws fully apply to online imports of digital products that violate U.S. copyright laws. While these distributors would likely oppose a CVD case on film subsidies, they would need to take into account their interests in the integrity of U.S. intellectual property law as applied to Internet transmissions in framing any arguments as to the applicability of the CVD law to goods transmitted digitally.

If objections are raised, one likely argument emerged from the question of whether a potential CVD petition would be filed with respect to the "master" version of a film or to copies of that film. For example, a production company in Canada could produce an entire film there using subsidies, and then sell the "master" (with all copyrights in the work) to a U.S. film distributor. Or, alternatively, it could sell the "master" to a distributor in Canada or a third country where copies would be made and exported to the United States. In principle, the physical (or digital) item that is "imported" into the United States in these two scenarios could be identical, even though the license accompanying the copy would transfer many fewer rights than would the transfer of the master. This difference has implications both for the definition of the relevant "market" that is being distorted by the subsidized import and for the calculation of the subsidy – the full amount of the subsidy received can be attributed to the import of the master, but only a pro rata share to the import of any one copy. It could be argued, in this situation, that the "real" subsidized product is the *rights* associated with the imported good rather than the import itself. These rights, as distinct from the goods, would not be "merchandise" and would therefore fall outside the scope of the CVD law.[4]

A similar, but not identical, argument was rejected by Commerce in a 2001 CVD investigation of imports of uranium from four European countries. In these cases, uranium produced in the United States was shipped to Europe for enrichment so it could be used in U.S. nuclear power plants. Subsidies were provided to the European enrichment companies, and the competing U.S. enrichment industry filed CVD (and antidumping) petitions. In the industry's practice, the uranium was owned by the U.S. uranium producer before, during, and after its enrichment in Europe. The European enrichment companies argued that they merely were providing a service; they were not buying unenriched uranium and then selling enriched uranium for export to the United States, any more than a dry cleaner buys a dirty suit from a customer and sells her a clean suit in return. Since the transaction was structured as the (foreign) provision of a service rather than the export of a good, the European producers argued that the CVD law did not apply.

Commerce rejected this argument. Low Enriched Uranium from France, 66 Fed. Reg. 65,877, 65,878-81 (Dep't Commerce Dec. 21, 2001). With regard to the CVD law, Commerce stated that "the statute is clear that, where merchandise from an investigated country enters the commerce of the United States, the law is applicable to such imports." Id., 66 Fed. Reg. at 65,879. When unenriched uranium is transformed into low enriched uranium, a new product is created, and that product is imported, i.e., introduced into the

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[4] We understand that considerations of this type may have played a role in USTR's rejection of the Section 301 petition in 2007, and so we believe that this argument should be taken seriously in framing a potential CVD petition in this sector.

commerce of the United States. Therefore, the CVD law can apply to the imported product, regardless of the particular structure of the transaction under which the product is imported:

> It does not matter whether the producer/exporter sold subject merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise entering the commerce of the United States. The first, and threshold, question we must ask is whether the merchandise entering the United States is subject merchandise. All else flows from this.

Id. If, as we have explained above, digital products are "merchandise" for purposes of trade law, then the same conclusion should apply here – what matters is whether some *thing* (whether or not expressed on a carrier medium) produced in another country enters the commerce of the United States. If it does, then the CVD law applies, regardless of whether the sales transaction between the ultimate buyer in the United States and the ultimate producer in the other country is structured primarily as a provision of services or a transfer of intellectual property rights.

Importantly, Commerce's position in the Uranium investigations initially was rejected both by the Court of International Trade and by the Court of Appeals for the Federal Circuit. However – in the first antidumping or CVD case accepted by the U.S. Supreme Court in decades – the Supreme Court reversed the lower courts and affirmed Commerce's original analysis. United States v. Eurodif S.A., 555 U.S. 305 (2009).[5] Commerce's analysis in the uranium cases, which focused on the objective nature of what was imported rather than the structure that the private parties gave to the transaction, would indicate that even if the U.S. purchaser is interested primarily in the intellectual property rights in the imported good rather than the good itself, the fact that a good is being imported controls. Therefore, the CVD law applies.[6]

For these reasons, we conclude that – while there are substantial novel legal questions that are likely to lead Commerce to be initially skeptical of a CVD petition in the

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[5] Because the CVD order had been terminated on other grounds prior to the Supreme Court decision, the Court's decision refers only to the antidumping law. However, as Commerce's original decision simultaneously related to the applicability of the antidumping and the CVD law, the Court's analysis would apply to the CVD law as well.

