

Understanding Customs: Anti-Dumping and Countervailing Duties



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Introduction

U.S. biodiesel producers reached an apparent breaking point in March 2017 when the National Biodiesel Board (NBB) Fair Trade Coalition filed a complaint with the U.S. Commerce Department claiming that biodiesel producers in Argentina and Indonesia were being unfairly subsidized by their governments. The Commerce Department apparently agreed, when it issued a [final determination](#) in November 2017 that U.S. producers were being harmed by imports from the two countries, and set the stage for the imposition of penalties.

According to [Biofuels Digest](#), the NBB Fair Trade Coalition filed its petition to address “a flood of subsidized and dumped imports from Argentina and Indonesia that has resulted in market share losses and depressed prices for domestic producers.” In fact, biodiesel imports from Argentina and Indonesia grew by 464 percent from 2014 to 2016, a period in which U.S. market share fell by 18.3 percent.

As a result of the Commerce Department’s determination, anti-subsidy duties were imposed on Argentinian producers ranging from 71.45 percent to 72.28 percent, depending on the degree to which products had been subsidized by

the government. Indonesian producers must now pay duties ranging from 34.45 percent to 64.73 percent.

This biofuels case is a classic example of a critical trade issue known as countervailing duties (CVD). Usually referenced in conjunction with anti-dumping duties (AD), countervailing duties refer to instances in which foreign governments are found to unfairly subsidize domestic industries, thus putting U.S. competitors at a disadvantage. Dumping occurs when products are exported by a company and sold in the United States at a below market price.

U.S. companies and industries that believe they are unfairly disadvantaged by either dumping or illegally subsidized exports may seek relief through the International Trade Commission and the Department of Commerce.

Conversely, U.S. businesses run the risk of purchasing products from an international supplier without realizing the goods may be subject to punitive duties. A U.S. business may think it has procured quite a deal for itself only to have its low-cost products end up costing significantly more after AD/CVD are applied.

Important to note, AD/CVD can be controversial. In the biodiesel case noted above, for example, the decision to impose countervailing duties was condemned by many, including the National Association of Truckstop Operators and the Advanced Biofuels Association. In a [statement](#), David Fialkov of the [Truckstop Operators](#) said: “Any outcome that results in cutting off Americans’ access to cleaner burning fuels, such as biodiesel, from foreign markets is a bad day for Americans.”

Further, a [report](#) by public policy think tank The Heritage Foundation criticized the use of anti-dumping duties, noting they are often applied in error and can be confusing and arbitrary. The report also claimed the effect of anti-dumping duties is to “drive up the costs of imported components used by other American enterprises, making their products less competitive in world markets.”

Regardless of one’s position on the use of anti-dumping and countervailing duties, they have been a part of international trade practices and will remain a part. In fact, in its first year in office the Trump administration initiated [65 percent](#) more anti-dumping and countervailing duty investigations than were filed during the final year of the Obama administration.

The Commerce Department initiated 79 AD and CVD investigations during 2017, a 65 percent increase over the previous year.

Source: [Department of Commerce](#)

The following discussion will help businesses understand the concepts of anti-dumping and countervailing duties, along with possible implications for their import activities. Any business with a more direct interest in AD/CVD is encouraged to contact either the U.S. Commerce Department or a customs professional for more detailed information.

What are Anti-Dumping and Countervailing Duties?

According to [U.S. Customs and Border Protection](#) (CBP), dumping occurs when a foreign manufacturer sells goods in the United States at a below-fair-value price, thereby causing injury to the U.S. industry. Anti-dumping cases are company specific, and if a foreign company is found to have committed anti-dumping, duties will be “calculated to bridge the gap back to a fair market value.”

Countervailing duties cases occur when a foreign government provides assistance and subsidies, such as tax breaks, to manufacturers that export goods to the United States that are sold in the U.S. cheaper than domestically produced goods. Countervailing duties cases are country specific, and duties are calculated to negate the impact of the subsidy.

Historical Overview – Anti-Dumping Laws

Dartmouth College Professor Douglas Irwin [cites](#) the Antidumping Act of 1921 as the basis for the anti-dumping laws on the books today. According to research by Irwin, the law states: “Whenever the Secretary of the Treasury finds that an industry in the United States is likely to be injured, or is prevented from being established, by reason of the importation into the United States of foreign merchandise, and that merchandise of such class or kind is being sold or is likely to be sold in the United States or elsewhere at less than its fair value, he shall make such finding public.... If

the purchase price or the exporter’s sales price is less than the foreign market value, there shall be levied, collected, and paid a special dumping duty in an amount equal to such difference.”

