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Antidumping and Countervailing Duty (AD/CVD) Investigations

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Overview of U.S. Antidumping and Countervailing Duty Laws

Under the antidumping (AD) statute, members of a particular domestic industry may petition the U.S. government to investigate imports of similar foreign goods and to impose compensating duties where two threshold requirements are met:

- The imports are sold in the United States at less than fair value; and
- The dumped imports are a cause of (or threaten) material injury to the domestic industry.

In a countervailing duty (CVD) investigation, the U.S. government must determine:

- Whether imports are being subsidized by the government of the exporting country; and
- Whether the subsidized imports are a cause of (or threaten) material injury to the domestic injury.

Generally, AD and CVD investigations are conducted together on parallel tracks before both the U.S. International Trade Commission (ITC) and the U.S. Department of Commerce (Commerce). The ITC—an independent, quasi-judicial, federal agency—determines whether a domestic industry is materially injured or threatened with material injury by the dumped or subsidized imports. In an AD case, Commerce determines whether the imported products are being sold at less than fair value—or "dumped"—into the U.S. market and calculates the appropriate remedial duty. In a CVD case, Commerce is responsible for determining the nature and extent of the government subsidies. The extent of the subsidy then determines the amount of the countervailing duty assessed on the imported merchandise.

In an AD case, Commerce determines whether the imported products are being sold at less than fair value—or "dumped"—into the U.S. market and calculates the appropriate duty.

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The Antidumping and Countervailing Duty Statutes

Adopted as part of the Tariff Act of 1930, the U.S. AD statute is a remedial measure that authorizes the imposition of compensating duties when imports are sold at less than normal value and are a cause of (or threaten) material injury to the U.S. industry producing products like those that are imported. The dumping duty is based on the difference between the "normal value" of the product and the price charged for it in the United States. Following a preliminary investigation that results in positive determinations from both the ITC and Commerce, a dumping duty deposit is immediately imposed on all imports of the subject products.

Similarly, the CVD statute authorizes the imposition of compensating duties to "countervail" subsidies paid by foreign governments to their country's exporters. Consequently, Commerce calculates the CVD by determining and offsetting the amount of the subsidy. Just as with a dumping duty, a CVD is immediately imposed on all imports of the suspect products following positive preliminary determinations from the ITC and the Department.

Domestic companies and industry trade associations begin the investigative process by simultaneously filing a petition with Commerce and with the ITC. After the investigation is initiated, opposing and neutral companies are required (under threat of subpoena) to provide information necessary to the investigation. Foreign producers who do not fully cooperate with the investigation are frequently subject to the application of "adverse facts available," in effect having the relevant agency draw negative inferences against the foreign producers and in favor of the domestic producers.

> Domestic companies and industry trade associations begin the investigative process by simultaneously filing a petition with the U.S. Department of Commerce and with the U.S. International Trade Commission.

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AD Investigation: Imports are Sold Below Fair Value

Once an AD investigation is initiated, Commerce is responsible for calculating whether there is dumping. Commerce first calculates normal value, which is based on prices in the foreign companies' home market. Alternatively, if there are insufficient sales of comparable merchandise in the home market, normal value is based on the fully distributed cost of production plus profit.

Given that the dumping calculation is based on ex mill net values, the normal value (when based on price) is reduced by any inland freight and other similar charges incurred in delivery of the product by the foreign producer to its own domestic customers (or to third country customers). The export price into the U.S. is also determined using similar means, including a downward adjustment to reflect transportation costs (both foreign and local), importation expenses, U.S. processing, and other such costs. Additional adjustments are made for differences in quality, credit, and other circumstances of sale unique to the foreign producers.

After these adjustments to normal value and U.S. price (officially called the "export price" or "constructed export price"), Commerce then makes its dumping calculation. The product is considered dumped if the constructed export price—the price of the good in the U.S. market—is lower than the normal value of that product in the producer's home market. The difference between the two prices is the margin of dumping, which is then divided by the U.S. price to determine the dumping duty percentage.