[6] We would note that USTR's 2007 review of the Section 301 petition took place when Commerce's analysis in the Uranium cases had been under sustained attack from the lower courts, but before the Supreme Court vindicated Commerce's original analysis. It may be that Commerce would have more confidence in building upon its Uranium analysis today than it did in 2007.

film context and that are certain to provoke significant arguments from the CVD petition's opponents – the CVD law should be interpreted as applying to digital media products, even if imported electronically via the Internet.[7]

C. What Is the "Class or Kind of Merchandise" That Benefits from Film Subsidies?

As explained above, the CVD law requires Commerce to determine whether countervailable subsidies have been provided "with respect to the manufacture, production, or export of a *class or kind* of [imported] merchandise." 19 U.S.C. § 1671(a) (emphasis added). The "scope" of a CVD case refers to the specific "class or kind" of merchandise that is the subject of the proceeding. It defines the merchandise imported from a particular country that will be investigated for subsidies and that will be subject to countervailing duties if a CVD order is issued. In addition, the "domestic like product" normally will be defined as merchandise produced in the United States that is coextensive with the definition of imported merchandise covered by the "scope." The "domestic industry" for purposes of standing and injury will be defined as all U.S. producers of that "domestic like product."

The definition of the "scope" is therefore central to any invocation of the CVD law. As we have noted already, too narrow a definition of the "scope" may lead to a CVD order that is circumvented easily by exporters, while too broad a definition may expand the domestic like product, and therefore the domestic industry, to include opponents of the petition (thus preventing petitioners from establishing support from the domestic industry) or producers not really competing with, and therefore not injured by, the subsidized imports (thus preventing petitioners from establishing injury to the domestic industry by reason of subsidized imports). In addition, Commerce (for standing) or the Commission (for injury) may determine that – based on factors such as physical characteristics, consumer expectations, ultimate uses, channels of distribution, and manner of advertising or display, 19 C.F.R. § 351.225(k)(2) – the scope actually may include two or more distinct classes or kinds of merchandise. In such a case, the investigations would be divided into two or more separate investigations, which might have different outcomes.

Thus, for example, "movies and video games" may be construed as two distinct classes or kinds of merchandise, but it would be more difficult to establish whether "visual effects incorporated into movies or video games" would be one or two products. Likewise,

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[7] As noted above, when a CVD case involves imports from Canada or Mexico, appeals are not taken to U.S. courts but to binational panels under NAFTA. Because of the number of novel legal issues that would be involved in any film subsidies petition, we believe it would be advisable to ensure that a country other than Canada or Mexico is covered by petitions. This would ensure that any appeals of fundamental questions of U.S. law, as least as applied to the non-NAFTA countries, would be heard in U.S. courts.

"full-length movies and TV series episodes" may have been two distinct products at one time, but given the convergence and multiplication of distribution channels, they might be a single class or kind of products today, or in the near future. In general, if there is no clear dividing line along a continuum of products, even a very broad scope can be found to be a single product.

The scope for a CVD petition can be defined as a final consumer product (e.g., refrigerators), or it can include intermediate products that may be contained within a finished product. In cases involving chemicals or additives, for example, the scope often includes imports of the chemical or additive itself and products containing the chemical or additive, either absolutely or in a particular concentration. For example, the scope of a recent antidumping investigation on xantham gum (a food additive) from China covered "dry xantham gum, whether or not coated or blended with other products, … regardless of physical form," including blends with other products if xantham gum is 15 percent or more of the total mix by weight. Xantham Gum from the People's Republic of China, 78 Fed. Reg. 33,351, 33,353 (Dep't Commerce June 4, 2013) (final AD determ.). Even in the case of manufactured products, it is common to define the scope as including the product at various stages of manufacture. To take another recent example, the recent antidumping and CVD order on solar cells from China had a scope that covered "crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials." Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China, 77 Fed. Reg. 73,017, 73,017 (Dep't Commerce Dec. 7, 2012) (CVD order).

