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Beware of Recent Amendments to U.S. Trade and Customs Laws

Department of Commerce is vested With Discretionary Powers in AD/CVD Proceedings

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Significant amendments in U.S. laws through the *Trade Preferences Extension Act of June 2015 (Trade Remedies Act)* and *Trade Facilitation and Trade Enforcement Act of February 2016 (Customs Enforcement Act)*, afford the U.S. Department of Commerce (Commerce), International Trade Commission (ITC), and Customs and Border Protection (Customs) new tools to counter alleged dumping and subsidies. The new laws are in response to U.S. domestic industry's lobbying, alleging that the prior laws were insufficient in content, lacked effective enforcement, and had failed to curb imports of dumped and subsidized goods.

Given the severity and wide scope of these changes, all foreign exporters to the U.S. market need to be vigilant about the new legal requirements and constraints.



Anti-dumping (AD) duty is levied on goods that are allegedly exported at prices lower than their fair value. Countervailing duty (CVD) seeks to neutralize the amount of government subsidy benefits conferred on exported goods.

In AD proceedings, the rate of AD duties is crucially dependent on a “fair value” determination, over which Commerce has vast discretion. For countries designated as market economies (ME), the law requires Commerce to calculate fair value based preferably on an exporter’s home market sale prices or alternatively, exporter’s third country selling price or using a cost construction method, utilizing the exporter’s price and consumption data.

Conversely, for determining the fair value of goods from non-market economy (NME) countries, Commerce rejects the actual cost/price data and applies a hypothetical cost-build up method by aggregating cost of all inputs, valuing such inputs based on price or surrogate value data from a third country (called the surrogate country), unless a significant portion of any particular input is purchased from an ME country. This methodology unsurprisingly yields an unpredictable and, in practice, unreasonably higher fair value.

Mischief of a Particular Market Situation

Amendments to the Trade Remedies Act enable Commerce to reject all three prices based simply on an alleged presence of a “particular market situation” in an ME country. Since “particular market situation” is not defined anywhere, Commerce could conveniently elevate routine government subsidy programs into the mischief of a “particular market situation”, and reject all the three established metrics used for determination of fair value. Countries designated as generally subsidized countries (presuming pervasive government subsidy programs) are especially vulnerable to this mischief.

Pursuant to invoking a “particular market situation” in ME countries, Commerce could proceed to determine fair value using the surrogate country methodology, otherwise reserved for NME AD cases. As such, all technically designated ME countries potentially face an uncertain specter in future US AD proceedings.

This provision also does not portend well for NME countries since it could potentially be used to deny the de facto benefits of an ME country to China and Vietnam whenever these countries are de jure regarded as an ME country. That is potentially the case for China on December 11, 2016 and on January 1, 2019 for Vietnam, pursuant to Article 15 of their World Trade Organization Accession Protocol.

Mandatory Submission of Cost of Production data

In determining fair value, Commerce is permitted to reject home market price if it is less than the cost of production of goods. Prior to the amendment, a specific allegation was required from U.S. domestic industries to trigger a cost of production inquiry. Now, Commerce is mandated to call for cost of production data in all AD investigations and

reviews. This requirement adds an avoidable burden on exporters undergoing AD proceedings.

Rejecting Price data of ME Inputs Subject to Subsidies and AD Order

In NME AD proceedings, Commerce can reject cost/prices of an input purchased from ME countries if such input is subject to subsidies or AD duty order. This could be used to reject a bona fide import price paid by Chinese or Vietnamese producers by showing even a tenuous connection with some subsidy benefits or AD order. As such, this change renders the fair value determination in NME cases even more uncertain.

Punitive Adverse Facts Available Rate

Commerce is vested with vast discretionary powers in drawing adverse inference and consequently, applying adverse facts available (AFA) information when an exporter fails to provide information in an AD/CVD proceeding. Earlier on, Commerce had to justify the selected AFA rate by corroborating it with other record information. Now, Commerce can select the most punitive AFA rates, disregarding the commercial reality. There are several pieces of information, such as those in possession of tollers—manufacturing jobbers, usually small firms—over which the exporter has no direct control. Under the new law, the exporters would need to exercise a much higher degree of planning and control over their supply chains.

Material Injury Definition Liberalized

The new law **also amends the definition of “material injury” and the factors the ITC examines when evaluating material injury.** The ITC is prohibited from giving a no injury finding merely because the U.S. domestic industry was profitable or its performance had recently improved. This change is favorable to U.S. domestic industries and unfairly deprives foreign exporters of a genuine defense from false injury claims.

Finally, the Customs Enforcement Act provides that an importer could be held guilty of “evasion” of duties on imported merchandise subject to an AD/CVD order, even in situations of non-deliberate acts of omissions and commissions. Unlike the past, when it had to refer scope issues related to AD/CVD cases to Commerce, Customs can now conduct a full blown investigation. This expansion portends avoidable duplication and contradictory orders from two agencies on the same subject matter, which is a real concern for bona fide exporters.

All foreign exporters to the U.S. market need to carefully analyze the ramifications of these new requirements and strategize accordingly.

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