

Summary of Antidumping and Countervailing Duty Investigation Procedures

The antidumping duty law provides that a special antidumping duty will be imposed on all imports of a product from a country if (1) there is a price differential (“dumping margin”) between the home market price and the export price to the United States, and (2) the U.S. industry that produces merchandise like the imported good is being materially injured or threatened with material injury by reason of the dumped imports. The countervailing duty law provides that a special antidumping duty will be imposed on imports of a product from a country if (1) the foreign government has provided certain subsidies to the foreign respondent companies, and (2) the U.S. industry that produces merchandise like the imported good is being materially injured or threatened with material injury by reason of the subsidized imports.

I. ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

Antidumping and countervailing duty investigations are ordinarily initiated by the U.S. Department of Commerce (“DOC”) based on a petition from a U.S. producer, a group of U.S. producers, or a U.S. labor union. After the case is initiated, an investigation will involve the following four stages:

A. Preliminary Determination of Injury

The U.S. International Trade Commission (“ITC”) must determine within 45 days after receipt of the petition whether there is a “reasonable indication” of material injury, or threat thereof, as a result of dumped or subsidized imports. Material injury is measured by such factors as lost sales, price suppression, layoffs, increasing inventories, decreasing shipments, low capacity utilization, and reduced profits (or losses). Prior to making the preliminary determination, the ITC holds an informal public hearing approximately mid-point in this 45-day period.

Because of the short schedule for this stage of the investigation, the U.S. petitioner is usually at an advantage because it probably will have organized its presentation long before it filed the petition. By contrast, foreign producers and the foreign government have little time to prepare their arguments against the petitioner’s allegations.

If the ITC’s preliminary determination is negative (that is, no injury or threat of injury by reason of imports), the case is terminated. If the ITC’s preliminary determination is affirmative, the DOC continues the investigation.

B. Preliminary Determination of Dumping and Countervailing Duties

1. Timing

Within 140 days after the case is initiated, the DOC must ordinarily make its preliminary dumping determination, although a 50-day extension is possible in a “complicated” case. The preliminary determination is based on information contained in responses that the DOC receives to detailed dumping questionnaires that are sent to the major foreign producers of the investigated merchandise (usually those constituting between 60 to 80 percent of a country’s exports of the subject product to the United States).

Within 65 days after the case is initiated, the DOC must ordinarily make its preliminary countervailing duty determination, although a 65-day extension is possible in a “complicated” case. The preliminary determination is based on information contained in responses that the DOC receives to detailed countervailing duty questionnaires that are sent to the major foreign producers of the investigated merchandise (usually those constituting between 60 to 80 percent of a country’s exports of the subject product to the United States), and the foreign government.

2. Calculation Method

a. Antidumping Investigations:

Typically, in antidumping investigations, DOC calculates dumping margins by comparing a foreign producer’s ex-factory prices to customers in a comparison market (usually its home market), and (2) in

the United States.

To calculate the ex-factory price, the DOC adjusts the invoice price for costs incurred in shipping the merchandise to the customer (including post-sale freight, insurance, handling, duties, brokerage, etc.) and “directly-related” selling expenses. When the foreign producer and the U.S. importer are “related parties,” the DOC requires the U.S. affiliate’s sales to unrelated U.S. customers, rather than the exporter’s sales to the U.S. affiliate. Moreover, in addition to the expenses deducted above, the DOC also deducts from the U.S. price the U.S. importer’s general and administrative expenses, and “indirect” selling expenses. Further, the DOC will deduct the amount of profit that is allocable to the “indirect” U.S. selling expenses.

DOC calculates normal value by calculating the ex-factory price of the comparison market sales. DOC normally will base that comparison on home market sales, as long as those sales are viable (typically accounting for more than 5 percent of U.S. sales by quantity). If home market sales are not viable, DOC typically chooses the largest third-country market as the comparison market. If no third-country market is viable, DOC will construct a comparison price bases on cost of production, plus profit.

If normal value is based on home or third-country sales, DOC will often investigate whether the respondent is selling subject merchandise in the comparison market at less than the fully-absorbed cost of production. If so, DOC may disregard below-cost sales, which tends to increase dumping margins because U.S. prices are compared only to higher-priced comparison market sales.

