Combating Dumped and Subsidized Imports in the United States

A Domestic Producer's Guide

KING & SPALDING

Combating Dumped and Subsidized Imports in the United States: A Domestic Producer's Guide is a publication of King & Spalding LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only. You are urged to consult your own lawyer concerning your own situation and any specific legal questions you may have.

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Introduction

This pamphlet is a primer for business executives on the remedies available to U.S. industries against injurious dumping and foreign government subsidization of goods that are imported into the United States. Our purpose is to provide a basic understanding of the highly effective remedies that are available under the U.S. antidumping duty ("AD") and countervailing duty ("CVD") laws.

AD/CVD remedies can enhance the market share, pricing power, and profits of any industry that is suffering lost sales and price erosion due to competition with increasing volumes of lower priced imports. Clearly legal under U.S. antitrust law and clearly consistent with international trade rules, AD/CVD remedies can sharply restrict imports and cause U.S. market prices to increase.

Numerous U.S. industries have filed successful AD/CVD cases that have generated billions of dollars in additional profits. Successful petitioners include industries producing basic industrial products (cement, magnesium, steel, aluminum, paper, antifriction bearings, and pipes and tubes), consumer products (bedroom furniture, sinks, cooking ware, paintbrushes, paper clips), agricultural commodities and processed foods (raspberries, canned pineapple, pasta, garlic, kiwi fruit, salmon), chemicals and pharmaceuticals (sulfanilic acid, aspirin, citric acid, glycine, melamine, ammonium sulfate), and advanced technology products (semiconductors, solar panels).

The AD/CVD laws are administered by two federal agencies. The U.S. Department of Commerce ("Commerce") is charged with determining whether imported products are dumped and/or subsidized. The U.S. International Trade Commission ("ITC"), a six-member independent agency, determines whether dumped and/or subsidized imports are materially injuring or threatening to injure a U.S. industry producing a product that is "like" the imported merchandise.

What Is Dumping?

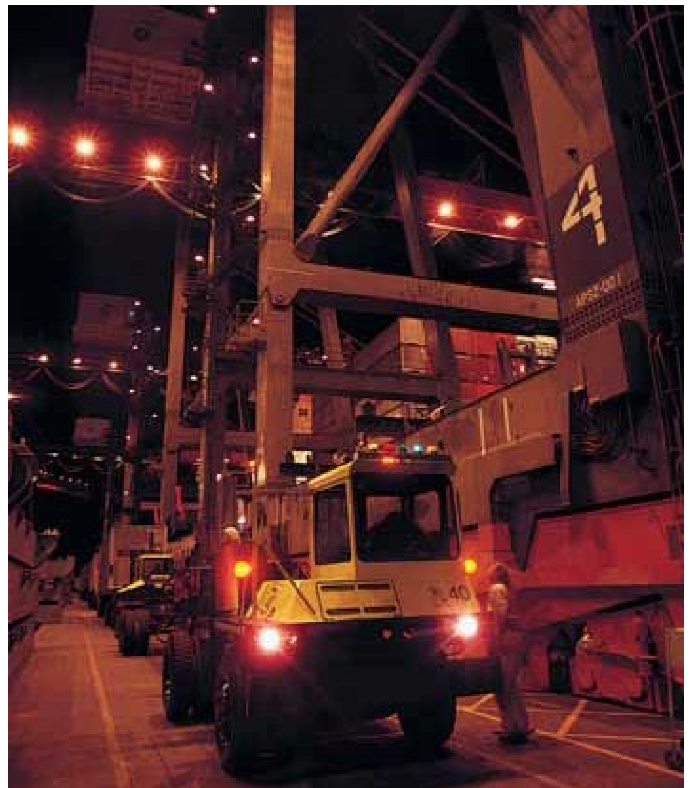
Dumping is price discrimination between purchasers in different national markets. Under U.S. law, dumping is defined as selling an imported product in the United States at less than "normal" value. Most often, normal value is the adjusted price at which the foreign exporter sells the product in its home market. If the product is not sold in the home market, normal value can be based on the prices of exports to third-country markets or the fully absorbed cost of production plus profit. For home market or third-country prices to be used as the basis of normal value, those prices must be above the cost of production.

