

DEFENSE OF COUNTERVAILING DUTY INVESTIGATION

A U.S. anti-subsidy countervailing duty (CVD) investigation is unlike any other litigation that most companies will have experienced. The tight deadlines, unusual information requests, and particular data requirements are unique to this kind of proceeding. In addition, these cases involve on-site scrutiny by U.S. government officials with a low tolerance for error or misstatement and present an ever-present possibility of punitive assumptions being made where data is incomplete or insufficiently verifiable.

The defense of CVD investigation requires substantial effort. It involves investigations by two separate U.S. government agencies. The first is an investigation of whether there has been unlawful subsidies by the host government – which might lead to CVD duties. This phase of the proceeding is conducted by the Department of Commerce (DOC). The second phase is an investigation of whether the imports at issue cause material injury to the U.S. industry. This phase of the investigation is conducted by the International Trade Commission (ITC) (see section on ITC Investigations).

Defending such a complex and unconventional investigation requires the assistance of U.S. legal counsel familiar with the peculiarities of U.S. countervailing duty law. The foreign respondent must dedicate a considerable amount of managerial time and attention to the multiple data requests that are involved. However, if the foreign respondent devotes the necessary resources and time to this process, it may be rewarded with a lower CVD rate, and a significant business advantage over its competitors.

The following outline describes the primary tasks that a company and its legal counsel must complete at each stage of the antidumping investigation.

A. DOC CVD Investigation

The U.S. Department of Commerce decides whether a company is receiving unlawful host government subsidies, and if so, imposes the countervailing duty rate that must be deposited for future imports. In a CVD investigation, the DOC examines the government programs and benefits the company has availed itself of, and determines whether they are permissibly general, or impermissibly specific to that industry. If they are found to be unlawful, a duty is imposed in the amount of the subsidy. The DOC issues various questionnaires, which require extensive responses to numerous questions. In addition, the responding company must submit computer data, for CVD, a listing of all monetary benefits received in the various government programs under investigation, all with detailed supporting documentation and explanations.

However, not every manufacturer or exporter in a country is selected by the DOC for the investigation. Usually the DOC tries to cover 80 percent of total U.S. sales volume from each country, and if it can do so with just a few large companies, it will issue questionnaires only to those companies. All other companies will receive the average rate of those companies who are investigated. A company that is not required to submit a response may nevertheless wish to volunteer for the investigation, since a company can attempt to receive its own low rate and thus a competitive advantage.

On the basis of the submitted information (and taking into account any objections by the petitioning U.S. industry), the DOC will establish a preliminary CVD rate (which is the amount of subsidy assistance received). At that point, all imports of the product under investigation become subject to a CVD deposit in the amount of the preliminary rate.

After the company has submitted its questionnaire responses, the DOC then conducts an extensive on-site verification of the data submitted, normally taking 5 to 10 days. Each item of information submitted must be verified from the company's records, and the DOC must assure itself as well that the company's accounting system, its purchasing and selling practices, and its cost accounting all meet the DOC's standards. Failure to satisfy the DOC in this verification can result in punitive assumptions being imposed, which can significantly increase the CVD margin.

After the verification, the DOC permits the parties to submit legal argumentation in the form of briefs and a hearing. Thereafter the DOC publishes its final CVD margin, which is substituted for the preliminary margin. As noted above, if a company's final margin is less than 2 percent, the case is terminated with respect to that company. Otherwise all future entries are subject to a duty deposit at the rate found.

Each year thereafter, an annual review may be requested in which entries in the past year are examined in order to establish the actual CVD margin. The deposit rate is adjusted to reflect the new rate, and excess deposits may be refunded.

In responding to the DOC investigation, the central tasks to be performed by a foreign company's legal counsel include the following:

- Prepare a detailed work plan to guide the company in collecting, checking, and formatting the data required in the investigation;
- Establish and maintain open dialogue with the DOC investigators in order to ensure their understanding of the data and encourage favorable determination of discretionary issues;
- Prepare for and respond to the DOC's initial countervailing duty questionnaire. This will include a detailed narrative response providing information on the

company's sales to the United States and any subsidies received during the investigation period;

- Perform computer analysis of the data before submission to the DOC to ensure it is accurate and to determine how best to present various issues;
- Establish an estimate of the potential duty that can be anticipated under various scenarios, to identify significant issues in the case;
- Respond to one or more supplemental questionnaires requesting additional data and clarification;
- Provide information about all government programs availed of, and all benefits received;
- Coordinate with the home government, which will also be required to provide subsidy information;
- Prepare for on-site verification at the company's home office as well as at its U.S. importer or subsidiary (if any), including thorough review and internal audit to ensure that all submitted information is verifiable, organized, and presented in the required manner;
- Assist with verification, including responses to data and evidence requests and provision of supplemental information;
- Review the DOC's verification report for indications of issues requiring legal argumentation;
- Review preliminary determination as well as computer program used by the DOC to identify legal, factual, or programming errors;
- If countervailing duty margins are found in the preliminary determination, assist in complying with customs regulations;
- Prepare and submit legal briefs and participate in oral hearing advocating the legal position of the company;
- If countervailing margins are found, assist in strategic analysis of future marketing and pricing decisions.
- Prepare case for appeal to the U.S. Court of International Trade if the DOC committed a procedural or substantive error in its conduct of the investigations

The DOC's investigation normally takes 10 to 12 months.