Because DOC considers China to be a non-market economy, DOC will not compare the exporter’s U.S. prices to its Chinese prices. Instead, DOC will compare the ex-factory U.S. price to a constructed price in China, based on the producer’s factors of production (quantity of material needed to make the product, hours of labor to make the product, etc.). Because DOC believes that the costs in China are not reliable, it will value the factors of production based on surrogate values from a market economy of comparable development (such as Indonesia).

b. Countervailing Duty Investigations:

DOC normally calculates the amount of the subsidy provided in the form of various government programs (e.g., grants, loans, provision of goods at less than adequate remuneration, etc.) from which the foreign respondent producers have benefited. The amount of each benefit is calculated as a percentage of the affected sales.

3. Impact of DOC Preliminary Determination

If the DOC preliminarily determines that a particular company is dumping or has benefited from countervailable subsidies, the U.S. Customs Service (“Customs”) will suspend liquidation of all entries of merchandise produced by that company entered on or after the date on which the preliminary determination is published in the Federal Register. At that time, the importer of the merchandise must post a cash deposit to cover potential antidumping/countervailing duties that may be assessed later. The importer’s financial liability in an antidumping or countervailing duty case begins with the suspension of liquidation. Therefore, the date on which the suspension of liquidation occurs is the key date for enforcement of the law.

The dumping and countervailing duty laws do not provide for a retroactive duty assessment except in unusual situations (i.e., when “critical circumstances” are found to exist). Even then, the retroactive duty applies only to entries that are unliquidated as of the date on which the affirmative preliminary determination is published in the Federal Register. Entries that have already been liquidated by that date would not be affected by the retroactive duty assessment.

If the DOC’s preliminary determination is negative (that is, the DOC finds no dumping or countervailing duties), Customs does not suspend liquidation. The investigation then proceeds to the DOC’s final determination.

C. Final Determination of Dumping/Countervailing Duties

The DOC ordinarily must make its final determination of dumping within 75 days after its preliminary determination, although a 60-day extension is possible. The DOC must make its final determination of countervailing duties within 75 days after its preliminary determination, although an extension may occur (which normally is the same date as the date of the final determination of dumping if there is a concurrent antidumping investigation).

Before making its final determination, however, the DOC will conduct an audit (called a verification) of the foreign

producer (and, in the case of countervailing duties, the foreign government). In addition, DOC allows all foreign and U.S. parties to request a hearing and to submit comments and legal arguments pertaining to the investigation. If the DOC's final determination is negative (that is, the DOC finds no dumping or no countervailable subsidies), the investigation is terminated. If the final determination is affirmative, the DOC determination will set company-specific estimated dumping and countervailing duty margins and the ITC would conduct a final injury determination.

D. Final Determination of Injury

If the DOC's final determination is affirmative, the ITC must determine whether the U.S. industry is being materially injured (or threatened with material injury) by reason of the dumped and/or subsidized imports. The ITC holds a hearing and accepts testimony and economic presentations. In this final investigation, the ITC considers the same factors as in the preliminary determination. Nevertheless, the ITC must apply a higher legal standard in its final investigation.

If the DOC's preliminary determination was affirmative, the ITC must make its final determination of injury before the later of (1) 120 days after an affirmative preliminary determination by the DOC, or (2) 45 days after an affirmative final determination by the DOC. If the DOC's preliminary determination was negative, the ITC's final determination is due 75 days after the final affirmative determination by the DOC.

II. POST-INVESTIGATIVE PROCEEDINGS

If the ITC and DOC both issue final affirmative determinations concerning injury and dumping/countervailable duties, respectively, then the DOC will publish an antidumping/countervailing duty order in the Federal Register. The order requires importers of the investigated merchandise to post a cash deposit equal to the estimated dumping/countervailing duty margins set in the DOC's final determination.

The DOC will, upon request, periodically conduct "administrative reviews" of the order for purposes of (A) calculating the exact dumping/countervailing duty margins for each exporter on entries covered by that review, and (B) recalculating the duty deposit rate for future entries. Based on the results of the administrative review, the DOC will order liquidation of all entries for which actual dumping/countervailing duty margins are calculated. If no review is requested, the DOC will order liquidation based on the estimated duties deposited.

The review process continues indefinitely until the order(s) is either completely or partially revoked. On the fifth anniversary of the antidumping/countervailing duty order, the DOC and the ITC are required to determine if revocation of the antidumping order would likely to lead to the continuation or recurrence of dumped/subsidized imports and of material injury to the domestic industry by reason of the dumped/subsidized imports. If both the DOC and the ITC make negative findings, then the order is revoked.