Because China is not a market economy under U.S. law, Commerce does not use prices in China or actual Chinese production costs to determine normal value. Instead, Commerce calculates normal value based on the cost of production using the market prices of raw materials, labor, energy, and all other factors of production in a "surrogate country," a market economy country with economic development comparable to China that is also a significant producer of a comparable product. In recent cases, Commerce has identified South Africa, Thailand, Brazil, Bulgaria, and Mexico as potential surrogate countries.

What Is Unfair Subsidization?

Subsidies are financial contributions by a foreign government that benefit its producers or exporters. To be countervailable, subsidies must be specific, that is, provided in law or in fact to only specific enterprises or industries. For example, the government's construction of a road within a company's industrial complex would be considered specific, while one available to all citizens would not. Prior to 2007, Commerce did not apply the CVD law to nonmarket economies (e.g., China, Vietnam). Since then, however, Commerce has imposed CVD orders against many products from China and one from Vietnam.

"… Commerce has imposed CVD orders against many products from China…"



What Is the Remedy?

AD/CVD investigations seek to remedy, not punish, unfair pricing and subsidization of imported merchandise. A successful action does not award any damages to the domestic producers. Rather, additional import duties are assessed to offset the amount of dumping and/or subsidization. Although the duties go to the U.S. Treasury, not to the petitioning U.S. industry, they force foreign producers and U.S. importers to raise prices. Depending on the magnitude of the duties, this can force foreign producers to sharply reduce or even eliminate their exports to the United States. The reduction or elimination of the dumped and subsidized imports generally results in increased market share, higher prices, and higher profits for U.S. producers.

When Is an AD/CVD Petition the Best Option?

An AD/CVD petition is the most promising path to relief from unfairly traded imports when import prices and volume are adversely affecting the domestic industry's profitability.

International rules established by the World Trade Organization ("WTO") generally prohibit the U.S. government from establishing import quotas or raising normal import duties. A tariff remedy against dumped and/or subsidized imports that are causing or threatening injury to a domestic industry, however, is permitted by the WTO, and the U.S. AD/CVD law has been drafted to implement WTO requirements.

Relief available under other U.S. trade laws is either designed to remedy distinct types of unfair practices other than dumping or subsidization or is so restricted that the petitioner has little likelihood of obtaining effective relief. For example, Section 337 of the Tariff Act of 1930, which is administered by the ITC, can provide effective relief against imports that infringe U.S. intellectual property rights such as patents and trademarks. Section 301 of the Trade Act of 1974, which is administered by the Office of the U.S. Trade Representative, is most often used as a tool to open foreign markets to U.S. exports.

A safeguard action under Section 201 of the Trade Act of 1974 is designed to give a domestic industry an opportunity to adjust to import competition if it can meet the rigorous requirements of that law. Under Section 201, imports from all countries may be subject to a temporary quota or increased tariffs if the merchandise is being imported in such increased quantities as to be a substantial cause of serious injury to the U.S. industry. Section 201 petitions are rarely successful, however, and none has been filed since 2001. Not only are the standards for obtaining relief more difficult to satisfy than under the AD and CVD law, but the ultimate decision of whether to grant a remedy is entirely within the discretion of the President. The duration of the relief is uncertain and could be as short as 18 months. In contrast, the President cannot reject or modify AD/CVD duties, which are based on the application of legal standards by administrative agencies that are subject to judicial review. The duration of AD/CVD orders is at least five years and may be extended.

How Are AD/CVD Investigations Conducted?