In fact, the Congressional Research Service [reports](#) an “absence of statutory direction” on the anti-dumping issue from the period in which the 1921 law was enacted until passage of the Trade Act of 1974. During those intervening 53 years, “the application of anti-dumping law was devised and implemented exclusively through administrative agency action, as the statutes were silent on the matter.”



A brief historical overview of anti-dumping statutes and regulatory actions includes:

- **1954:** Congress shifted responsibility for [injury](#)

[determination](#) from the Treasury Department to the International Trade Commission.

- **1960s:** The implementation by the Treasury Department of the “surrogate country” approach, whereby, CRS explains, comparable prices and costs from third countries were used to determine fair value market in considering feasibility of dumping claims.
- **Trade Act of 1974:** The act formalized the surrogate process into law.
- **1975:** It wasn’t long before problems began to surface with the surrogate method, namely instances in which comparable third countries were not available. In response, the Treasury Department adopted a new method, the “factors of production” approach, whereby input values from “a market economy country considered to be at a comparable stage of economic development” were used to assess dumping claims.
- **Trade Agreements Act of 1979:** The act formalized the use of the “factors of production” method when surrogate countries were not available. Also, transferred responsibility for dumping determinations from the Treasury to the Commerce Department.
- **Omnibus Trade and Competitiveness Act of 1988:** Several anti-dumping reforms were enacted, including a [definition](#) of a non-market economy, as a country that “does not operate on market principles of cost or pricing structures so that sales of merchandise in such countries do not reflect the fair value of the merchandise.”

The legislation also set standards for the Department of Commerce to use in determining if a specific country meets the definition of a non-market economy. (For example, in October 2017 the Department of Commerce affirmed its [categorization of China](#) as a non-market economy, with regard to evaluating anti-dumping cases involving China).

- **1995:** U.S. anti-dumping law was modified via the “Uruguay Round Agreements,” which amended key provisions of GATT’s Article VI Anti-Dumping Agreement. In addition, the URA established the World Trade Organization and also provided for “sunset reviews” to determine whether antidumping orders should be revoked after five years.
- **2015 Trade Preferences Extension Act (Trade Remedies Bill):** This act amended existing law to “make it easier for petitioners to demonstrate injury before the U.S. International Trade Commission and to afford Commerce additional discretion over certain aspects of AD/CVD cases,” according to legal analysis by [Arnold & Porter](#).
- **2016 Trade Facilitation and Trade Enforcement Act (TFTEA/Customs Bill):** This law builds on the Trade Remedies Bill and adds numerous provisions to assist CBP in more efficiently enforcing U.S. trade law.
- **March 2017:** President Donald Trump signed two trade-related executive orders including:

- The Presidential executive order regarding the Omnibus Report on Significant Trade Deficits directs the Commerce Department and the United States Trade Representative to conduct a broad review of causes of the federal budget deficit. The order also calls for an assessment of injurious dumping.
- The Presidential executive order on Establishing Enhanced Collection and Enforcement of Anti-dumping and Countervailing Duties and Violations of Trade and Customs Laws seeks to strengthen anti-dumping rules and enforcement, and it calls for Customs and Border Protection (CBP) to develop a plan to address the nonpayment of AD/CVD. According to CBP, [uncollected AD/CVD](#) during fiscal year 2015 exceeded \$2.3 billion.

Meanwhile, anti-dumping protocols were also established on a global level, beginning with the 1948 formation of the [General Agreement on Tariffs and Trade](#) (GATT). Key dates and milestones include:

- During negotiations to establish an International Trade Organization, the United States submitted a draft proposal on dumping, based on its 1921 anti-dumping legislation. This proposal formed the basis for Article VI of the General Agreement on Tariffs and Trade (GATT), which established international standards and remedies for anti-dumping practices. GATT Article VI was refined on

several occasions during the 1948-94 period of GATT’s existence.

- Changing world conditions, including increasingly complex and substantive global trade, made it clear by the early 1980s that GATT was “no longer as relevant to the realities of world trade as it had been in the 1940s.” In 1986, a round of GATT talks commenced – the Uruguay Round – which eventually led to the 1995 creation of the World Trade Organization.

The World Trade Organization was formed in 1995 to regulate international trade. Headquartered in Geneva, Switzerland, the WTO currently has 164 member countries.



- It was agreed that any country choosing to become a member of the WTO would automatically be subject to

the GATT [Antidumping Agreement of 1994](#). Today the WTO has 164 member countries and is the preeminent [international body](#) for establishing trade agreements and adjudicating disputes.