When the scope covers a product that is incorporated within another product when it is imported, enforcement problems can arise, as importers – and Customs – may not always be fully aware whether an imported product contains a component subject to a CVD order. However, this may be the only way that the domestic industry truly affected by the subsidized imports can obtain relief. For example, if the scope of a CVD order covered "movies," then the domestic industry producing "movies" in the United States would include U.S. production companies, including companies producing movies in the United States containing substantial material produced in other countries benefiting from subsidies. These companies benefit from the subsidies and may oppose a CVD petition. Therefore, a narrower scope – such as visual effects, whether incorporated into individual shots, unfinished movies or sections thereof in the post-production process, or finished movies – may enhance chances of success. The finished works themselves would be outside the scope – and U.S. producers of finished works would not be included in the domestic industry, but imports of visual effects would be covered by the scope even if they had been incorporated into a finished work.

The introduction of multiple countries in a CVD case, and in the production process, raises additional questions. For example, because the scope of the solar cells case from China is based on the actual cells, and not the solar panels or other products in which the

cells are incorporated, a solar panel manufactured in a third country from Chinese solar cells is included within the scope – but a solar panel manufactured in China from imported solar cells is not. Likewise, if a movie contains visual effects produced in (and subsidized by) both Canada and New Zealand, and the scope of a CVD order covered "visual effects from Canada," it would cover the Canadian subsidies but not the New Zealand subsidies, regardless of whether the finished product was imported from Canada, New Zealand, Australia, or some other country.

If subsidies from multiple countries are targeted in simultaneous petitions with the same scope, the relevant "domestic industry" will be largely the same in each case. For injury purposes, the effects of the subsidized imports from all of the countries will be considered cumulatively, unless it can be shown that the subsidized imports from certain countries do not compete with imports from other countries.

Based on our conversations with industry participants, we believe that there are multiple possible scopes that could result in successful CVD petitions. It therefore may be advantageous to file more than one set of petitions, each covering a different "class or kind" of merchandise. In fact, given how many of the legal issues in a film subsidy petition would be novel, it may be most practicable to begin with one relatively narrow and more straightforward scope in an initial set of petitions, with others to follow if the first is successful – and benefitting from any "lessons learned" from the process.

D. Can a CVD Order on Film Products Be Administered Successfully?

If a CVD petition or set of petitions is filed on one or more products that benefit from film subsidies, and the petitioners are successful in demonstrating both subsidies and injury, Commerce will issue a CVD order. Even assuming that a CVD order is obtained successfully, we see a number of challenges in administering an order given the unusual characteristics of this industry. However, we believe that even the imperfect administration of a CVD order would provide significant leverage not otherwise attainable over the subsidizing governments and the beneficiaries of the current subsidy program – which is the ultimate reason to bring a CVD petition in the first place.

The single largest challenge to administrability that we have identified is the absence of Customs entry requirements for digital imports. As described above, Customs considers digital products transmitted over the Internet to be "imported" "merchandise" but to be exempt from the requirement that "entry" documentation must be filed and duties, if any, paid on the imported merchandise. The CVD law provides that, when imported merchandise is found to be subsidized and causing injury, "then there shall be imposed upon such merchandise a countervailing duty . . . equal to the amount of the net countervailable subsidy." 19 U.S.C. § 1671(a). Thus, the CVD law requires that duties be imposed on the merchandise, regardless of whether there is an "entry" of the merchandise.

However, as a practical matter, the Customs "entry" procedure is central to the actual application of most CVD orders. The CVD law provides that importers are required to make cash deposits of the estimated final CVD upon the "entry" of merchandise – the only references in the entire CVD law to the "entry" of merchandise relates to cash deposits. Once a year, any party – a domestic industry member, an importer, or an exporter – can request that an importer or exporter's actual CVD liability be assessed retrospectively for the *imports* (not the entries) during the prior year. The actual assessment of duties that must be paid is based on the annual review, and may be higher or lower than the cash deposit. If no review is requested, then the final assessment is equal to the cash deposit.