AD/CVD petitions are filed on behalf of a domestic industry by an "interested party," which may be a U.S. producer of a product like the imported product, a labor union that is representative of the industry, a trade association, or an *ad hoc* coalition of producers and labor unions. If the petitioner is a company, it need not be U.S.-owned, as long as it produces the product in the United States. The petition is filed simultaneously with Commerce and the ITC and may target imports from a single country or multiple countries.

Within 20 days of the filing of the petition, Commerce must decide whether to initiate an investigation based on the information in the petition. Commerce must first determine whether the domestic producers or workers supporting the petition account for at least 25 percent of U.S. production of the product and more than 50 percent of production by those companies expressing a position on the petition. Commerce will poll the industry or rely on other information if the petition does not establish that a majority of the industry supports it. Commerce rarely declines to initiate an investigation. Instead, Commerce ordinarily asks the petitioner to correct any deficiencies in the data before initiation.

Even before Commerce formally decides whether to initiate an investigation, the ITC begins the preliminary phase of its investigation. Within 45 days of the filing of the petition, the ITC makes a preliminary determination whether a "reasonable indication" exists that the domestic industry is materially injured, or threatened with material injury, by the allegedly dumped and/or subsidized imports. Because the "reasonable indication" standard is relatively easy to satisfy, few investigations are terminated at the preliminary phase.

If the ITC finds a reasonable indication of material injury or threat of material injury, Commerce conducts its investigation and makes preliminary AD and/or CVD determinations based on information submitted by the foreign exporters or producers. If its preliminary determination is affirmative, Commerce will (1) determine a subsidy rate and/or dumping margin for each foreign exporter or producer investigated, (2) suspend the final assessment by U.S. Customs and Border Protection ("Customs") of the amount of duties owed pending the final determination in the investigation, and (3) require importers of the merchandise to post cash deposits with Customs in the amount of the estimated subsidy rate and/or dumping margin applicable to the foreign manufacturer or exporter of the merchandise.

Unlike the ITC's preliminary injury determination, a negative preliminary determination by Commerce (i.e., a finding of zero or negligible subsidy rates or dumping margins) does not end the investigation. The final assessment of duties on entries of the imported merchandise, however, is not suspended during the remainder of the investigation. That means that any entries of the product under investigation between the date of the negative preliminary determination and the date of the final determination will escape the imposition of duties even if the final determination is affirmative.

If Commerce's final determination is affirmative, the ITC will proceed to make its final injury determination. If Commerce's determination is negative, the investigation is terminated and cash deposits of estimated duties are refunded.

If the ITC makes an affirmative final determination that imports are causing material injury or threatening material injury to the domestic industry, Commerce will issue an AD and/or CVD order directing Customs to collect cash deposits of estimated AD and CVD duties from importers on future customs entries. The cash deposit is based on the dumping margin and/or subsidy rate determined by Commerce in the investigation. A negative final determination by the ITC terminates the investigation, resulting in the refund of cash deposits. The duration of an investigation, from the filing of the petition to imposition of an AD and/or CVD order following the ITC's final affirmative determination, is 10-13 months.

An importer of merchandise covered by an AD or CVD order is responsible for payment of all cash deposits and duties. Importers are required to certify to Customs at the time of entry that the foreign producer or exporter has not reimbursed them for AD/CVD duties.

How Does Commerce Determine If Imports Are Dumped?

To determine the dumping margin for each foreign producer or exporter in a market economy, Commerce compares the "export price" (the price paid for the imports in the United States) to the "normal value," which is usually the price of the identical or the most similar product sold in the home market. In making this comparison, Commerce begins with the selling price in each market to the first unaffiliated customer. Because goods sold in the foreign market and in the United States may differ in physical characteristics, the level of trade at which they are sold, selling costs, transportation costs, and other circumstances of sale, Commerce makes adjustments to the gross price in each market to arrive at "ex-factory" prices. The comparison of prices at the "factory gate" results in an "apples to apples" comparison between the home market price and export price. In determining normal value, Commerce disregards home market sales that are at prices below the cost of production or that are made under sufficiently unusual circumstances that they are considered to be outside the ordinary course of trade.

