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U.S. ANTIDUMPING AND COUNTERVAILING DUTY LAWS AND PROCEDURES

JANUARY 2017

This memorandum discusses the various provisions of U.S. antidumping and countervailing duty laws which apply to imports of merchandise from other countries.

I. ANTIDUMPING LAW AND PROCEDURES

A successful antidumping proceeding requires the U.S. industry to demonstrate that: (a) the imported merchandise in question is being “dumped” in the U.S. market and (b) the U.S. industry is being materially injured or threatened with material injury by reason of the dumped imports. The U.S. DEPARTMENT OF COMMERCE (“DOC”) conducts the investigation of dumping, and the U.S. INTERNATIONAL TRADE COMMISSION (“ITC”) makes the injury determination. Both agencies must make affirmative final determinations in order for an antidumping order to be issued.

A. DOC INITIATION OF INVESTIGATION

The first step taken by the U.S. GOVERNMENT following the filing of an AD petition is the DOC’s decision whether or not to initiate a full-scale investigation. In making this decision, the DOC will look only at the petition itself and decide whether the information contained in the petition, if verified, would support a finding of dumping. The DOC must also determine that the petition has the support of the domestic industry. At this stage, the DOC will not discuss the petition with other parties, such as overseas producers or importers. The DOC must make its initiation decision within 20 days after the filing of the complaint unless additional time (up to a period of 20 days) is required to poll or otherwise determine support for the petition by the domestic industry.

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B. ITC PRELIMINARY INJURY DETERMINATION

The next stage of an AD investigation is the preliminary injury investigation by the ITC, an independent federal agency with six commissioners nominated by the PRESIDENT and confirmed by the CONGRESS. The ITC must decide whether there is a “reasonable indication” that imports are causing material injury to the domestic industry or are threatening to cause such injury. It must make this preliminary determination within 45 days after the filing of the petition.

During this preliminary injury investigation, the ITC will send questionnaires to U.S. and foreign producers and U.S. importers of the merchandise under investigation. The ITC staff will also hold a public conference at which interested parties may testify, and the ITC will consider written briefs filed by interested parties following the conference. If the ITC finds a “reasonable indication” of injury, then the investigation continues, and the DOC will conduct its investigation on the issue of dumping. If, however, the ITC finds that there is not a “reasonable indication” of injury, the investigation is terminated, and the petition is dismissed.

C. DOC PRELIMINARY DETERMINATION

The third stage of an AD investigation is the preliminary dumping determination by the DOC. In making a dumping determination, the DOC normally compares the foreign producer’s ex-works price for merchandise sold to customers in the home market (“normal value”) with the foreign producer’s price to customers in the United States (the “U.S. price”). If the U.S. price is lower than the normal value (*i.e.*, the product is being sold for less in the United States than in the home market), then the product is “dumped.” In addition, the DOC will investigate allegations that the foreign producer is selling its products at prices which are below its cost of production. Below-cost sales in the home market are generally excluded from the dumping calculation, resulting in a higher dumping margin.

However, in the case of nonmarket economy (“NME”) countries like China and Vietnam, the DOC applies a different methodology to make its dumping determinations. Instead of using the foreign producer’s home market prices and costs, the DOC asks the foreign producer to identify its factors of production (inputs) used to produce the product under investigation. These factors include direct and indirect materials, energy, labor, and packing materials. From the factors of production—which are reported in quantities and not values—the DOC calculates the cost of production using values from a “surrogate” market economy country. Further, the DOC will review the public financial records of market economy companies that make the same or comparable products in order to derive values for factory overhead, SG&A expenses, profit, and other costs. From these calculations, the DOC computes the “normal value” for the product sold in the NME, and it compares this normal value with the U.S. price in order to calculate the dumping margin.