Historical Overview – Countervailing Duties Legislation

U.S. legislative efforts to address instances of foreign governments subsidizing domestic industries date back to 1897. The U.S. International Trade Commission (ITC) reports that key tenets of the 1897 legislation remained largely intact, with slight modifications, until 1979 when changes were made to conform with the GATT Tokyo round of multilateral trade negotiations.

Congress passed the Trade Agreements Act of 1979, which included provisions of agreements reached in Tokyo. According to the ITC, “one of the most important changes made by the 1979 Act was the requirement of an injury test, along with a shift in responsibility for administering countervailing duty law from the Treasury Department to the Commerce Department.”

Since then, changes to anti-dumping statutory and regulatory oversight have largely paralleled changes made to enforce dumping claims. Key pieces of legislation have included:

- Trade and Tariff Act of 1984
- Omnibus Trade and Competitiveness Act of 1988
- 1995 Uruguay Round Agreements (GATT)
- 2015 Trade Preferences Extension Act (Trade Remedies Bill)
- 2016 Trade Facilitation and Trade Enforcement Act (TFTEA/Customs Bill)

The Process: Filing an Anti-Dumping or Countervailing Duties Claim

Anti-dumping and countervailing duty laws are administered jointly by the International Trade Commission (ITC) and the U.S. Department of Commerce, with each having specific responsibilities under the law. As explained by the [ITC](#):

- The Commerce Department determines whether the dumping or subsidizing exists and, if so, the margin of dumping or amount of the subsidy.
- The ITC determines whether there is material injury or threat of material injury to the domestic industry by reason of the dumped or subsidized imports.

In other words, the Commerce Department determines if dumping or subsidization has occurred, while the ITC determines the extent to which the domestic industry has been harmed. The Commerce Department also calculates the duties to impose on imports based on the degree of dumping or subsidies found.

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According to the [ITC's Antidumping and Countervailing Duty Handbook](#), the process begins when U.S. manufacturers or businesses file petitions simultaneously with the ITC and the Commerce Department. An "interested party" may file both anti-dumping and countervailing duty petitions involving the same imported merchandise. In addition, the petitions may involve multiple countries.

The petition must contain specific and detailed information, including evidence that the foreign entity's products are

being unfairly subsidized and quantifiable documentation of proof of harm to the domestic industry.

After petitions are filed, investigations will begin within each agency. Investigations must begin no later than 20 days after petition filing. The investigation will generally take place over the course of five separate stages, with a determination at the end of each stage regarding whether or not to continue the case. The five stages include:

1. Initiation of the investigation by the Commerce Department – within 20 days after petition filing.
2. Preliminary phase of the ITC's investigation – completed within 45 days after petition filing.
3. Preliminary phase of the Commerce Department investigation – completed within 115 days after the ITC's preliminary determination in anti-dumping cases or 40 days in countervailing duty cases.
4. Final phase of the Commerce Department investigation – 75 days after the Commerce Department's preliminary determination.
5. Final phase of the ITC investigation – 120 days after the Commerce Department's preliminary determination or 45 days after its final determination, whichever is later.

With the exception of Commerce's preliminary determination, stage 3, a negative finding by either Commerce or the ITC results in a termination of proceedings at both agencies.

According to analysis in *Global Trade magazine*, if both agencies find dumping/subsidizing and material injury have occurred, the Commerce Department will issue an order directing U.S. Customs and Border Protection (CBP) to levy a duty “equal to the amount by which the price of the import is less than the fair value and/or offset by unfair subsidies. Importers are then required to post a cash deposit equal to the amount of the estimated anti-dumping and/or countervailing duties.”

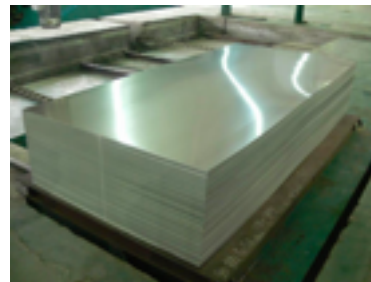
The Exception: Government-Initiated Claims

The vast majority of unfair trade practice cases are initiated by businesses, business groups, or industry trade associations. Although permissible, it is rare for the U.S. government to self-initiate a claim of dumping or countervailing duties against a foreign entity.

