



INTERNATIONAL
TRADE
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Webinar on Updated Antidumping and Countervailing Duty Regulations

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U.S. Department of Commerce | International Trade Administration



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Today's Agenda

- 1. AD/CVD Overview**
- 2. New Filing Requirements**
- 3. Scope/Circumvention Changes**
- 4. Government Inaction**
- 5. Particular Market Situation**
- 6. Countervailing Duty Changes**
- 7. Withdrawal of Prohibition on Analysis of Transnational Subsidy Allegations**



1. AD/CVD Overview

Antidumping and Countervailing Duty (AD/CVD) Proceedings:

Counteract:

- **unfair foreign pricing (AD); and**
- **unfair government subsidization (CVD).**

Commerce's procedures and regulations follow U.S. AD/CVD laws and are subject to review by U.S. Federal Courts.

If Commerce determines that there has been dumping or unfair subsidies during a period of investigation, Commerce will issue an AD or CVD order that applies to specific merchandise from a particular country. Importers of merchandise subject to an AD or CVD order must pay duties upon importation of that merchandise to the United States.

In conjunction with the U.S. International Trade Commission (ITC), Commerce's AD/CVD investigations and reviews help ensure that U.S. companies, workers, and farmers are strengthened and not harmed in certain ways by international trade.

What is Dumping?

- Dumping occurs when a foreign producer sells its product at a lower price in the importing country than it does in its home country or other primary markets, or when it sells its product below its production costs.

What is a Countervailable Subsidy?

- When a company benefits from a financial contribution from a government or public body, that financial contribution is considered a subsidy. A subsidy is “countervailable” if it is provided to a specific enterprise or industry.

Commerce's Recent Updates to Its Regulations

On March 25, 2024, Commerce updated its regulations to improve and strengthen the administration and enforcement of several areas of the AD and CVD laws.

Today's presentation covers some of those new regulations and modifications. All of the revisions described are in full compliance with U.S. law, which in turn is consistent with the United States' relevant obligations under World Trade Organization agreements.

Along with the updated regulations, Commerce also responded to 53 submissions from various governments and private entities in an extensive preamble. We invite the public to read the preamble for answers to many questions on these regulation updates.

Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws, 89 Fed. Reg. 20766 (March 25, 2024).

2. New Filing Requirements

Location in Regulation:

19 CFR 351.104(a)(1), (a)(3)(i), (a)(4), (a)(5), (a)(6), & (a)(7)

Commerce's New Filing Requirements Clarify What Can Be Cited in Submissions Without Placing Certain Source Documents on the Administrative Record

1. All Federal Register notices may be cited without putting them on the record.
2. All proprietary information from other proceedings must be put on the record for Commerce to consider it.
3. Two lists of public documents that can be cited and not put on the record by the parties can now be found in the regulations, including Court cases and statutes, as well as Commerce scope rulings and remand redeterminations. Any unpublished document authored by Commerce and cited in submissions, but not put on the record, must include a barcode number in the citation derived from ACCESS – our filing system.

19 CFR 351.104(a)(1), (a)(3)(i), (a)(4), (a)(5), (a)(6), & (a)(7)



3. Scope/Circumvention Changes

Location in Regulation:

19 CFR 351.225(c)(1), (c)(2)(x), & (q)(1)

19 CFR 351.226(c)(3), (d)(1), (e)(1)

Scope Rulings & Circumvention Inquiries Definition

- **Scope Rulings:** Rulings in which Commerce determines if a product is covered, or not covered, by the scope of an AD or CVD order.
- **Circumvention Inquiries:** Inquiries in which Commerce determines whether a product that is not covered by the scope of an AD or CVD order was further assembled in the United States or a third country, or slightly altered to avoid the payment of antidumping or countervailing duties. If Commerce determines that a product was circumventing an AD or CVD order, by statute, it can determine that the product is now covered by that AD or CVD order.

Scope Regulations Updates

If a product has not previously been imported into the United States but an applicant wants Commerce to conduct a scope inquiry and issue a scope ruling, then the applicant must show that the product was commercially produced and sold in another country. Commerce will not conduct a scope inquiry of a sample, prototype or mere model of a product.

In addition, there is a list of situations now found in the regulations in which Commerce may issue a “scope clarification” rather than a scope ruling:

- 1) Commerce has previously issued a decision on the same type of product twice before, finding it consistently covered or not covered by an AD or CVD order;
- 2) There is no question a product is covered by an AD or CVD order, but the product might still be exempt from payment of AD or CVD duties based on special circumstances;
- 3) There has been a change in Harmonized Tariff Schedule (HTS) numbers or industry standards referenced in the scope, or other changes were made to the scope because of litigation; and
- 4) Commerce previously issued a scope ruling on an issue but, because of the unique facts in an ongoing case, further clarification of that earlier scope ruling is needed.