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In a normal case, the DOC will make its preliminary dumping determination within 140 days after the DOC initiates the investigation. If, however, the DOC decides that the case is particularly complicated, it can postpone its preliminary determination for an additional period of 50 days. If the DOC makes a preliminary determination of dumping, it will compute the estimated AD margin and instruct U.S. CUSTOMS AND BORDER PROTECTION (“CUSTOMS”) to suspend liquidation of entries of the merchandise and to require importers to post a bond in the amount of the estimated AD margin. If the DOC makes a preliminary determination of no dumping, it takes no action at this stage, but the investigation nevertheless continues.

This stage revolves around the overseas producer’s response to the questionnaires which are prepared by the DOC. The DOC will make its preliminary determination largely on the basis of the information contained in the response. After its preliminary determination, the DOC will schedule a visit to verify the information contained in the response. The verification visit is similar to an audit, and each element of the response is verified against company records and/or audited financial statements.

D. “CRITICAL CIRCUMSTANCES”

If the AD petition also alleges that “critical circumstances” exist, the DOC will make its preliminary determination on that issue at the same time as it makes its preliminary dumping determination. Under the AD laws, “critical circumstances” exist if: (a) there have been “massive imports” (*i.e.*, a surge in the level of imports) of the merchandise under investigation over a relatively short period of time, and (b) there is a history of dumping of the merchandise or importers knew or should have known that the merchandise is being dumped. The DOC’s regulations provide that an increase of 15 percent or more constitutes “massive imports,” and it is the DOC’s policy that an AD margin of 25 percent or more is evidence that importers knew or should have known that the merchandise is being dumped.

If the DOC finds that “critical circumstances” exist, it can order the retroactive imposition of AD duties for a period of 90 days. That is, imports which are entered into the United States during the 90-day period prior to the preliminary determination will be liable for the eventual assessment of AD duties.

E. DOC FINAL DETERMINATION

The next stage of an AD investigation is the final determination by the DOC. During this stage, the DOC will hold a disclosure conference at which it will explain the reasons for its preliminary determination. Interested parties may also request a formal hearing at which parties may present their views on the legal and factual issues of the case. Written case briefs and rebuttal briefs may also be submitted during this stage.

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The DOC must make its final determination within 75 days of the preliminary dumping determination. However, the DOC may postpone its final determination by an additional period of 60 days. If the DOC makes a final determination of dumping, it will publish the final margin and announce that it will instruct CUSTOMS to collect AD duties in that amount. If the DOC makes a final determination of no dumping, the investigation is terminated, and the case is dismissed.

If there is an allegation of “critical circumstances,” then the DOC will make a final determination on this issue as well. The DOC will make its decision on the basis of the two factors mentioned previously—that is, a surge of imports and a history of dumping. If the DOC finds that “critical circumstances” do not exist, then this part of the case is closed, and duties are not applied on a retroactive basis. If, however, the DOC finds that “critical circumstances” do exist, then the ITC must determine whether the surge of imports will undermine the effectiveness of relief.

F. ITC FINAL INJURY DETERMINATION

The final stage of an AD investigation is the final injury determination by the ITC. The standard of injury at this stage is higher than that at the preliminary investigation—the ITC must find actual or threatened material injury to the domestic industry as the result of dumped merchandise. The ITC must complete its investigation and make its final injury determination within 45 days after the final dumping determination by the DOC.

During this final injury investigation, the ITC will send questionnaires to U.S. and foreign producers and U.S. importers of the merchandise under investigation. These questionnaires are designed to update the information which the ITC had previously received from these parties during the preliminary injury investigation. In addition, the ITC will send questionnaires to U.S. purchasers of the merchandise, requesting information about market conditions, terms of sale, prices of domestic and imported merchandise, and related information. There will also be a public hearing before the Commissioners, at which interested parties may testify. Interested parties may also submit prehearing and posthearing briefs for consideration by the ITC. If the ITC finds injury, then the DOC will issue a formal AD order. If, on the other hand, the ITC finds no injury, the investigation is terminated, and the case is dismissed. In a case involving a critical circumstances allegation, if both the DOC and the ITC find critical circumstances, then the dumping duties calculated by the DOC will be applied retroactively. If the DOC makes an affirmative critical circumstances finding but the ITC does not, then duties will not be applied retroactively.

