U.S. Antidumping and Countervailing Duty Laws Accompany Trade Preferences Extension Act

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The ***Trade Preferences Extension Act*** of 2015, which has now passed both houses of Congress and awaits signature by President Obama, contains some significant rule changes and codifications of contested practice with respect to the US ***antidumping (AD)*** and ***countervailing duty (CVD)*** laws. The new rules will affect the international trading community in several respects, including: (1) making it easier for U.S. industries to obtain relief; (2) streamlining procedures when a foreign producer fails to cooperate in AD and CVD proceedings; (3) enhancing the ability of the U.S. government to refuse to use possibly distortive data in calculating AD and CVD margins; and (4) increasing the U.S. government's ability to individually calculate dumping margins for a small subset of exporters.

I.   Background

The AD and CVD laws are two relief vehicles for domestic industries seeking protection against foreign imports. The AD duty law provides that a special antidumping duty will be imposed on all imports of a product from a country if: (1) there is a price differential (dumping margin) between the home market price and the export price to the United States; and (2) the U.S. industry that produces merchandise like the imported good is being materially injured or threatened with material injury by reason of the dumped imports. The CVD law provides that a special anti-subsidy duty will be imposed on imports of a product from a country if: (1) the foreign government has provided certain subsidies to the foreign respondent companies: and (2) the U.S. industry that produces merchandise like the imported good is being materially injured or threatened with material injury by reason of the subsidized imports.

Generally, the U.S. Department of Commerce (DOC) determines whether dumping has occurred and unfair subsidies have been received, and then calculates AD and CVD margin to offset the dumping and subsidies. AD and CVD duties are imposed only if the U.S. International Trade Commission (ITC) also finds that the U.S. industry is materially injured by reason of the dumped and subsidized imports.

II.   Redefining Material Injury

U.S. industries seeking to obtain relief from unfairly traded imports must demonstrate that they have been materially injured (or are threatened with material injury) because of those imports. The new law prohibits the U.S. International Trade Commission (ITC) from making a finding of “no injury” merely because the industry is profitable or because the performance has recent improved. The new law will remove an impediment to affirmative findings of material injury, and may encourage more U.S. industries that are *only beginning* to experience adverse financial impacts from unfairly traded imports, but show other signs of injury, to file petitions *before* several quarters or years of bad financial results appear.

III. Consequences of Failure to Cooperate With a Request for Information

Parties that are deemed to have been uncooperative in an AD or CVD proceeding are often assigned extremely high margins, making continued importation into the United States prohibitive. However, until now, the DOC has been legally constrained by the existing statute’s requirement that any margin assigned to an uncooperative exporter, when based on so-called “secondary information,” be corroborated. Secondary information includes information from the initial petition, the original investigation, or any subsequent administrative review of the Order, as well as “any other information placed on the record.” Previously, the DOC could apply to uncooperative respondents the highest margin alleged in the petition, or the highest margin calculated in an administrative review, whichever is higher. But each time the DOC applied such “secondary information” it would have to “corroborate” the rate, which means that the DOC would have to perform a “reality check” to make sure the secondary information reflects a reasonably accurate estimate of what the respondent’s rate would have been, if cooperative, but with some built-in increase to deter uncooperative behavior. The new law provides an exception to the corroboration requirement, stating that once the DOC has actually applied a piece of “secondary information” in one segment of the proceeding (for example, the original investigation), the DOC can later apply that same piece of secondary information to an uncooperative respondent in a *later* segment of the same proceeding (for example, a later administrative review), and can do so without having to corroborate the same secondary information *again* in the context of the later administrative review. Moreover, for CVD cases, the law authorizes the DOC to use high margins taken from cases involving the same or a similar subsidy program in the same country, but in a proceeding involving a different product. As a result, respondent parties deemed uncooperative by the DOC can expect to receive the highest AD/CVD margins from the original investigation or any past administrative review, and will not be able to question high rates applied as secondary information from that earlier investigation or administrative review.

IV. Ability to Disregard Certain Distortive Data

Under the existing AD law, the DOC has the statutory right, when constructing the benchmark “normal” value against which to compare U.S. prices to measure dumping, to refuse to consider sales made below cost, and sales made to affiliated parties. These are considered to be sales made outside of the ordinary course of trade. Under the new law, the DOC has been given a much broader tool to remove sales that lower dumping margins (usually home market sales that are advantageous to the foreign exporter) with the expansion of the definition of “ordinary course of trade” to include any case in which the “particular market situation” prevents a proper comparison.

When the DOC constructs a benchmark value in AD cases involving so-called “non-market economies,” such as China and Vietnam, the benchmark consists of constructed costs derived by multiplied company-specific material, labor, and energy usage rates by values for those inputs in an economically comparable market economy country. The DOC, however, does not wish to use price data from market economy sources where those prices are likely to be distorted through, for example, export subsidies. The new law explicitly grants the DOC the legal right to reject such prices where there is some evidence of distorted prices in the market economy country, including broadly available export subsidies, other specific subsidies, or even if the price or cost values were subject to an antidumping duty order.

V. Reduction in the Number of Voluntary Respondents

The DOC does not review every exporter for which a review is requested. In fact, where multiple companies have been named for review, DOC's standard practice has been to accept one to three such exporters for full review. The DOC assigns to the remaining exporters some type of an average rate calculated based on the results of review for those parties selected for full review. Pursuant to the rules of the World Trade Organization, the DOC is supposed to allow companies that are not selected as mandatory respondents to request status as "voluntary" respondents, and thus entitled to calculation of a rate based on their own actual sales and cost data. The DOC has seldom permitted voluntary respondents to get a rate based on their own data (as opposed to the average rate), but the DOC's practice of rejecting requests for voluntary respondent status has been questioned by the U.S. courts. The new law gives DOC extremely broad discretion to reject consideration of voluntary respondents, deferring to the agency to make its decision as it "considers appropriate."

VI. Combatting Circumvention of AD and CVD Duties

We note that separate statutory language designed to strengthen laws combating circumvention of AD and CVD orders is currently included in another trade bill that may soon be headed for the White House. If and when that bill becomes law, we will provide a further analysis.

National Law Review, Volume V, Number 177