



ANTIDUMPING AND COUNTERVAILING DUTIES

FREQUENTLY ASKED QUESTIONS

This document is intended to provide an overview of trade remedy laws "in plain English." It is not intended as legal advice, nor should it be relied upon as such. As you read through this, you will note there are a number of Washington alphabet soup acronyms. A reference sheet for these acronyms can be found at the end of this document.

What are antidumping (AD) and countervailing duty (CVD) investigations?

Under the Tariff Act of 1930, U.S. industries may petition the government for relief from imports that are sold in the United States at less than fair value ("dumped") or that benefit from subsidies provided through foreign government programs. Under the law, the U.S. Department of Commerce determines whether the dumping or subsidizing exists and, if so, the margin of dumping or amount of the subsidy; the US International Trade Commission determines whether there is material injury or threat of material injury to the domestic industry by reason of the dumped or subsidized imports.

What is the difference between the International Trade Commission (ITC) and the Department of Commerce (DOC)?

The two government agencies conduct separate parallel investigations.

The **ITC** is a quasi-judicial commission made up of 6 Commissioners (typically three Republicans and three Democrats) that vote on whether there is injury to the domestic producers. There are currently only 4 Commissioners. At the ITC, all "respondent" parties (i.e. importer and foreign producers against the petition) are in the same boat – it is an "up or down" vote. So, if the vote is "negative," or no injury, at the preliminary phase, the case stops completely. If there is an affirmative vote at the preliminary phase, the case proceeds to the DOC and starts up again after the DOC issues its preliminary determination. At the final phase, if there is a negative vote, the case is over, regardless of what tariffs were announced by DOC. If it is affirmative, DOC's tariffs will stand.

The **DOC** is an executive branch agency that measures the level of dumping or subsidization of certain exporters. At the DOC, there are "winners and losers" because some foreign producer companies will get a more favorable rate than others. Although it is a single agency, the DOC conducts independent investigations on AD and on CVD and these cases run on different timelines.

What is dumping?

Dumping is defined as U.S. Sales at "less than fair value." The dumping margin is calculated by comparing the U.S. price to "normal value" (normal value can be the sales price in the home market or a constructed value). The U.S. Price is adjusted to remove any movement or other expenses necessary to bring the price to an "ex-factory" basis. In a market economy case, normal value is normally based on the price for the same product in the home market (the country of production), unless those sales are made at a level below the cost of production. In a nonmarket economy (NME) case, such as one against China, normal value is constructed based on prices in another, "surrogate" country as follows:

- for each raw material input, the per-unit consumption is multiplied by the cost of that raw material in the chosen surrogate country (currently, one of the following: Brazil, Bulgaria, Mexico, Romania, South Africa, Thailand);
- per-unit labor hours are multiplied by the DOC surrogate labor rate;
- per unit energy costs (electric, coal, steam, water) are multiplied by surrogate values;
- these costs are added together to calculate the cost of manufacturing, then surrogate values for SG&A, profit and overhead are added to create the "normal value."
- If net U.S. price is less than normal value, this is considered dumping.

What is a countervailable subsidy?

A government financial contribution that confers a benefit to a specific industry or enterprise. Examples include: (1) direct transfer of funds (grants, loans, equity infusions) or the potential direct transfer of funds or liabilities (loan guarantees); (2) foregoing or not collecting revenue that is otherwise due (tax credits, deductions from taxable income, import duties); (3) providing goods or services for less than adequate remuneration; or (4) purchasing goods for more than adequate remuneration.

What companies receive an AD/CVD rate?

Often, there are multiple exporters of the product and the DOC does not have the resources to examine the sales and possible subsidization of each company. In these cases, the DOC will typically choose the two or three largest exporters, by volume, during the period of investigation. Sometimes the DOC will make this selection based on import data it requests from Customs and Border Protection ("CBP"). In other cases, DOC will issue Quantity and Value (Q&V) questionnaires to the exporters and select the largest based on those responses. The companies that are selected to be individually examined are referred to as "mandatory respondents." The rest of the companies will get the weighted average of the rates of the mandatory respondents. In NME cases, all exporters also need to file a separate rate application (SRA) to demonstrate their independence from government control. Exporters that do not file an SRA or who fail to demonstrate independence of government control will be assigned a punitive adverse facts available (AFA) rate, usually the highest rate alleged in the petition.

Who pays the duties?

The importer of record pays the duties. The exporter cannot reimburse the importer for these duties. Importers often pass the increased costs on to their customers.

When will I have to start paying duties?

The preliminary CVD duties can be effective within three months of the petition being filed. The preliminary AD duties can be effective within six months of the petition being filed. However, in rare instances called "critical circumstances," duty liability can be retroactively applied to entries 90 days earlier, which means that a duty risk for CVD duties may exist just a few days after the initiation of the investigation, with AD risk following only a few months later. It is very important to note that the timing of deadlines in these cases is variable and the dates can change frequently.

How long does the case take?

Most commonly, cases are extended to the full amount of time allowed under the statute. In those cases, the initial investigation can take about 13 months. If extensions are not taken, a CVD case can be completed at the DOC within 7 months and an AD case can be completed at the DOC within 9 months. After the DOC preliminary determinations, the ITC will begin its final phase investigation. If DOC announces duties and the ITC makes an affirmative finding of injury in the final phase, then the DOC will issue an antidumping or countervailing duty "order." The month in which the order is published is thereafter considered the "anniversary month."

What is the difference between an investigation and administrative review?