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II. COUNTERVAILING DUTY LAW AND PROCEDURES

A successful countervailing duty proceeding requires the U.S. industry to demonstrate that: (a) the imported merchandise in question is being subsidized by the foreign government and (b) the U.S. industry is being materially injured or threatened with material injury by reason of the subsidized imports. The DOC conducts the investigation of subsidization, and the ITC makes the injury determination. Both agencies must make affirmative final determinations in order for a countervailing duty order to be issued.

A. DOC INITIATION OF INVESTIGATION

The first step taken by the U.S. Government following the filing of a countervailing duty petition is the decision by the DOC whether or not to initiate a full-scale investigation. In making this decision, the DOC will look only at the petition itself and decide whether the information contained in the petition, if verified, would support a finding of subsidization. The DOC must also determine that the petition has the support of the domestic industry. The DOC must make its initiation decision within 20 days after the filing of the complaint unless additional time (up to a period of 20 days) is required to poll or otherwise determine support for the petition by the domestic industry.

B. ITC PRELIMINARY INJURY DETERMINATION

The next stage of a CVD investigation is the preliminary injury investigation by the ITC. The ITC must decide whether there is a “reasonable indication” that imports are causing material injury to the domestic industry or are threatening to cause such injury. It must make this preliminary determination within 45 days after the filing of the petition. During this preliminary injury investigation, the ITC will send questionnaires to the U.S. and foreign producers and the U.S. importers of the merchandise under investigation. The ITC staff will also hold a public conference at which interested parties may testify, and the ITC will consider written briefs filed by interested parties following the conference. If the ITC finds a “reasonable indication” of injury, then the investigation continues, and the DOC will conduct its investigation on the issue of subsidization. If, however, the ITC finds that there is not a “reasonable indication” of injury the investigation is terminated, and the petition is dismissed.

C. DOC PRELIMINARY DETERMINATION

The third stage of a CVD investigation is the preliminary determination by the DOC. In a normal case, the DOC will make its preliminary subsidy determination within 65 days after the DOC initiates the investigation. If, however, the DOC decides that the case is particularly complicated, it can postpone the preliminary determination for an additional period of 65 days. If the DOC makes a preliminary determination of subsidization, it will calculate the estimated

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CVD margin and instruct the U.S. CUSTOMS SERVICE to suspend liquidation of entries of the merchandise and to require importers to post a bond in the amount of the estimated CVD margins. If the DOC makes a preliminary determination of no subsidization, it will take no action at this stage, but the investigation will continue.

This stage revolves around the responses of the overseas producers and the foreign government to the questionnaires which are prepared by the DOC. The DOC will make its preliminary determination largely on the basis of the information contained in these responses. After its preliminary determination, the DOC will schedule a visit to verify the information contained in the responses. The verification visit is similar to an audit, and each element of the response is verified against company records and/or audited financial statements.

D. “CRITICAL CIRCUMSTANCES”

If the CVD petition also alleges that “critical circumstances” exist, the DOC will make its preliminary determination on that issue at the same time as it makes its preliminary subsidy determination. Under the CVD law, “critical circumstances” exist if: (a) there has been “massive imports” (*i.e.*, a surge in the level of imports) of the merchandise under investigation over a relatively short period of time, and (b) the alleged subsidies are inconsistent with the *WTO Subsidies Code*.

If the DOC finds that “critical circumstances” exist, it can order the retroactive imposition of CVD duties for a period of 90 days. That is, imports which are entered into the United States during the 90-day period prior to the preliminary determination will be liable for the eventual assessment of CVD duties.

E. DOC FINAL DETERMINATION

The next stage of a CVD investigation is the final determination by the DOC. During this stage, the DOC will hold a disclosure conference at which it will explain the reasons for its preliminary determination. Interested parties may also request a formal hearing at which they may present their views on the legal and factual issues of the case. Written statements may also be submitted during this stage.

The DOC must make its final determination within 75 days of the preliminary subsidy determination. However, the DOC may postpone its final determination by an additional period of 60 days. If the DOC makes a final determination of subsidization, it will publish the final margin and instruct CUSTOMS to collect CVD duties in that amount. If the DOC makes a final determination of no subsidization, the investigation is terminated, and the case is dismissed.