If a significant portion of the imports covered by a film subsidy CVD order are not subject to "entry" requirements, it may not be possible to enforce the order in the ordinary way by requiring a cash deposit at the time of importation. If CVDs are pursued, it would be useful to work with Commerce and Customs to evaluate the practicality of an alternative entry mechanism that would apply to digital imports subject to a CVD order – although even if it were legally possible to create such a structure, it may be difficult for the agencies actually to enforce an order on Internet transactions as a practical matter. Nonetheless, the possibility of creating such a mechanism should be explored.

Even without cash deposits, it should be possible to assess most of any CVD liability through the annual administrative review procedure. The number of potential producers or exporters of subsidized products in any given country is likely to be relatively small, so that the domestic industry could research and request reviews on most of the significant producers and exporters. The subsidizing governments would be required to report to Commerce the subsidies paid during the year, and so it should be possible to determine the duty liability associated with a limited universe of imports. Thus, while the annual review process probably would be more complicated than in the ordinary situation, we believe it could in fact be carried out.[8]

Because duty assessment is retrospective, duty payment can be avoided if the domestic industry failed to name an exporter in an annual review request, or if an importer – who ultimately would be liable for paying the duty – had gone out of business or otherwise

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[8] In addition, it is not clear which U.S. government agency would collect the duty if the merchandise had not been "entered." In the normal case, the "liquidation" of "entries" subject to a CVD order – in essence, Customs' sending to an importer a final, definitive bill for duties owned on an entry – is suspended until Commerce instructs Customs as to the final CVD owed after review. If there is no entry, there is nothing to liquidate and it is not clear how Commerce would ensure that the duty is paid. However, the statute requires Commerce to impose the duty – so even if the agency has not yet determined how it would impose the duty in this circumstance which has not yet arisen in practice, it will be required to figure something out.

did not have sufficient assets to cover the duty assessment. Nevertheless, even with these limitations, importers would run a significant risk of being assessed a substantial duty – i.e., the repayment of all subsidies received. This risk therefore should affect their behavior with respect to seeking the subsidies in the first place. As long as the risk is perceived to be substantial, then, the CVD order would have the desired effect even with enforcement limitations.

Nonetheless, it would be useful to explore whether an "entry" requirement could be constructed for purposes of administering an order on digitally transmitted imports. Interestingly, the diskettes containing the software in the Certain Computer Aided Software Engineering Products from Singapore case also were exempt from "entry" requirements – not because they were digitally transmitted, but because the customs value of the import was based on the value of the carrier medium, which was low enough to be exempt from the requirements of "entry." In that case, Commerce requested "that the U.S. Customs Service require all importations of the subject merchandise into the United States … be subjected to formal entry requirements to ensure compliance with the countervailing duty law." 55 Fed. Reg. 1596 (Dep't Commerce Jan. 17, 1990). Although the particular statutory provision upon which Commerce based its request in that case would not be available here, an early dialogue with the agencies as to how an order would be administered would be useful – not only to ensure the order is as effective as possible, but also to reassure the agencies that the CVD law indeed can be applied, practically as well as legally, to digital imports.

IV. Developing an Action Plan to Move Forward

In the final part of this memorandum, we address how affected U.S. producers could move forward with a CVD petition, should it be determined that – notwithstanding the legal and practical challenges involved – it is worth trying to use the CVD law to address the significant harm being caused by international subsidies in this sector.

Below, we discuss four additional steps that should be undertaken if the industry decides to move forward under the CVD law:

- Organizing industry participants to invoke the trade laws.
- Identifying an initial petition scope and assemble the required information and support.
- Filing a petition and follow through on the investigation and subsequent reviews.
- Leveraging the petition to further advance the ultimate goal of addressing subsidies.

We address each of these in turn below.

A. Organizing Industry Participants to Invoke the Trade Laws

We believe that moving forward with actions under the CVD law is made considerably easier by establishing a formal organization, such as a 501(c)(6) trade association. Such a formal organization has several advantages.

