

# **U.S. Trade Law and Enforcement: AD/CVD/Safeguards**

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# Trade Remedies

- Unfair foreign pricing and government subsidies distort the free flow of goods and adversely affect competing businesses in the global marketplace.
- **Antidumping (AD) and countervailing (CVD) duty measures** may be used to remedy the artificial advantage created by **unfair foreign pricing and government subsidies**.
- **Safeguard actions** may be used to provide relief for domestic industries seriously injured or threatened with serious injury by **increased imports**.

# Antidumping Measures

- Dumping involves the **actions of companies** (in contrast to subsidy cases which involve the actions of governments).
- Dumping investigations and determinations are **country, product, and company-specific**.
- If a **company exports a product at a price lower than the price it normally charges in its own home market for that product**, it is said to be “**dumping**” the product.
- The **difference between the price (or cost) in the home market and the price in the export market is called the dumping margin**.
- The WTO Antidumping Agreement does not regulate the actions of companies engaged in dumping. Its focus is on how governments can or cannot react to dumping.

# Antidumping Measures, cont'd

- Under the U.S. system, the **Commerce Department determines whether dumping is occurring**, and if so, the margin of dumping.
- The **International Trade Commission (ITC) determines whether the U.S. industry is materially injured** or threatened with material injury **by reason of the imports** under investigation.
- **If both Commerce and the ITC reach affirmative final determinations, Commerce will instruct Customs and Border Protection (CBP) to assess duties** against imports of that product into the United States.
- The **duties (tariffs) are assessed as a percentage of the value of the imports** and are equivalent to the dumping margin.

# Countervailing Duty Measures

- Foreign governments subsidize industries when they provide financial assistance to benefit the production, manufacture or exportation of goods.
- Subsidies can take many forms, such as direct cash payments, credits against taxes, and loans at terms that do not reflect market conditions.
- The WTO Subsidies Agreement disciplines the use of subsidies by governments and regulates the actions countries can take to counter the effects of subsidies.
- Under the Agreement, a **country can use the WTO's dispute settlement procedure to seek the withdrawal of the subsidy** or the removal of its adverse effects.
- **Or the country can initiate a countervailing duty investigation.** The value of subsidies the foreign producer receives from the government is the basis for the subsidy rate by which the subsidy is offset, or "**countervailed**," through additional import duties.

# Countervailing Duty Measures, cont'd

- Not all subsidies are countervailable. **Injurious subsidies may be countervailed if –**
  - The **government or a public body** provides, directly or indirectly, a **financial contribution**;
  - Which confers a **benefit** to the recipient; **and**
  - The subsidy is **specific** to an enterprise or industry or group of enterprises or industries. (Prohibited subsidies (such as export subsidies) are deemed to be “specific.”)

# Countervailing Duty Measures, cont'd

- Examples of “**government or public body**” include a government agency, government bank, or state-owned enterprise.
- **Financial contribution** includes a direct transfer of funds, government revenue otherwise due that is foregone, government provision of goods or services (other than general infrastructure), and government purchase of goods.
- If both Commerce and the ITC reach affirmative final determinations of subsidization and injury, respectively, Commerce will instruct Customs and Border Protection (CBP) to assess countervailing duties (tariffs) against imports of that product into the United States.

# Injury to a Domestic Industry

- Under the U.S. system, the ITC determines **whether imports (that have been found to be dumped or subsidized) materially injure or threaten to materially injure a U.S. industry.**
- “Material injury” is not defined in the WTO Agreements.
- U.S. law defines **material injury** as **harm which is not inconsequential, immaterial, or unimportant.**
- Determination of injury is based on consideration of a number of factors including the **volume of dumped or subsidized imports, the effect of such imports on domestic prices, and the consequent economic impact on the domestic industry.**



# AD/CVD Investigations – The Process

- An **AD/CVD investigation** is started when a **petition is filed** by or on behalf of the domestic industry. Petitioners must represent at least 25% of domestic production of the product(s) at issue. Commerce may also self-initiate an investigation.
- The petition sets the “**scope** of the investigation.”
- “**Interested parties**” – including manufacturers, exporters, importers, foreign governments and unions – may participate in the investigation.
- During the course of an investigation, the investigating authorities collect information, hold public hearings, issue preliminary and final determinations, and audit information provided by certain interested parties.