The investigation sets the initial duty rates and the cash deposits at those rates are considered contingent liabilities because the final duty rates are not determined until after the first administrative review of the AD/CVD order. Each customs entry that requires a cash deposit will be "suspended" until the conclusion of the first administrative review. The first administrative review, if one is requested, will begin on the one year anniversary of the order and normally takes about 12-18 months to complete. The first administrative review examines sales from the first day that duties were applied through the end of the month before the anniversary month, typically covering 18 months of sales. Each subsequent administrative review will cover 12 months. The AD/CVD rates announced at the end of each administrative review will set the "assessment rate" or the rate at which the entries will ultimately be liquidated. If the assessment rate is lower than the deposit rate, the importer will receive a refund. If it is higher, the importer will owe additional duties to Customs. One exception to this retroactivity is that there is a cap on duties deposited between the date of publication of the DOC's preliminary determination and the publication of the ITC's final determination, there can be no retroactive additional assessment for entries in that period. This is called the "provisional measures deposit cap."

What is the "scope"?

The scope of the investigation is the written description of the products that will be covered by the case. The products covered by the scope are often referred to as "subject merchandise" or "merchandise under consideration." The scope is accompanied by a listing of Harmonized Tariff Schedule (HTS) numbers that typically cover the products as they enter the United States. There may be products that fall within the listed HTS categories that are not covered by the scope and there may be products that are covered by the scope but that come in under an HTS category that is not listed. The written description of the products is what governs, not the HTS classification. Read the scope very carefully and consider all possible products that you import/produce that could be covered. Identify products

that might need clarification. DOC will accept comments on the scope within the first 20 days of publication of the initiation of the case.

What can I do? What should I do?

The initial question for all parties involved should be – should I even continue exporting/importing this product? If the answer is no, then there is no need to continue. If the answer is yes, there is a lot to do.

As an **exporter**, you must watch the DOC's deadlines carefully and respond completely to DOC's questionnaires that ask for a variety of commercial and financial information depending on whether or not your company is selected as a mandatory respondent. DOC is very strict with its deadlines. A filing that is missed by only minutes will be rejected as "late" by the DOC, with often disastrous results. Missed deadlines means that DOC will likely consider the exporter to be non-cooperative and will impose a penalty duty rate, often in the hundreds of percent. Exporters need to engage legal counsel early and fully understand DOC's procedures and requirements.

As an **importer**, you need to know your risk window(s) and watch the case developments like a hawk. Almost every decision taken by the DOC has major consequences for importers. For example, the choice of which foreign producers to examine as representative of the industry comes early in the case and can dramatically affect the final duty levels. The Importer is the only party in the case that ends up with a bill from the government. All other parties feel the effects of the case. But only importers are on the hook for duty liability.

As a **purchaser** but not a direct importer, you have one of the most important positions in the case because you can explain the reasons you purchased the product from various sources. Petitioners usually argue that purchasers make all decisions based solely on getting the lowest price. While price is a factor that any purchaser would take into consideration, there often are other reasons for final sourcing decisions, such as product quality, availability, physical characteristics, etc.

While purchasers are among the most important groups at the ITC, one issue is that the law does not confer full party status on purchasers. For this reason, purchasers who want to participate in a case often coordinate with importers and/or the foreign industry.

Are these cases political?

Both the DOC and ITC purport to operate immune from political influence. However, both agencies receive input from political representatives. Companies affected by an unfair trade complaint should consider the best means to making their views known. Often this will be through a trade association. The most effective political efforts emphasize the impact of the filing of a trade case on American workers and the economy.

Can these decisions be appealed?

Yes. All ITC and DOC decisions can be appealed to a U.S. federal court of special jurisdiction called the Court of International Trade (CIT) in New York. CIT decisions can be appealed to the Court of Appeals for the Federal Circuit (CAFC) in Washington DC. Only those parties that actively participated in the underlying administrative proceeding have standing to appeal.

COMMON ACRONYMS IN TRADE REMEDY INVESTIGATIONS

ACCESS	ITA Electronic Filing System
ACE	Automated Commercial Environment
AD	Antidumping
AFA	Adverse Facts Available
APHIS	Animal and Plant Health Inspection Service
APO	Administrative Protective Order
AR	Administrative Review
BIT	Bilateral Investment Treaty
BOL	Bill of Lading
BPI	Business Proprietary Information
CAFC	Court of Appeals for the Federal Circuit
CBP	Customs and Border Protection
CEP	Constructed Export Price
CVD	Countervailing Duty
CV	Constructed Value
DHS	Department of Homeland Security
DOC	Department of Commerce
DSB	Dispute Settlement Body (World Trade Organization)
EDIS	U.S. ITC Electronic Document Information System
EP	Export Price
FOIA	Freedom of Information Act
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GATS	General Agreements on Trade in Services
GRI	General Rules of Interpretation
GSP	Generalized System of Preferences
HTS	Harmonized Tariff Schedule
ICE	Immigration and Customs Enforcement
ITA	International Trade Administration (U.S. Department of Commerce)
ITC	International Trade Commission
ILO	International Labor Organization
JPO	Judicial Protection Order
LTAR	Less Than Adequate Remuneration
ME	Market Economy
MFN	Most Favored Nation Status
NAFTA	North American Free Trade Agreement
NME	Nonmarket Economy
NSR	New Shipper Review
PNTR	Permanent Normal Trade Relations
Q&V	Quantity & Value

USTR	United States Trade Representative
SRA	Separate Rate Application
SRC	Separate Rate Certification
SOE	State Owned Enterprise
SPS	Sanitary and Phytosanitary Measures
SC	Surrogate Country
SV	Surrogate Value
TAA	Trade Adjustment Assistance
TPA	Trade Promotion Authority
WCO	World Customs Organization
WTO	World Trade Organization
7501	Standardized Customs Form for Entry