First, it is useful to have a group of decisionmakers who can make strategic decisions and give direction to your attorneys. Lawyers can present legal options and help you evaluate them, but decisions ultimately must be made by the client. Forming an organization which then enters into an attorney-client relationship with your lawyers ensures that identifiable persons in the industry, not the lawyers, have ultimate control over any actions to be taken. In our experience, the best outcomes for everyone concerned are achieved when the industry itself is in control of the strategic decisions. Having an organization to formalize the decisionmaking process is a useful way to structure this process in a way that provides clear guidance to attorneys and is accountable to the broader industry.

Second, as we outline below, trade actions such as CVD cases are brought on behalf of the affected domestic industry. This requires assembling and demonstrating support from the industry, assembling data demonstrating injury to the industry, and clearly communicating to industry participants what is going on in the case. An organization could be the mechanism for accomplishing all of these tasks. It also could be useful in obtaining political support for any actions that might be taken.

Third, part of the process of preparing a CVD petition may mean the provision of individual producers' business confidential information to the relevant U.S. government agencies. While the agencies protect the confidentiality of this information, companies may be reluctant to share this information with their competitors – indeed, doing so could be illegal under the antitrust laws. An organization can facilitate the collection of the necessary information consistent with confidentiality concerns and legal requirements.

Fourth, in order to pursue legal action, you likely will need to have a more stable and reliable system of funding. This can readily be achieved by forming a 501(c)(6) organization, which is by definition a membership association, for which a significant level of funding comes from membership dues. There is considerable flexibility in how dues levels and membership could be set. Regardless of how this is structured, it is helpful for everyone involved to have clear expectations – people generally want to know that if they contribute financially to a cause, they will have some input in the decisions to be made.

Organizations that pursue trade remedies are frequently structured as 501(c)(6) trade associations. To meet the requirements for this status, an organization:

- must be an association of persons having some common business interest and its purpose must be to promote this common business interest;

- must be a membership organization and have a meaningful extent of membership support;
- must not be organized for profit;
- no part of its net earnings may inure to the benefit of any private shareholder or individual;
- its activities must be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons;
- its primary activity does not consist of performing particular services for individual persons; and
- its purpose must not be to engage in a regular business of a kind ordinarily carried on for profit, even if the business is operated on a cooperative basis or produces only sufficient income to be self-sustaining.

Establishing such an organization for these purposes would be fairly straightforward. As a practical matter, it would involve:

- determining the purpose and structure of the organization;
- forming a board of directors to oversee the organization;
- filing articles of incorporation in a particular state according to the law of the particular state where the organization will be created and appointing a registered agent in that state (either an individual affiliated with the organization, or a company that provides this service on a commercial basis);
- drafting and adopting bylaws that set forth how the organization would be governed;
- obtaining a federal tax ID (EIN) and determining filing requirements;
- establishing an accounting system; and
- applying to the IRS for tax-exempt status as a 501(c)(6) organization.

B. Identifying an Initial Petition Scope and Assembling the Required Information and Support

As explained above, there may be advantages to identifying a "test case" with a relatively narrow scope for filing an initial CVD petition. If that petition is successful, other petitions can be filed thereafter. There are several reasons to take such an approach. First, it may be a more efficient use of resources to focus efforts on establishing standing and injury for a more limited segment of the industry before taking on the substantial legal and practical issues related to invoking the CVD law in this industry. Once the pattern is established successfully – or if lessons are learned about unforeseen pitfalls – moving on to

additional segments of the industry can be done more effectively. Second, highlighting the subsidy problem in detail in one segment of the industry can build momentum, publicity, political support, and industry participation that will be helpful in moving on to the next segment.

Third, and perhaps most important, demonstrating that a CVD petition *can* be brought against subsidies in these sectors may affect the behavior of subsidizing governments and subsidy recipients in ways that have effects beyond the segment of the industry directly targeted by an initial petition. This is important because no CVD order or set of orders can comprehensively address the full range of trade-distorting subsidy practices in this industry. Some subsidies (especially U.S. domestic subsidies) will be left unaddressed; some segments of the U.S. industry may not be able to demonstrate support or injury; some players will find ways around CVD orders. If the ultimate goal is to change the incentives in the industry so that an international agreement limiting and disciplining subsidies in this sector becomes in everyone's interest, then the most important thing is to begin somewhere as effectively as possible, and build from there.

