

Trade Wars: Anti-Dumping And Countervailing Duty Trends

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This article is the first in a special series examining the legal, strategic and economic dimensions of the Trump administration's trade agenda, and assessing what the recent shifts in U.S. trade policy may mean for the country and for the established system of international commerce. In this installment, Shelby Anderson, William Isasi and David Lindgren of Covington & Burling LLP explore how the administration's aggressive use of anti-dumping and countervailing duty enforcement is creating new compliance challenges for foreign companies and U.S. importers.

During the 2016 presidential campaign, then-candidate Donald Trump ran on an “America First” platform that promised sweeping reforms to U.S. trade policy. A key pillar of this new policy was the increased use of trade remedy tools to address unfair trade practices harming American businesses and employees.

Since taking office, President Trump has followed up on his campaign promises by aggressively using trade remedy laws to impose sweeping tariffs on a wide range of products entering the United States. Although the most visible tariffs have been those imposed under Section 232 of the Trade Expansion Act of 1962 and Section 301 of the Trade Act of 1974, the U.S. Department of Commerce has also significantly ramped up its enforcement of U.S. anti-dumping and countervailing duty laws.

AD and CVD duties are imposed following investigations by Commerce into alleged unfair trade practices. These investigations are generally commenced by a petition filed by members of the U.S. domestic industry on a country- and product-specific basis, and are intended to determine whether foreign producers in the country under investigation have unfairly priced their products in the United States or have benefited from unfair government subsidies.



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A second agency, the U.S. International Trade Commission, determines whether the domestic industry producing the same or similar product in the United States is either materially injured or threatened with material injury by reason of imports of the product under investigation. If both Commerce and the ITC reach “affirmative” determinations in their investigations, then the government imposes AD/CVD duties on imports to offset the effects of the unfair trading practices, with U.S. importers liable for the payment of the duties.

Under the Trump administration, there has been a significant increase in AD/CVD proceedings. Between January 2017 and September 2018, Commerce initiated 124 new AD/CVD investigations covering 34 different products from 32 different countries — a roughly 20 percent increase from the final 21 months of the Obama administration. These figures are notable not just in their magnitude, but also in the range of products and countries being targeted. Although investigations remain strongly oriented toward steel and metal products, primarily from China, Commerce has also initiated investigations on products from countries not traditionally targeted by trade remedies (including, for example, biodiesel from Argentina and civilian aircraft from Canada).

Beyond initiating more investigations, Commerce has become increasingly aggressive in its interpretation and application of AD/CVD laws. One indication of this new approach has been Commerce’s increased appetite for “self-initiating” investigations under its little-used self-initiation authority.

In a self-initiated investigation, Commerce identifies specific exports that may be benefiting from unfair trade practices, and unilaterally initiates an investigation rather than waiting for a petition from the domestic industry. Unlike petition-based investigations, there is no legal requirement that a substantial portion of the domestic industry support a self-initiated investigation.

Commerce self-initiated AD/CVD investigations on common alloy aluminum sheet from China in 2017, marking the first time that Commerce used this authority in over 25 years. Every indication is that Commerce plans to continue along this path, with Commerce Secretary Wilbur Ross making clear that Commerce assigns staff to monitor for trade violations and, unlike in prior administrations, Commerce intends to self-initiate AD/CVD investigations as a means of addressing unfair trade practices.

Commerce has also begun cracking down on the so-called “circumvention” of AD/CVD orders. Circumvention may occur, for example, where a foreign producer shifts the final stage of its production process to a third country to avoid tariffs that would otherwise apply if the product were shipped directly from the originating country to the United States. Although U.S. law has long allowed Commerce to apply duties to products that have been manufactured to circumvent AD/CVD orders, Commerce has historically avoided finding circumvention across AD/CVD orders by, for example, not finding that inputs subject to an AD/CVD order are circumventing that order when they are transformed into products for which separate AD/CVD orders exist.