19 CFR 351.225(c)(1), (c)(2)(x), & (q)(1)



Circumvention regulation updates

Interested parties now have **10 days** from the filing of a circumvention inquiry request to submit comments and new factual information regarding the request (alleging the request was incomplete, incorrect, or misleading, for example).

Within **five days** of the filing of responsive new factual information, the circumvention inquiry requestor may submit rebuttal comments and factual information to rebut, clarify or correct that responsive information.

If responsive and rebuttal factual information was submitted, as described above, the regulations allow for Commerce to extend its initiation determination by an additional **30 days**.

Furthermore, if a circumvention case is complicated, Commerce can now extend its preliminary determination by **90 days** to gather more information and analyze data.

19 CFR 351.226(c)(3), (d)(1), (e)(1)



4. Government Inaction

Location in Regulation:

19 CFR 351.529(a) & (b), 351.408(d)(2), 351.511(a)(2)(v), 351.416(g)(10) & (11)

Government Inaction – Unpaid Fees, Fines and Penalties

Just as government actions can provide foreign industries with benefits, so can government **inaction** in some circumstances.

For example, in a CVD proceeding, Commerce may determine that a company has received a countervailable subsidy from a foreign government when the record shows that the company owes the government a fee, fine or penalty, and that fee, fine or penalty goes unpaid, including interest charges, during a period of investigation or review.

This codifies Commerce's existing practice. Whether the foreign government has sought payment or did nothing, if the company did not pay its fee, fine or penalty, that is sufficient evidence for Commerce to determine **the company benefited from government inaction.**

19 CFR 351.529(a) & (b)



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Government Inaction – Addressing it in Nonmarket Economy AD Proceedings

Another way that government inaction can benefit foreign companies is when such inaction results in the distortive lowering of those companies' costs or prices. Commerce's regulations address such government inaction in three different ways. The first is in AD cases involving nonmarket economy countries (NMEs).

Certain countries are classified as NMEs for the purpose of Commerce's AD proceedings if they meet certain statutory criteria. Sales of merchandise in NMEs, and therefore costs of production in NMEs, do not reflect the fair value of that merchandise.

Factors which Commerce considers in determining if a country is an NME include:

- The extent to which wage rates are determined by free bargaining between labor and management;
- Government ownership or control over the means of production; and
- Government control over the allocation of resources.

The People's Republic of China, the Republic of Belarus, the Socialist Republic of Vietnam, and the Russian Federation are all examples of countries which Commerce has designated as NMEs.

Government Inaction – Consideration in Selecting a Surrogate Value (NME)

In its AD calculations, for companies producing merchandise in an NME, Commerce applies “surrogate values” to a company’s factors of production. Surrogate values are costs and prices from a “surrogate” market economy which Commerce uses instead of the costs paid in the NME, as those NME costs are considered distorted.

When valuing factors of production, Commerce is directed by the statute to use prices or costs from market economy countries, to the extent possible, that:

- Are at a comparable economic level of development to the nonmarket economy country
- Are significant producers of comparable merchandise



Government Inaction - Rejecting a Surrogate Value (NME)

The new regulations allow Commerce to reject sources of surrogate values for certain reasons, including distortions to those surrogate values caused by ***weak, ineffective, or nonexistent property, intellectual property, human rights, labor, or environmental protections***.

For Commerce to disregard a surrogate value based on government inaction through weak, ineffective or nonexistent protections:

- The proposed value must be for either a significant input or labor.
- The proposed value must be derived from one country or an average of values from a limited number of countries.
- The record must support a claim that the weak, ineffective or nonexistent protections undermine the appropriateness of using that value as a surrogate value.

19 CFR 351.408(d)(2)

Government Inaction - Weak, Ineffective or Nonexistent Protections

Why Would Commerce Consider Such Weak, Ineffective or Nonexistent Protections In Its Selection of Surrogate Values?

Government inaction through ineffective property, intellectual property, human rights, labor, and environmental protections can allow firms to produce merchandise at lower costs because firms are not paying some or all of the “cost of compliance” to meet regulatory standards for which other firms in the surrogate country, or in other countries, are responsible.



Examples of weak, ineffective, or nonexistent property, intellectual property, human rights, labor, or environmental protections. A rejection of proposed surrogate values must be based on record evidence.