The difference between the ex-factory price for sales in the home market and the ex-factory price for U.S. sales determines the dumping margin. Thus, if the ex-factory price of a product sold in the home market is $100 and the ex-factory price of the identical product sold in the United States is $80, the dumping margin calculation is as follows:

$$\frac{100 - 80}{80} = \frac{20}{80} = 25\%$$

The dumping margin calculated by Commerce determines the amount of AD cash deposits that will be imposed in the event of affirmative dumping and injury determinations.

If there are too few home market sales to allow a meaningful comparison between the home market price and the export price, Commerce will compare the export price either to the ex-factory price for sales to the first unaffiliated customer in a third country or to the "constructed value" of the merchandise. Constructed value is the sum of the cost of production (including the cost of materials; direct labor; and general, selling, and administrative expenses), profit, and packing cost.

Dumping margins are normally based on a comparison of the foreign producer's weighted average price for sales in the United States to the weighted average price of its sales in the home market (or third-country market) or the constructed value. Margins are calculated on a company-by-company basis for foreign producers and exporters that Commerce selects to participate in the investigation. Other producers and exporters from the same country that are not selected to participate are subject to an "all others" rate that is based on the weighted average of the margins for all the companies that participated in the investigation.

How Does Commerce Determine If Imports Are Dumped? (Cont'd)

Commerce's methodology is significantly different for AD investigations involving imports from nonmarket economies such as China and Vietnam. In nonmarket economy cases, Commerce cannot base normal value on actual prices or costs to produce the merchandise. Instead, Commerce bases normal value on a calculation of the cost of production using the market prices of raw materials, labor, energy, and all other factors of production in a surrogate country at a level of economic development that is comparable to the nonmarket economy at issue. In recent cases involving imports from China, Commerce has identified South Africa, Thailand, Brazil, Bulgaria, and Mexico as potential surrogate countries.

Commerce's determination of whether imports are dumped is based primarily on information supplied by the foreign producers and exporters in response to detailed questionnaires. This information usually covers sales during the four most recently completed fiscal quarters (two fiscal quarters for imports from China and Vietnam) preceding the month in which the petition is filed. The information must be supplied in a format specified by Commerce.

Commerce normally will use only information that it has verified from an on-site inspection of the books and records of each foreign producer or exporter. By examining source documents and tracing particular transactions, Commerce ascertains whether the information provided is accurate and complete.

If a foreign producer withholds information, fails to submit requested information within the time requested or in the proper form, or submits unverifiable information, Commerce may disregard the information and rely on the facts otherwise available. If Commerce determines that the foreign respondent has failed to cooperate by not acting to the best of its ability to comply with an information request, Commerce will base its choice of the facts otherwise available on an inference that is adverse to the interests of the respondent. Adverse facts available may include information provided by the petitioner. Because Commerce lacks subpoena power over foreign respondents, the ability to resort to adverse facts available is an effective tool for obtaining compliance with its information requests.

Much of the pricing and cost information used by Commerce in its investigation is proprietary, is treated as confidential, and is withheld from public access. That information may be disclosed only to counsel for the parties under an administrative protective order, which limits the use of the information to the investigation at issue and forbids disclosure to unauthorized persons.

Parties are given the opportunity to submit briefs and information relevant to the issues in Commerce's investigations and to comment on the information submitted by opposing parties. Upon request, Commerce will also hold a hearing.