Thus, for example, foreign producers could be reasonably assured that if an input produced in China was used to produce a product in a third country, and separate AD/CVD orders existed for the input and product when produced in China, Commerce would not find circumvention of the AD/CVD orders in



China when the product was produced in a third country and then exported to the United States. The existence of the separate orders meant that the transformation of the input into the finished product was substantial for purposes of the AD/CVD circumvention law, thereby resulting in a negative circumvention determination.

Under the Trump administration, Commerce appears to have changed this practice, adopting an increasingly expansive view of circumvention. For example, Commerce recently determined that corrosion-resistant steel produced in Vietnam with intermediate steel inputs from China was circumventing AD/CVD orders on corrosion-resistant steel from China. Commerce reached this conclusion even though separate AD/CVD orders exist for the input and the corrosion-steel product, and even though it has previously found that converting intermediate steel inputs into final steel products “substantially transformed” the inputs.

Commerce’s approach in this proceeding has potentially far-reaching implications for companies with diversified supply chains, as an export could be subject to AD/CVD duties simply because it relies on major inputs that originate in countries subject to AD/CVD orders.

In a similar vein, Commerce has, with no hesitation, applied a new statutory provision that allows the agency to disregard the recorded costs of producers where those costs are distorted by a “particular market situation” in their home country. Commerce employs this approach even though the World Trade Organization Appellate Body recently ruled that an analogous methodology employed by the European Union was WTO-inconsistent in a dispute involving biodiesel from Argentina.

For instance, in a recent proceeding involving oil country tubular goods from Korea, Commerce found that a “particular market situation” existed in significant part because of the widespread availability in Korea of cheap Chinese steel inputs. Under this expansive interpretation of the statute, market distortions in one country (in this case, China) can support a finding of distortion in another country (Korea).

The particular market situation approach gives Commerce wide latitude to make adjustments or offsets to a company’s reported costs — with the practical result that, in many instances, the calculated AD rates end up being much higher. At a minimum, because Commerce disregards or adjusts a company’s actual costs in the calculation of dumping levels pursuant to this methodology, it becomes very difficult, if not impossible, for a foreign producer to know the price at which it must sell in the United States to eliminate dumping.

A final area where the Trump administration has been notably assertive is in the use of “adverse facts available,” or AFA, in both AD and CVD proceedings. Because Commerce lacks the legal authority to compel responses from foreign companies and governments, Commerce is authorized by statute to use AFA to incentivize cooperation. Thus, for example, where a foreign company altogether fails to supply price or cost information to Commerce, Commerce will rely entirely on AFA and determine that the company is dumping.

While this outcome is not particularly controversial in a proceeding where a company fails to respond at all, Commerce also relies entirely on AFA in proceedings where a company has been actively participating in the proceeding. Under these circumstances, Commerce disregards vast amounts of data the company submitted on the record because Commerce determines the company was uncooperative on a limited number of issues.

For example, a respondent in a recent AD investigation of polyethylene terephthalate resin from Pakistan participated throughout the investigation, but was ultimately assigned a rate based entirely on AFA after Commerce determined at the final stage of the investigation that the company was uncooperative regarding its cost reporting. As a result, this company went from a preliminary duty rate of 7.75 percent to a final rate of 59.92 percent.

Such high rates not only effectively lock a company out of the U.S. market in the near term, but may also lock them out of the market altogether. Commerce reviews a company's AD/CVD duty rates in its annual review process only if the company had shipments of the covered goods in commercial quantities during the period of review. It may be quite difficult for a company to make shipments in commercial quantities if sales of its product to the United States are subject to extremely high AD/CVD duty rates.

Just as in other areas of trade policy, the Trump administration is expected to continue deploying all available tools and resources toward enforcing anti-dumping and countervailing duty laws to the maximum extent possible. If Commerce's recent practice is any indication, it will be difficult for foreign companies and U.S. importers to meaningfully gauge their potential exposure to AD/CVD duties, because Commerce's policies are evolving at a fast pace. As a result, it is vital that companies understand potential areas of risk, and consult experienced AD/CVD practitioners in the event that they are impacted by a Commerce proceeding, to avoid potential pitfalls that can have serious operational and financial implications.

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