1. A producer incorporates technology into its production of merchandise which is subject to patent protections, but the foreign government doesn't enforce the intellectual property rights of the patent owner. The producer pays no licensing or usage fees and thus, because of government inaction, the producer gets a windfall.
2. The government does little or nothing to mitigate unsafe and unhealthy working conditions – allowing companies to avoid paying costs associated with preventing or alleviating such adverse human rights or labor costs of production.
3. A firm dumps toxic waste into a local water supply or corrosive smog billows onto nearby neighborhoods and the government does nothing about it – allowing a “race to the bottom” on environmental protections. Such inaction enables manufacturers to produce merchandise at costs lower than if the government required them to mitigate the environmental impact of production.

Government Inaction – Addressing Weak, Ineffective or Nonexistent Protections in Market Economy AD Proceedings and CVD "Less Than Adequate Remuneration" Proceedings

- In addition to addressing weak, ineffective or nonexistent protections in NME AD proceedings, Commerce also revised its regulations to provide for consideration of such government inaction in both market economy AD proceedings, through a particular market situation analysis (addressed below) and through certain CVD proceedings.
- With respect to CVD proceedings, the consideration of weak, ineffective or nonexistent protections may arise when Commerce analyzes an allegation that a government has sold an input product to a producer for prices that are below the appropriate benchmark value.
- In other words, under that analysis, Commerce must determine if a foreign government is selling a product to industries in its country for prices that are so inexpensive that the product is being sold for "less than adequate remuneration."

Less Than Adequate Remuneration example – Purchasing an expensive house from the Government for \$1!



Producers/
Purchasers

Government

Government Inaction - Selecting Benchmarks in Measuring the Benefit of Goods Sold for Less Than Adequate Remuneration (CVD)

- In determining the benefit received by the producer, Commerce must select a benchmark price to determine approximately what the producer should have paid for the input product. Sometimes, such benchmark prices are derived from transactions for that input found in other countries.
- Under the revised regulations, If interested parties demonstrate, with sufficient information, that certain potential benchmark prices on the record are derived from countries with **weak, ineffective or nonexistent property, intellectual property, human rights, labor or environmental protections**, and the lack of such protections would likely impact such prices, Commerce may exclude those potential benchmark prices from its benefit analysis.
- If Commerce determines that the product is being sold for less than adequate remuneration, it will apply CVD duties on the difference between what the producer should have paid for the product (as determined using the selected benchmark) and what the government charged the producer for the product.
- The key element in selecting surrogate values in an NME AD case, benchmark prices in a CVD case, or in analyzing costs of production in a particular market situation analysis in a market economy AD case under the revised regulations is that Commerce is analyzing if a cost or price is distorted by the weak, ineffective or nonexistent protections provided by the government.

19 CFR 351.511(a)(2)(v)

5. Particular Market Situation

Location in Regulation:

19 CFR 351.416(a) – (h)

Particular Market Situation – Definitions

The two types of particular market situation are set forth in the statute. A particular market situation is a circumstance or set of circumstances that either:

- Prevents a proper comparison of sales prices in the home market or third country market with prices in the U.S. market; or
- Contributes to distortion of the cost of materials, fabrication or other processing.

19 CFR 351.416(a)

Particular Market Situation – Examples of Situations that Prevent a Proper Comparison of U.S. and Home Market Sales Prices

- The imposition of an export tax on subject merchandise
- Direct government control over pricing of subject merchandise to such an extent that home market prices for subject merchandise cannot be considered competitively set.

19 CFR 351.416(c),(c)(1)

Particular Market Situation – Examples of Situations that Distort the Cost of Production

- Global Overcapacity
- Government Ownership Or Control
- Government Intervention
- Export restrictions on inputs
- Export taxes on inputs
- Exemption from paying trade remedies
- Government rebates taxes or duties associated with trade remedies
- Government financial assistance or support to producers of subject merchandise or inputs
- Certain government mandates for the use of domestic-manufactured inputs, sharing of IP, or technology transfer
- Weak or ineffective property (including intellectual property), human rights, labor or environmental protection laws and policies
- Nonexistent property (including intellectual property), human rights, labor or environmental protection laws and policies
- Nongovernmental actions such as noncompetitive arrangements, price-fixing, monopolies, oligopolies, strategic alliances, and third-country dumping

19 CFR 351.416(g)

Particular Market Situation – Cost-Based PMS Analysis

Commerce’s Three-Part Test For a Cost-Based PMS

1. Is there a circumstance that might distort costs?
2. Is there evidence on the record indicating costs are distorted?
3. Is it “more likely than not” that the circumstances at issue contributed to the distortion in the costs of production?

