

Antidumping & Countervailing Duties

What You Don't Know Can Hurt You

Of the many Customs and trade laws that result in significant financial consequences for importers, antidumping and countervailing duty laws pose a most dangerous threat. These provisions exist to protect domestic industries and producers from unfair foreign competition. But exactly what are they and what are the hidden financial exposures they create for importers and their sureties?

Antidumping Duty (ADD)

Under U.S. law, goods are subject to assessment of “ordinary duties” based on their classification under the Harmonized Tariff Schedule of the United States. However, U.S. law also defines certain situations in which goods are being sold to the U.S. at prices below cost of production or below “fair market value”. This is referred to as “dumping”.

If dumping occurs, the International Trade Administration (ITA) of the U.S. Department of Commerce (USDOC) may instruct U.S. Customs and Border Protection (CBP) to assess ADD in addition to the ordinary duties applicable to those goods. This additional duty is designed to eliminate the unfair advantage of the foreign supplier engaging in questionable pricing practices.

Countervailing Duty (CVD)

Like ADD, CVD is designed to combat unfair advantages enjoyed by foreign suppliers. If a foreign government is paying a subsidy, bounty, or grant on exports of certain goods, the foreign supplier receiving the funds is able to price those goods lower than a U.S. supplier not receiving such payments from our government. The assessment of CVD in addition to ordinary duties offsets or “countervails” these subsidies.

It's possible but infrequent for ADD and CVD to be assessed on the same goods. To simplify the explanations and examples going forward, this overview will primarily refer only to ADD. While there are some technical differences between ADD and CVD processes, they are generally similar.



How does the ADD/CVD Process Work?

The process begins with an investigation, usually initiated at the request of members of an industry in the U.S. that believe goods are being sold here at less than fair market value or with the benefit of a subsidy. Questionnaires are sent to the suppliers allegedly involved. Responses to the questionnaires and other data are evaluated by ITA and the International Trade Commission (ITC), a separate U.S. agency.

Preliminary and final determinations are made by ITA as to whether or not dumping or sales with the benefit of subsidies are occurring. ITC determines whether such sales to the U.S. are causing injury to domestic industries.

Pre-Order Phase

If both preliminary determinations (dumping and injury) are affirmative, ITA will instruct CBP to suspend liquidation and require ADD at a preliminary rate. The ADD rate is the “dumping margin” (difference between fair market value and the U.S. sale price) divided by the U.S. sale price. For example, if the U.S. sale price is \$100 and the fair market value is \$106, the difference is \$6 making the ADD rate 6%. During this pre-order phase, the importer of record must deposit the ADD in cash at the preliminary (pre-order) rate with the entry summary.

The importer’s liability for ADD on pre-order entries is capped at the deposit rate, even if the “final” ADD rate at liquidation is determined to be higher.

If the final ADD rate is lower than the deposit rate, the importer will (upon liquidation) receive a refund of the excess ADD originally deposited.

Critical Circumstances

If ITA determines critical circumstances exist it will instruct CBP to suspend liquidation and require ADD retroactively up to 90 days. Most often, critical circumstances are cited when a massive amount of imports of the product occur prior to the effective date of the pre-order phase, to avoid the additional duties. ITA will make this determination if the massive imports increase by 15% or more during a three-month period.

Post-Order Phase

As the process continues, “final” determinations as to dumping and injury are made. If both are affirmative, ITA issues an “antidumping order” and instructs CBP to assess ADD at “final” rates. The post-order phase is different from the pre-order phase in one very important respect:

Liability for ADD on post-order entries is not capped. The ADD paid at time of entry summary is merely an estimated amount. If the ADD rate at liquidation is lower than the initial amount paid, the importer will receive a refund. But if there is an increase to the ADD rate at liquidation, the importer has unlimited liability.



What makes ADD / CVD rates so volatile?

“Final” Rates are not truly Final

Once an antidumping order is in place (most antidumping orders remain in place for many years), any “interested party” (e.g., suppliers, importers, members of domestic injury) can request an administrative review of ADD rates on an annual basis. An administrative review takes 12 to 18 months to complete.

Upon completion of each review, ADD rates can increase, remain the same or decrease. If the ADD rate increases, the importer is liable for the difference between the ADD originally deposited and the ADD calculated at liquidation, plus statutory interest from the date of the original deposit.



ADD Rates can actually Change Midstream

An ADD rate may be shipper-specific, a “weighted average” rate applicable to a number of shippers, or an “all others” (or “countrywide”) rate. Sometimes shippers are transferred from a shipper-specific rate to a weighted average or “all others” rate upon conclusion of an administrative review. ADD rates, especially on goods from non-market economies such as China or Vietnam can exceed 100%.

As of this writing, the weighted average rate applicable to shipments of wooden bedroom furniture from many suppliers in China is 6.68%. However, the “all others” or “PRC-wide” rate for these commodities is 216.01%. If the deposit rate was the weighted average and the entry liquidates at the “all others” rate, the additional ADD owed will be more than twice the value of the goods (plus interest from date of original ADD deposit). Failure on the part of the suppliers to participate in key administrative and judicial review processes can result in ADD rate advances and the assessment of substantial ADD increases against the importer.



Further Complications & Hidden Exposures

Liquidation Delays

From the preliminary affirmative determination point onward, liquidation of entries is suspended indefinitely by operation of law and, in some instances, by court order. In some instances called “Critical Circumstances”, entries up to 90 days prior can also be subject to ADD. Completion of administrative and judicial processes often results in an interval of years between entry date and liquidation. It's impossible to calculate a true cost of goods sold in the meantime.

Goods that are Resold

Suppliers are required to report sales to the U.S., but in some cases a supplier may fail to do so. This is especially likely when a “re-seller” is involved (the importer buys from a party that is not the actual manufacturer or producer). The result is that, although the goods were imported using the manufacturer’s or producer’s specific rate, the entry liquidates at a much higher ADD rate because the sale wasn’t reported. The importer is fully liable for the increase.

Non-Reimbursement Certificates

In all instances, the importer must file a statement prior to liquidation certifying that he has not entered into an agreement to be reimbursed for ADD paid. If the certification is not timely, CBP will assess ADD at double the applicable ADD rate. (This certificate is not required for CVD.)

Drawback

ADD cannot be recovered via drawback.

Protest

CBP does not determine the ADD rate used at liquidation, it merely carries out ITA’s instructions. Supplemental ADD assessments upon liquidation are not generally subject to CBP protest in the usual manner. Administrative review by ITA must be timely requested. Judicial review of ADD assessments must be timely initiated shortly after the conclusion of an annual administrative review.

Precautions Importers Can Take to Minimize Exposure

- Establish a relationship with competent customs counsel and a licensed customs broker before importing.
- Avoid dealing in goods subject to ADD or CVD whenever possible.
- If you cannot avoid ADD/CVD imports, carefully qualify your suppliers.
- Make sure they are solvent and maintain constant communication with them to avoid problems.
- It is also important to ensure that your suppliers are active participants in ADD / CVD administrative and judicial processes when applicable.
- Discuss with your customs broker how to best monitor your ongoing financial exposure related to unliquidated entries.



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