Timetable of an AD/CVD Case

The following is the statutory timeline for AD/CVD investigations:

Day	Event
Day 20	Commerce initiates investigation
Day 45	ITC issues preliminary injury determination
Day 85	Commerce issues preliminary CVD determination
Day 160	Commerce issues preliminary AD determination
Day 235	Commerce issues final AD/CVD determinations
Day 280	ITC issues final injury determination
Day 287	Commerce publishes AD and CVD orders

AD/CVD Petitions Against China Handled By King & Spalding, 2007 - 2017[1]

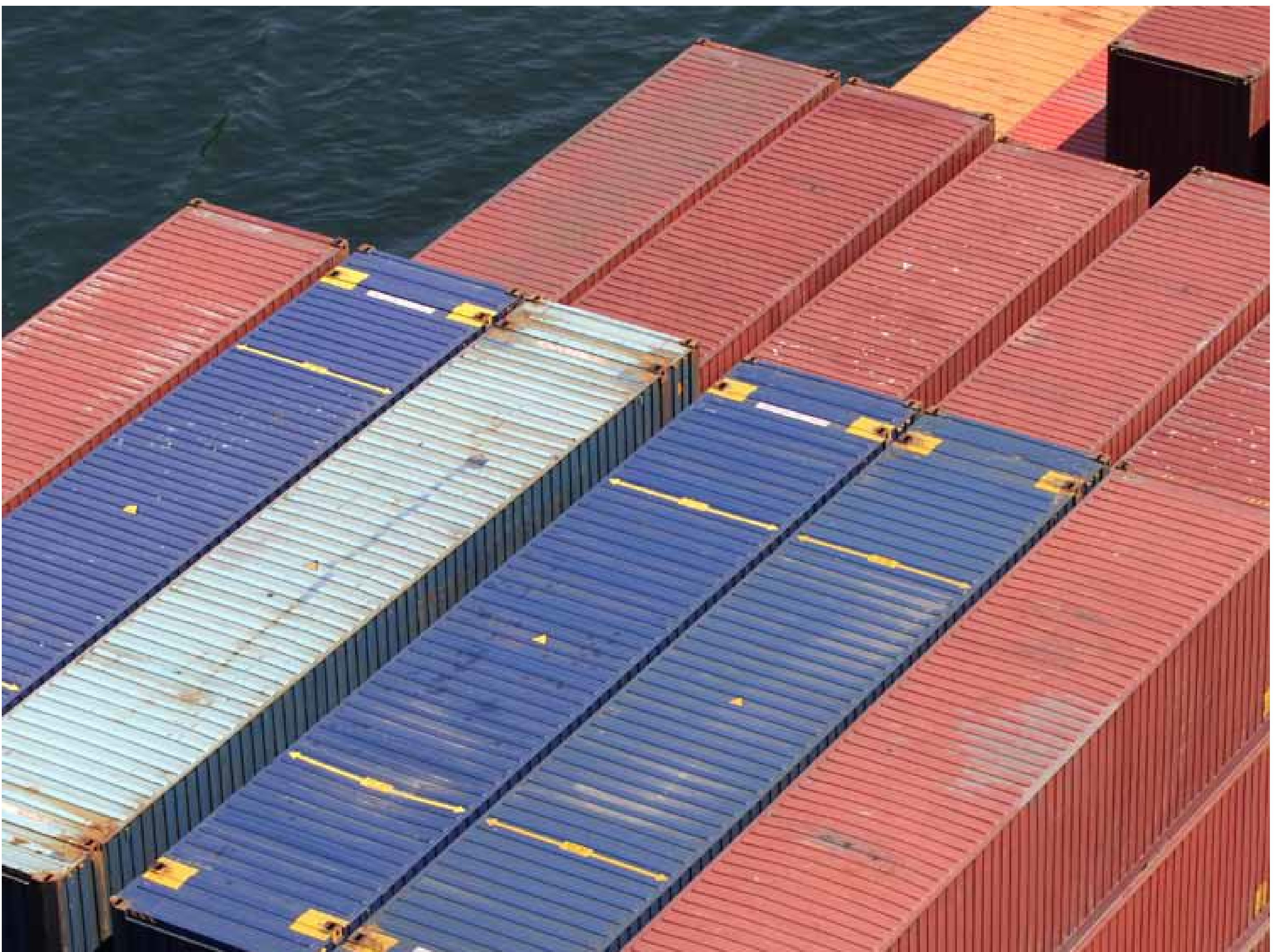
Product	Final Determination Date	AD Duty (%)	CV Duty (%)
Cold-Rolled Steel	September 2016	265.79	256.44
Corrosion-Resistant Steel	June 2016	209.97	241.07
Uncoated Paper	February 2016	149.00	176.76
Melamine	December 2015	363.31	156.90
Non-Oriented Electrical Steel	November 2014	407.52	158.88
Stainless Steel Sinks	March 2013	85.4	12.26
Aluminum Extrusions	May 2011	33.3	374.2
Coated Paper for High-Quality Print Graphics	November 2010	135.8	19.5
Circular Welded Carbon Quality Steel Line Pipe	January/May 2009	101.1	35.7
Lightweight Thermal Paper	November 2008	115.3	13.6
Laminated Woven Sacks	August 2008	91.7	226.9
Off-the-Road Tires	September 2008	210.5	5.6
Coated Free Sheet Paper	October 2007	99.65	44.25

