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Complying With Antidumping and Countervailing Duty Requirements

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What Are Antidumping and Countervailing Duties?

- Antidumping duties (“ADD”) are duties, above and beyond normal customs duties, that are imposed in order to offset the amount by which a foreign exporter’s US sales prices are below “normal value” (generally, the exporter’s sales prices in its home market).
- Countervailing duties (“CVD”) are duties, above and beyond normal customs duties, that are imposed to offset the amount by which a foreign producer’s exports benefit from foreign government subsidies.
- Dumping and foreign government subsidization are considered unfair trade practices by the WTO.

How Are ADD and CVD Imposed?

- ADD and CVD proceedings generally begin with the filing of petitions at the US Department of Commerce ("DOC") and the International Trade Commission ("ITC") by a US industry seeking their imposition.
- The DOC will investigate, based on entries made in an earlier period (six months – year) whether or not dumping/subsidization is occurring, and, if so, in what amount.
- The ITC will investigate whether or not the subject imports are causing material injury, or threat thereof, to a US industry.
- If both investigations result in final affirmative determinations, ADD/CVD will be imposed.

What Are Some Warning Signs That An ADD/CVD Petition May Be Filed?

- Press reports or speeches made by US producers, that ADD/CVD petitions are being considered.
- Poor financial performance by the US industry – increasing losses and layoffs for at least two calendar quarters, particularly when combined with foreign producers increasing their US market share, and there is underselling/price suppression or depression.

When Will Imports be Impacted by ADD/CVD Proceedings?

- The DOC will normally make its preliminary determination of dumping/subsidization within three-seven months of the filing of the petition. At that time, it will order CBP to suspend liquidation of subject imports and require importers to post cash deposits on future entries in the estimated amount of dumping/subsidization. In cases where "critical circumstances" are found, the cash deposits will also have to be made on imports made within the preceding 90 days.
- Normally, within 60-135 days after its preliminary determination, the DOC will make its final determination and will adjust the ADD/CVD rates, based on its investigation.
- Following an affirmative ITC final material injury determination, an ADD/CVD order will be issued and CBP will be ordered to continue suspension of liquidation and to collect cash deposits in the amount of dumping/subsidization found in the DOC's final determination.
- Because many affirmative final determinations are appealed to the US Court of International Trade, which may order one or more remands to the Commerce Department or the International Trade Commission, liquidation may not occur for quite some time.

When Will the Entries Subject to the ADD/CVD Be Liquidated?

- Each year on the anniversary month of the ADD/CVD Order, the DOC will give interested parties an opportunity to request an administrative review to adjust the ADD/CVD duty rate to reflect actual dumping/subsidization during the previous year (rather than the estimated cash deposit amounts based on sales in an earlier period).
- If no requests for review are received, the cash deposit amounts will become final and the entries will be liquidated at the deposited ADD/CVD rates.
- If a review is requested and conducted, the entries in the previous year will be liquidated at the rates determined in the review, with either excess cash deposits being refunded, with interest, or, where the cash deposit was insufficient to cover the dumping margin established in the administrative review, with a requirement for the importer to pay the difference, plus interest.
- The dumping/subsidization margins established in the administrative review will become the new cash deposit rates going forward.
- Every five years, the DOC and ITC will conduct a “sunset” review to see if the ADD/CVD order should be continued or revoked.

What Are “Subject Imports”?

- The petition will describe the merchandise it covers in a narrative description and by reference to particular HTSUS nos.
- The narrative description is dispositive in determining the scope of any order.
- If an importer believes the product it is importing is outside the scope of the merchandise identified in the Order, it can bring a “scope” proceeding before the DOC to try to get the item it is importing excluded from coverage.
- Scope rulings can also be sought by US producers such as in cases where they suspect “circumvention” of an ADD/CVD order, e.g., where minor or insignificant assembly of the subject merchandise occurs in the United States or another foreign country from parts and components made in the country that is the subject of the proceeding.

Transshipment

- Where an exporter mislabels the origin of its merchandise/ships it through a third country, to try to avoid the imposition of AD/CVD, it will have engaged in transshipment.
- Importers who fail to exercise reasonable care in identifying the origin of the merchandise it imports will face civil penalties, even where the importer relies on information provided by the exporter. Reasonable care requires importers to at least undertake an effort to verify the information contained in entry documents. <u>See</u>, <u>e</u>.<u>g</u>., <u>United States v. Golden Ship Trading Co</u>., <u>et al</u>., 25 CIT 40, 2001 WL 65751 (CIT) (2001).
- Where the importer purposely misdeclares the origin of its imports to avoid ADD/CVD, it can face criminal prosecution.

What Can An Importer Do To Protect Its Interests?

- Respond to ITC questionnaires, submit written arguments before the ITC as to why any material injury or threat thereof is not by reason of subject imports, and appear at the ITC hearings to testify.
- Impress upon the foreign vendor the need to cooperate fully with the DOC investigation (failure to cooperate will result in a dumping/CVD margin based on AFA – adverse facts available; the vendor's obtaining of a low ADD/CVD margin can be a competitive opportunity).
- Have the foreign vendor's US subsidiary be the importer of record so it will be responsible for payment of any ADD/CVD.
- Work with the foreign vendor to make at least one entry during the administrative review period at a price that is higher than normal value so that an administrative review can be requested and no dumping will be found.
- Periodically review market conditions to assess whether or not to request a "changed circumstances" review.

Non-Reimbursement

- If the foreign vendor pays directly on behalf of the importer, or reimburses the US importer for any ADD or CVD it must pay, the calculation of the US sales price for comparison to normal value will generally be deducted by that amount.
- The DOC requires importers to file a statement with CBP certifying that they have not entered into any agreement with the foreign vendor for the payment or reimbursement of ADD or CVD. Failure to file this certification can result in a DOC presumption that the foreign vendor paid or reimbursed the ADD or CVD.