If the target country is a non-market economy (NME), *e.g.*, China, Commerce uses a special procedure in calculating normal value. In such cases, Commerce makes its calculation by identifying the actual "factors of production" necessary to make the product. For example, in a steel investigation, Commerce would obtain from the NME producer the hours of labor, quantity of raw material, and units of electricity the producer actually uses in manufacturing each ton. Those input factors are then assigned values using the cost of labor, raw materials, and energy in a comparable—"surrogate"—market economy, such as Thailand or Mexico. Commerce then adds reasonable overhead and profit (based on data from the surrogate country) to arrive at the normal value for each ton of steel. The surrogate normal value is then compared with the adjusted U.S. price in determining the dumping margin for the NME producer. The NME methodology tends to result in high dumping margins on Chinese products.

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CVD Investigation: A Foreign Government Subsidizes Imports

The central issue in a CVD investigation is whether a foreign government subsidizes the production or export of merchandise that is then imported into the U.S. Subsidizing occurs when a foreign government provides financial assistance to benefit the production, manufacture, or exportation of a good. Subsidies can take many forms, such as direct cash payments, credits against taxes, and loans at terms that do not reflect market conditions. The CVD statute and accompanying regulations establish standards for determining when an unfair subsidy has been conferred. The amount of subsidies the foreign producer receives from the government is the basis for the offset through higher import duties.

Subsidizing occurs when a foreign government provides financial assistance to benefit the production, manufacture, or exportation of a good.

Commerce permits the initiation of CVD investigations of NME countries. As a result, domestic industries have an opportunity to challenge imports from China, and have had great success in doing so given the Chinese government's well-publicized practice of subsidizing exports.

AD and CVD Investigations: Imports Cause or Threaten Material Injury

Before providing relief to the domestic industry, the ITC must first find that the imports are a cause of material injury (or threat thereof) to the U.S. industry. In this regard, injury is defined simply as harm that is more than inconsequential, insignificant, or immaterial. The domestic industry can demonstrate injury in a number of ways, including through downward trends in industry data (production, shipments, profits, etc.). Operating losses are not a necessary component of material injury if it is otherwise clear that the industry would have been better off absent the subject imports. As long as the dumped and/or subsidized imports are found to be a cause of material injury or threat thereof, the ITC will make an affirmative determination, even if there are other causes of such injury or threat.

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Wiley's Expertise in International Trade

Wiley is an internationally respected law firm with more than 240 lawyers. Our International Trade Group is Washington's premier counsel in U.S. AD and CVD cases, and is consistently recognized by *Chambers USA* for its "high profile in trade remedy litigation."

We are among a limited number of practices that regularly serve as principal counsel for major unfair trade investigations, and we have a strong record of winning large and complex antidumping and countervailing duty cases on behalf of major U.S. industries, including clean energy technologies, steel, steel-containing products, aluminum, paper, wood products, and consumer products. Our Group has brought cases involving imports from numerous countries, including Argentina, Belarus, Belgium, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Kazakhstan, Korea, Latvia, Luxembourg, Mexico, Moldova, the Netherlands, New Zealand, Poland, Russia, Saudi Arabia, Slovakia, South Africa, Spain, Taiwan, Thailand, Trinidad and Tobago, Turkey, Ukraine, Venezuela, and Vietnam.

We provide both the technical expertise and judgment necessary for representing clients in today's environment. Our lawyers have the extensive technical experience that is a prerequisite for effective legal representation before the ITC and the Commerce. In addition, many of our attorneys have served in various government agencies, including Commerce, the ITC, and the U.S. Court of International Trade. We understand how public relations activities and involvement from Congress, the Executive Branch, and diplomatic channels can affect the outcome of an investigation. Our success in this area reflects our ability to quickly and thoroughly respond to our client's needs throughout the complex investigation process, and to carefully and effectively present all legal and policy arguments.

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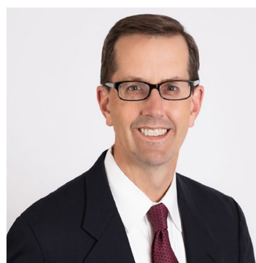

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