Such a strategy also counsels the early formation of a more formal organization, as discussed in the prior point. In order to begin somewhere, a decision must be made about where to begin. This will depend, in part, on identifying which segment of the industry can demonstrate most effectively, with the least expenditure of time and effort, the necessary industry support and injury. Determining this will require a broad spectrum of people from different parts of the industry, and the decision about where to begin will be perceived more credibly as helping everyone in the industry if the participants in the decision are broadly representative.

The determination of where to begin with an initial petition will depend, of course, on which segment of the industry is best positioned to provide the required information and support. The following considerations should be kept in mind.

Scope (Product). The product definition of the proposed scope should be drafted in consultation with experts in the particular sector of the industry. The definition should be precise enough to be enforceable, broad enough to prevent circumvention, and narrow enough so that the domestic industry can be mobilized to show sufficient support.

Scope (Countries). In the absence of reliable trade statistics, it will be a challenge to identify which countries' imports have caused the most harm and should be the subject of the petitions. It will be necessary to demonstrate subsidization individually for each challenged country – on this point, the more countries, the more complex the case. However, as long as the subject countries all compete with one another (and each accounts for at least 3 percent of imports), the injury effects are considered cumulatively – and on this point, including more countries may simplify the analysis, depending on the factual circumstances. In addition, as noted above, to ensure that legal issues are resolved in U.S.

courts to set precedents for future cases, at least one country other than Canada and Mexico should be included.

Industry Support. The petition must show support from at least 25% of the relevant domestic industry – that is, ordinarily, the U.S. industry producing the product coextensive with the scope – and at least 50% support from those of the relevant domestic industry that express an opinion. In the 2001 CVD petition, the petitioners attempted (unsuccessfully) to show that 25% of the workers in the film industry supported the petition. That approach to demonstrating industry support is quite unusual, and we believe Commerce would be uncomfortable initiating an investigation on that basis.

The more common approach is to base support on the production level of the relevant companies (including independent practitioners, if any) making up the industry. Commerce usually compares the aggregate production in the most recent year (either by volume or value, whichever is more reasonably available) of the petition supporters to that of the industry as a whole. Here, reliable data may be difficult to obtain, especially for the industry as a whole. Proxy data, such as comparing the number of workers in supporting companies to Bureau of Labor Statistics (BLS) data on the total number of workers in the affected industry, might be useful.[9]

In evaluating support at the company level, both management and workers are considered to speak for the company. If companies oppose the petition, but are related to (e.g., co-owned with) subsidized producers subject to the investigation, Commerce will disregard their opposition unless they can demonstrate that their opposition is based on their interests as domestic producers and not driven by their overseas interests. For example, a visual effects company with facilities in Los Angeles and Vancouver that opposed a petition with respect to Canada likely would be disregarded in determining whether to initiate an investigation with respect to Canada, but if it opposed a petition with respect to New Zealand its opposition would be counted (assuming it is not related to any company benefitting from New Zealand subsidies). If the company attempts to show that its opposition is based on its concerns as domestic producers, it has the burden of proof to substantiate that claim. 19 U.S.C. § 1671a(c)(4)(B)(i); 19 C.F.R. § 351.203(e)(4)(i).

In addition, if companies that oppose the petition are also importers of subsidized goods, Commerce also has the discretion to disregard that opposition. 19 U.S.C. § 1671a(c)(4)(B)(ii); 19 C.F.R. § 351.203(e)(4)(ii). Thus, even if a film production

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[9] For example, BLS reported that 29,270 U.S. workers were employed as "Multimedia Artists and Animators" as of May 2012, including 9,130 in the "Motion Picture and Video Industries." See http://www.bls.gov/oes/current/oes271014.htm#st (last visited June 27, 2003). If supporting companies employed 25% of these individuals in May 2012, that could be a reasonable indication of an adequate level of industry support.

company was considered part of the "domestic industry," if it made use of subsidized imported visual effects, then its opposition to a petition against imports from any such country could be disregarded. However, because Commerce's authority here is discretionary, it is preferable to be able to establish domestic support without having to rely on this provision.