[1] The rates shown in this table are the highest rates assigned to any respondent during the investigation.

How Does Commerce Determine If Imports Are Subsidized?

Under U.S. law, a subsidy exists if a foreign government entity or other public body provides a producer or exporter with a financial contribution that confers a benefit. Financial contributions can take a variety of forms, including direct cash payments, the provision of raw materials at below-market prices, credits against taxes, and loans. A benefit exists if the financial contribution is provided on terms better than those available from market sources. A subsidy is countervailable when it is "specific," i.e., limited to a specific enterprise or industry or group of enterprises or industries. In addition, subsidies that are contingent on export performance or the use of domestic goods are deemed specific. During the course of an investigation, the subsidies received by respondents are quantified and then divided by appropriate sales values to determine the percentage CVD rate.

As in AD investigations, Commerce bases its CVD determinations on information provided by the company respondents in the country under investigation. Unlike AD investigations, in CVD investigations, Commerce also sends questionnaires to the government of the country under investigation. As in AD investigations, Commerce conducts on-site verifications to test the validity of the information provided in response to questionnaires, and it has the authority to resort to the facts available, including adverse facts available, if the government and/or company respondents fail to cooperate.



How Does the ITC Determine If the U.S. Industry Is Injured by Dumped and Subsidized Imports?

The ITC gathers information for its injury determination from questionnaire responses by domestic producers, foreign producers, importers, and purchasers. In addition, the parties have the opportunity to submit information and briefs on the factual, legal, and economic issues in the injury investigation. The ITC's staff holds a public conference in the preliminary phase of the investigation, and the commissioners conduct a hearing in the final phase. To aid the commissioners with their determination in both phases, the staff prepares a report to the Commission summarizing and tabulating the information collected. As with Commerce's investigation, much of the information collected by the ITC is proprietary and kept confidential. Unlike Commerce, the ITC rarely relies on the facts otherwise available because it does have subpoena authority to compel responses to its questionnaires from U.S. producers, importers, and purchasers.

In determining whether imports are injuring the domestic industry, the ITC examines the volume of imports, the imports' market share, and the effect of imports on the domestic industry's sales, market share, pricing, production, capacity utilization, profit, return on investment, inventory, cash flow, ability to raise capital, investment, employment, and wages. To determine that dumped imports threaten material injury to the industry, the ITC must find that the threatened injury is "real and imminent." In assessing threat of injury, the ITC considers, among other things, whether the volume of imports and their share of the U.S. market are rapidly increasing, the likelihood that increasing imports will depress U.S. prices, and the existence of unused foreign production capacity that could lead to increased exports to the United States.

Domestic industries often bring petitions against imports from more than one country. In those instances, the ITC is generally required to consider the combined or "cumulative" effects of all the imports as long as they compete with each other and with domestic products in the U.S. market. A cumulative analysis of the effects of imports enhances the domestic industry's chances of prevailing in the investigation.