If there is an allegation of “critical circumstances,” then the DOC will make a final determination on this issue as well. The DOC will make its decision on the basis of

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the two factors mentioned previously—that is, a surge of imports and WTO-inconsistent subsidies. If the DOC finds that “critical circumstances” do not exist, then this part of the case is closed, and duties are not applied on a retroactive basis. If, however, the DOC finds that “critical circumstances” do exist, then the ITC must determine whether the assessment of the retroactive duties is required to prevent a recurrence of the injury to the domestic industry.

F. ITC FINAL INJURY DETERMINATION

The final stage of a CVD investigation is the final injury determination by the ITC. The standard of injury at this stage is higher than that at the preliminary investigation—the ITC must find actual or threatened material injury to the domestic industry as the result of subsidized merchandise. The ITC must complete its investigation and make its determination within 45 days after the final determination by the DOC.

During this final injury investigation, the ITC will send questionnaires to the U.S. and foreign producers and the U.S. importers of the merchandise under investigation. These questionnaires are designed to update the information which the ITC had previously received from these parties during the preliminary injury investigation. In addition, the ITC will send questionnaires to purchasers of the merchandise, requesting information about market conditions, terms of sale, prices of domestic and imported merchandise, and related information. There will also be a public hearing before the Commissioners, at which interested parties may testify. Interested parties may also submit prehearing and posthearing briefs for consideration by the ITC. If the ITC finds injury, then the DOC will issue a formal CVD order. If, on the other hand, the ITC finds no injury, the investigation is terminated, and the case is dismissed. In a case involving a critical circumstances allegation, if both the DOC and the ITC find critical circumstances, then the CVD duties calculated by the DOC will be applied retroactively. If the DOC makes an affirmative critical circumstances finding but the ITC does not, then duties will not be applied retroactively.

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APPENDIX

PROCEDURAL SCHEDULE FOR ANTIDUMPING (“AD”) AND COUNTERVAILING DUTY (“CVD”) INVESTIGATIONS

The dates listed in the right-hand columns represent the last day by which the agency in question must take the action discussed. The agency may, however, act at an earlier time.

DECISION/ACTION	DAYS AFTER FILING	
	<u>AD</u>	<u>CVD</u>
Filing of petition with U.S. DEPARTMENT OF COMMERCE (“DOC”) and U.S. INTERNATIONAL TRADE COMMISSION (“ITC”); or self-initiation of investigation by DOC.	0	0
Determination of adequacy of petition by DOC.	20	20
Public conference (or hearing) before ITC staff.	21	21
Preliminary injury determination by ITC.	45	45
Effective date of “critical circumstances” if the investigation follows a “normal” schedule.	70	20
Effective date of “critical circumstances” if the investigation is treated as “extraordinarily complicated.”	120	60
Preliminary dumping or subsidy determination by DOC if the investigation follows a “normal” schedule.	160	85
Preliminary dumping or subsidy determination by DOC if the investigation is treated as “extraordinarily complicated.”	210	150
Final dumping or subsidy determination by DOC if the investigation follows a “normal” schedule.	235	160
Final injury determination by ITC if the investigation follows a “normal” schedule.	280	205
Final dumping or subsidy determination by DOC if the investigation is treated as “extraordinarily complicated.”	285	225
Final injury determination by ITC if the investigation is treated as “extraordinarily complicated.”	330	270
Final dumping determination by DOC if the investigation is treated as “extraordinarily complicated” and the deadline for the final determination is extended.	345	—
Final injury or countervailing duty determination by ITC if the investigation is treated as “extraordinarily complicated” and the deadline for the final determination is extended.	390	—

NOTE: The antidumping or countervailing duty investigation will be terminated if: (a) the ITC makes a preliminary or a final determination of no injury or threat of injury, (b) the DOC makes a final determination of no dumping, or (c) the U.S. industry withdraws the antidumping petition.