Injury. It also will be necessary to gather data from the affected industry to show that the industry is, in fact, injured. This can include declines in the value of U.S. production as market share is captured by subsidized imports, price pressures on the U.S. industry from import competition, as well as declines in employment, wages, hours worked, profitability, and investment. It will be useful to demonstrate as much of this as possible for the relevant domestic industry in a petition, which will require some cooperation from as many industry participants as possible. In addition, the International Trade Commission will issue questionnaires to the industry immediately after the petitions are filed, and again later in the investigation. Assisting domestic industry members with completing the questionnaires and encouraging their participation would be a key task.

Subsidization. It will also be necessary to identify the subsidy programs that benefit producers in each of the targeted countries, along with basic documentation with respect to each. In many ways, given the ready availability of much of the relevant information, this likely would be the easiest task – but it needs to be done in order for Commerce to initiate investigations.

C. Filing a Petition and Following Through on the Investigation

Once a petition is filed, Commerce normally has 20 days to evaluate the petition before initiating the investigation. If the petition demonstrates support from at least 25% of the industry, but not more than 50%, Commerce may extend the initiation period for an additional 20 days to poll the industry and gather more statements of support or opposition in order to have a stronger basis for applying the 50% test. If it becomes apparent that either the 25% or 50% test will not be met, the petitioner can withdraw the petition – as happened in 2001 – and consider whether revisions to the petition might enable a successful refiling at a later date. Otherwise, Commerce dismisses the petitions and the petitioner can seek court review of Commerce's rejection.

After an investigation is initiated, Commerce proceeds with preliminary and final investigations of subsidization and the Commission conducts preliminary and final investigations of injury. Although the domestic industry can participate fully in the subsidy investigation, the primary activity involves information provided by the subsidizing governments and subsidized producers in response to Commerce requests. The injury investigation focuses more directly on the harm to U.S. interests, and here participation by the domestic industry is most important. A preliminary conference with Commission staff normally is held about three weeks after a petition is filed, and a full hearing with the

Commission itself occurs towards the end of the investigation. The testimony of industry members at the conference and the hearing are often very significant.

Further, the petition becomes public as soon as it is filed. This presents an opportunity to make the public case for the harmfulness of subsidies and to mobilize press coverage and political support. While these are of limited usefulness in the Commerce and Commission proceedings themselves – these are generally driven by the facts and legal considerations, not politics – the public perception of the merits of the industry's case and its ability and willingness to defend its interests using the trade laws is an important part of the larger objective of disciplining subsidies in this sector more generally. Therefore, attention will need to be paid to the public story, both in the press and politically, principally in Congress. Opponents of any CVD action likely are to be well organized and well funded on this front.

D. Leveraging the Petition to Further Advance Industry Interests

Finally, the possibilities of leveraging the CVD petition process to advance industry interests more generally should not be underestimated. As the industry comes together to accomplish one thing, success generates enthusiasm that can lead to further accomplishments.

Moreover, the process of preparing the information necessary to file a petition and pursue a case is often a tremendous learning opportunity for the industry itself. As government agencies shine a light on the nature of competition within the industry and documents the effect of subsidies on that competition, and as evidence and arguments are prepared and refined by supporters and opponents of CVD relief, it has been our experience that industry participants generally have a better understanding of the industry's structure and learn ways to advance their common interests on matters having nothing to do with trade. In addition, as an industry pools its resources to affect trade matters in Washington, it often identifies other opportunities to address problems that it did not previously have the capacity to address.

While subsidies are clearly a major problem in the entertainment industry, they are also not the only problem. We repeatedly have seen the spinoff benefits of working collaboratively within the industry on trade issues, many of which were not foreseen when trade relief was initially under discussion. We would advise you to consider these possible benefits in devising any plan going forward.

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It has been our pleasure to work with you and with all of the industry participants with whom we met in the course of this study. We hope that these considerations are useful to you and to your colleagues as you decide how to proceed with this important and difficult problem.