A threshold issue in many investigations is the definition of the industry that the ITC should examine in determining whether the industry is materially injured by dumped or subsidized imports. The industry is defined as the domestic producers of a product that is like the imported product under investigation. This can be a key issue, because a favorable definition of the industry will make it more likely that the ITC will find it to be injured. Generally, the more narrow the definition of the industry, the greater the likelihood of an affirmative injury determination. In appropriate circumstances, the ITC will examine injury to a regional, rather than a national, industry.

Can AD/CVD Investigations Be Settled?

AD/CVD investigations may be terminated by the petitioner at any time if Commerce agrees that it is in the public interest to do so. Investigations occasionally have been terminated on the basis of agreements between the U.S. government and the government of the exporting country to limit exports to the United States.

Another method of settling an AD/CVD investigation is for Commerce to suspend an investigation based on an agreement by the exporters that account for substantially all of the U.S. imports either to cease exporting to the United States or to eliminate the dumping or subsidization. Commerce is also authorized in extraordinary circumstances to suspend an investigation if the exporters agree to completely eliminate the injurious effect of the imports. Commerce monitors the foreign exporters' compliance with a suspension agreement. If the agreement is violated, Commerce may renew the suspended investigation. As a practical matter, few AD/CVD investigations are settled because agreements to cease dumping or subsidization or eliminate the injurious effects of those practices are very difficult to reach.

Judicial and Binational Panel Review

A party that is dissatisfied with a Commerce or ITC determination in an AD/CVD case may seek judicial review of the determination by the U.S. Court of International Trade, a federal court in New York City that handles only international trade and customs issues. Appeals to that court are normally handled by a single judge and usually involve the domestic petitioner, one or more foreign producers, foreign governments, U.S. importers, and the U.S. government, which is represented by its own counsel and seeks to have the agency determination upheld.

The court may not consider evidence that was not before Commerce or the ITC and may not reweigh the evidence considered by the agency. It may only review whether the agency has complied with legal standards and has based its decision on substantial evidence in the agency's record. The Court of International Trade's decision may be appealed to the U.S. Court of Appeals for the Federal Circuit and ultimately to the U.S. Supreme Court.

Cases involving imports from Canada and Mexico may be appealed instead to binational review panels established under dispute resolution provisions of the North American Free Trade Agreement ("NAFTA"). NAFTA panels have five members, selected from rosters of panelists maintained by the importing country and the exporting country. They are required to apply the same laws and the same standards for judicial review that would apply if the appeal were taken to a court in the importing country. Thus, U.S. law governs appeals in binational panel cases arising from U.S. AD and CVD determinations.

Administrative Reviews

The dumping margin or subsidy rate determined in an AD or CVD investigation does not determine the actual duties that the importer must ultimately pay, but rather the rate at which importers must pay cash deposits of estimated duties on future imports. The actual duties are not finally assessed until Commerce conducts an administrative review and determines the precise duty rate applicable to the imports that entered the United States during the period of review.

Commerce conducts administrative reviews annually, if requested by a party. If a review is not requested, the duties assessed on each entry during the period are the same as the cash deposits, i.e., the cash deposits paid on those entries are not refunded. Commerce usually completes reviews within one year, but reviews can take up to 18 months if they are extraordinarily complicated. The procedures for an administrative review are similar to those for an original investigation.

If Commerce does conduct an administrative review, the results of the review establish (1) the duties to be paid on entries during the period covered by the review and (2) the cash deposit rate on future entries pending the final results of the next review. If the rate determined in the review exceeds the cash deposit rate for the entries subject to review, importers will be assessed an amount in addition to the cash deposits already paid, plus interest. If the rate determined in the review is less than the cash deposit rate, importers will receive a refund of the difference, plus interest. Thus, at the time of entry, importers will not know the ultimate amount of duties that they will owe. This can create a strong incentive to avoid the risk of significant duties and instead purchase the merchandise from domestic producers.