# AD/CVD Investigations – The Process cont'd

- Interested parties have the right to review and comment on information collected during the course of an investigation, meet with the investigating authorities, and participate in the public hearings.
- Interested parties have a right to litigate the final Commerce and ITC decisions (separately) in federal court. In addition, foreign governments can request WTO dispute settlement with respect to these decisions.
- If an investigation involves imports from Canada or Mexico, interested parties have a right to request the final Commerce and ITC decisions be reviewed by a panel pursuant to USMCA Chapter 10.

# Safeguard Actions

- **Safeguards are temporary measures, i.e. emergency actions, to limit imports when a surge in imports causes serious injury to a competing domestic industry.**
- Elimination of trade barriers exposes domestic industries to increased competition. Safeguards provide temporary “breathing space” for industries to adjust to import competition.
- Safeguards are applied to any imports – i.e., there is no requirement for a finding of dumping or subsidization. So “fairly traded” imports can be a target.
- Unlike AD/CVD measures, **safeguard actions** normally are not country specific. They presumptively **apply to all imports from all countries**. Countries with which the U.S. has an FTA may be excluded under certain circumstances and countries may negotiate a country exemption. Certain LDCs may also be excluded.
- Types of relief generally includes quotas and/or tariffs.
- Safeguard measures **normally may not last more than 4 years (maximum 8 years) and are meant to be digressive in nature (i.e., less trade restrictive over time)**

# Safeguard Actions – The Process

- The **ITC alone conducts safeguard investigations – Commerce is not involved in these investigations.**
- If the ITC determines that a surge in imports is causing serious injury to a competing domestic industry, it may recommend relief to the President.
- The **President makes the final decision** with input from the United States Trade Representative.
- Relief can be in the form of quotas, tariffs, tariff-rate quotas, or Trade Adjustment Assistance.
- ITC safeguard determinations may be challenged in federal court (on limited grounds) as well as in the WTO.

# The Players

- Investigating authorities
  - Commerce
  - US International Trade Commission (ITC)
  - CBP
- Congress
- The Administration
- Interested parties

# Hot Topics

- **“Solar 3” AD/CVD Investigations of Solar Modules/Cells**
- April 2024 – 4 domestic manufacturers of solar module filed AD/CVD cases against imported “solar cells, whether or not assembled into modules” (i.e., solar cells and solar modules) from Cambodia, Malaysia, Thailand and Vietnam
- Issue #1: Are manufacturers in these jurisdictions manufacturing solar modules/cells which they are dumping and/or which are subsidized? Time frame for those determinations (preliminary tariffs) is Oct.-Dec. 2024
- Issue #2: Have the petitioning companies suffered “material injury” which is causally related to imports of solar modules/cells? Time frame for this determination (final tariffs) is spring 2025
- Context: Case is called “Solar 3” because there are “Solar 1 and 2” AD/CVD set of orders in place for Chinese-origin modules/cells

# Hot Topics cont'd

- **Section 201 Safeguard Action for Solar Cells/Modules**
  - Section 201 tariffs were put in place in Feb. 2018 by the Trump Administration after an ITC investigation found serious injury to the domestic solar module manufacturing industry due to imports
  - The initial 4-year remedy was extended for an additional 4 years (the limit under the statute) so the tariffs will terminate in Feb. 2026
  - For modules, the tariffs currently apply to all module imports (regardless of origin) unless the exporting country has an exemption (i.e., Canada, certain LDCs)
  - For cells, the remedy was a tariff rate quota (TRQ) which was recently raised by President Biden to ensure adequate cells for on-shored U.S. module assembly

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