19 CFR 351.416(d),(d)(1), & (d)(2)

Particular Market Situation – Types of Information Commerce May Consider in a Cost-Based PMS Analysis

- Comparisons of prices of inputs paid inside and outside of the market situation;
- Government and certain independent organization reports regarding government actions which may distort costs and prices;
- Previous Commerce determinations finding the existence of a Particular Market Situation; and
- Evidence of effective property, intellectual property, human rights, labor and environmental protections in other economically comparable countries.

19 CFR 351.416(d)(3)

Particular Market Situation – Information Not Precluding a Finding of a Cost-Based PMS

The following examples will not preclude the finding of a particular market situation:

- The speculated cost of production of the subject merchandise, or the speculated prices or costs of a significant input into the production of the subject merchandise, unsupported by objective data, that a party claims would hypothetically exist in the subject country absent the alleged particular market situation or its contributing circumstances;
- The actions taken or not taken by governments, government-controlled entities, or other public entities in other market economy countries in comparison with the actions taken or not taken by the government, state enterprise, or other public entity of the subject country; and
- The existence of the same or similar government or nongovernment actions in the subject country that preceded the period of investigation or review.

19 CFR 351.416(d)(4)

Particular Market Situation – Calculation Adjustments When Commerce Finds A Cost-Based PMS

If Commerce determines that a particular market situation exists, Commerce normally will make an adjustment to its calculations. However, Commerce may determine that an adjustment is not appropriate based on the information on the record. In determining whether an adjustment is appropriate, Commerce may consider the following:

- Whether the cost distortion is already sufficiently addressed in its calculations;
- Whether a reasonable method for quantifying an adjustment to the calculations is absent from the record; and
- Whether information on the record suggests that the application of an adjustment to the Secretary's calculations would otherwise be unreasonable.

19 CFR 351.416(f)(3)

Particular Market Situation – What Makes It Particular?

1. A market situation may be considered particular even if a large number of certain parties or products are impacted by the circumstance or set of circumstances. Commerce's analysis does not concern the specific number of products or parties, but whether the market situation impacts only certain parties or products, or the general population of parties or products, in the subject country;
2. The same or similar market situations can exist in multiple countries or markets and still be considered particular if Commerce determines that a market situation exists which distorts sales prices or cost of production for certain parties or products specifically in the subject country; and
3. There are varied circumstances in which a market situation in a subject country can be determined to be particular, and a market situation may apply only to certain producers, importers, exporters, purchasers, users, industries, or enterprises, individually or in any combination.

19 CFR 351.416(e),(e)(1), & (e)(2)

Particular Market Situation – Information Commerce May Consider in Determining if a Market Situation is "Particular"

- The size and nature of the market situation;
- The volume of merchandise potentially impacted by the price or cost distortions resulting from the market situation; and
- The number and nature of the entities potentially affected by the price or cost distortions resulting from a market situation

19 CFR 351.416(e)(2)



Particular Market Situation - Submission Requirements

Two Things to Keep in Mind when Submitting a Particular Market Situation Allegation

1. When submitting an allegation, interested parties must provide information reasonably available to them to support the claim.
2. If this allegation is similar to one already made in another investigation or administrative review, then the submitter must identify which factual elements are different in this case.

19 CFR 351.416(b)

6. Countervailing Duty Changes

Location in Regulation:

19 CFR 351.505(d) & (e)

CVD Regulations – Example: Government Loans as Grants

Commerce made modifications to several of its CVD regulations. In one example, the regulation was updated so that if the record shows that a firm had a government loan for three years and made no payment on that loan during all that time, Commerce will treat the loan as a countervailable grant program.

There are two exceptions:

1. Commerce will not treat the loan as a grant if the respondent can demonstrate that the nonpayment is consistent with the terms of a comparable commercial loan; or
2. The payments on the loan are consistent with the terms of the loan contract.

19 CFR 351.505(d) & (e)

7. Transnational Subsidies

Location in Regulation:
19 CFR 351.527 (Removed and Reserved)

Transnational Subsidy Allegations -- Withdrawal of the Prohibition on Analyzing a Transnational Subsidy

Commerce has removed the provision in which it prohibited itself from considering subsidies flowing from one country to another as part of its countervailing duty proceedings. Commerce determined that it was not required by U.S. law to have such a restriction in its regulations, and that in the current global market it should be permitted to consider allegations of transnational subsidies in its proceedings.

19 CFR 351.527 (Removed and Reserved)



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Thank you!

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