Sunset Reviews

AD and CVD orders terminate five years after their imposition unless Commerce and the ITC determine that expiration of the order “would be likely to lead to continuation or recurrence” of the dumping and/or subsidization and injury. If requested by the domestic industry, Commerce and the ITC will conduct a “sunset” review to determine whether the order should continue. Sunset reviews must be completed within one year of their initiation.

In determining whether there is a likelihood that dumping or subsidization will continue or recur if the order is revoked, Commerce must consider, among other things, the dumping margins and subsidy rates determined in the original investigation and in administrative reviews and the volume of imports before and after the issuance of the order. In reviewing whether material injury will continue or recur, the ITC must take into account, among other things, its prior injury determination, whether any subsequent improvement in the state of the U.S. industry is due to the order, and whether the domestic industry is vulnerable to injury if the order is revoked.

Evaluation of a Potential AD/CVD Case

The AD/CVD laws provide very effective remedies against unfairly priced imports. Domestic producers competing with low-priced imports should consider whether the imposition of duties would allow them to regain lost market share, increase prices, and achieve higher profits. If so, they should evaluate the likelihood of success of an AD/CVD petition. The decision to proceed should be based on a careful analysis of the likelihood of success, the estimated cost, and the potential benefits.

Based on the information provided by the potential petitioner, counsel should first determine whether a more detailed analysis of the merits of the proposed case is warranted. If so, the analysis will vary in scope depending on the size of the industry and the complexity of the issues, but it should take into account the following factors: (1) the trends in imports from major exporting countries, (2) the imports' share of the U.S. market over the past several years, (3) the definition of the U.S. industry that the ITC is most likely to adopt in its examination of injury, (4) information on trends in the operational and financial data of the domestic industry, (5) information regarding prices in both the U.S. and home markets, and (6) the extent to which subsidy programs are known to exist. If information on U.S. consumption, production, capacity utilization, employment, pricing, and profitability are not available from public sources, counsel should conduct a confidential survey of cooperating domestic producers to obtain this information. Information on foreign pricing relevant to the determination of dumping can sometimes be obtained from public sources or from industry contacts, but it may be necessary to retain an investigator in the foreign country who is familiar with the industry. Information about government subsidies typically can be obtained from public sources.

In general, AD/CVD petitions are more likely to succeed if imports are gaining U.S. market share due to lower pricing. Factors to be considered include (1) the volume of imports and whether imports are increasing; (2) the imports' market share and whether that share is increasing; (3) the definition of the industry and the products on which a case would be based; (4) industry trends during the last three calendar years in shipments, market share, production, capacity utilization, employment, prices, sales, and profitability; (5) evidence that prices are higher in the foreign country than in the United States; and (6) evidence that foreign producers are receiving government subsidies. The outcome of a petition often depends on making the most advantageous definitions of the product and the U.S. industry and choosing the most advantageous timing for filing the petition. For example, an affirmative injury determination by the ITC is more likely if, during the past three years, imports increased and the domestic industry's sales and financial performance declined.

In addition, the chances of success are enhanced by the client's close participation with counsel in the case. Frequently, counsel will not be intimately familiar with the industry, the product, or the market. In addition, unlike in normal civil litigation, there is no right to discovery. The client's knowledge of the industry may be invaluable in uncovering information necessary to a successful case. Representatives of the client will likely need to appear as witnesses in the ITC's hearing, assist counsel in preparing the petition and briefs to the agencies, and evaluate nonconfidential evidence and arguments made by the respondents.

Conclusion

Many U.S. industries have filed successful AD/CVD petitions, which have saved U.S. factories and U.S. jobs, facilitated renewed investment in U.S. production assets, and resulted in billions of dollars of additional profits. Thus, any U.S. producer that is losing market share or suffering price erosion due to competition with low-priced imports should assess the potential benefit of imposing AD/CVD duties and evaluate whether an AD/CVD petition would be successful.

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