But that is exactly what happened in November 2017 when the Commerce Department “[self-initiated](#)” two investigations regarding Chinese aluminum sheet exports. According to the Department, “normally, AD and CVD investigations are initiated in response to petitions filed by a domestic industry alleging that dumped or unfairly subsidized goods are being exported into the U.S. market. By contrast, self-initiation authority can be exercised whenever the Secretary determines, from information available, that a formal AD or CVD investigation is warranted.”

The Process: Filing an Anti-Dumping or Countervailing Duties Claim

In November 2017, the U.S. government took the unusual step of “self-initiating” an unfair trade investigation into Chinese aluminum sheet exports.



In this instance, the Department stated, the investigations were self-initiated “based on information indicating that Chinese producers are selling aluminum sheet in the United States at prices that are less than fair value and that the Chinese government is providing unfair subsidies to producers of aluminum sheet. Available evidence also indicates that U.S. producers of aluminum sheet are suffering injury caused by these imports.”

The Commerce Department was granted authority by Congress in 1980 to self-initiate anti-dumping and

countervailing duty cases. However, that authority has been used sparingly. The November 2017 case against China marked the first time in more than 25 years that the government has used this authority. The last self-initiated countervailing duty investigation was in 1991 and concerned imports of Canadian softwood lumber. The last self-initiated anti-dumping case was in 1985 and concerned imports of Japanese semi-conductors.

How Common are Anti-Dumping and Countervailing Duties Petitions?

According to the [U.S. Commerce Department](#), 79 anti-dumping and countervailing duty investigations were launched during 2017, which was a 65 percent increase over the 48 investigations initiated during 2016.

This significant increase reflects an enhanced focus by the Trump administration on enforcement of U.S. trade law, as clarified in a Commerce Department statement: “The Commerce Department intends to make use of all the tools available under U.S. trade laws, where such action is warranted under the law, to ensure potential unfair trade practices are addressed.”

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Source: U.S. Department of Commerce, November 28, 2017

The Department currently has in place 412 anti-dumping and countervailing duties orders that date back as far as 1977. [Affected products](#) range from pressure-sensitive plastic tape (Italy), to crawfish tail meat (China), to preserved mushrooms (Chile, China, India, and Indonesia). According to [Global Trade magazine](#), the top five countries of origin subject to these orders (as of May 2017) include:

- China – 26.8%
- India – 7.7%
- Korea – 6.3%
- Taiwan – 5.3%
- Japan – 4.1%

AD/CVD – Importer Responsibilities

Every U.S. business that imports goods is responsible for determining if a product is subject to AD/CVD and for ensuring that proper and timely payment is made. But making that determination can be a confusing process, and any mistake can result in punitive fines and possible legal action. While most businesses entrust the process of AD/CVD compliance to an experienced customs professional, ultimate responsibility remains with the importer.

Determining if Goods are Subject to Anti-Dumping/Countervailing Duties

The first step in determining if a product is subject to AD/CVD is to review “the scope” of existing/previous AD/CVD orders. By “scope,” the importer must determine if the circumstances and specifications of its products fall within the parameters or guidance outlined in previous cases.

In many instances, determining scope can be fairly straightforward. Anti-dumping duties assessed on “[raw in-shell pistachios](#)” from Iran, for example, would be obvious. But imports of metals, component parts, and chemicals, among other things, are not always clearly defined.

According to Customs and Border Protection, the scope of anti-dumping and countervailing duty orders can be found in several places, including:

- [Federal Register](#) notices from the U.S. Department of Commerce.
- [Automated Commercial Environment \(ACE\) database](#). ACE is the primary system through which the trade community interacts with the multiple government agencies that have a role in the import and export process. Administered by CBP, importers and exporters are responsible for registering with ACE and filing all shipment information and other data electronically. Among the many features available to ACE users is a searchable list of all AD/CVD cases.
- [U.S. Customs and Border Protection](#) website.
- Harmonized Tariff Schedule Classification. An importer may also use a product’s Harmonized Tariff Schedule (HTS) classification as guidance in determining AD/CVD applicability. However, as [CBP explains](#), “HTS classifications are listed in the scope of AD/CVD orders for convenience only, and do not determine whether a product falls under the scope of an AD/CVD order.” Instead, only the written description of the scope of the order is dispositive, not the HTS classification.

That said, the [International Trade Administration](#) maintains a listing of all current AD/CVD cases that includes relevant tariff classification codes. For example, a user interested

in learning about restrictions on imports of honey from Argentina would find the following:

Import Administration
Honey from Argentina (A-357-812)

Scope Description:

For purposes of this order, the products covered are natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight, and flavored honey. The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form.

The merchandise subject to this order is currently classifiable under subheadings 0409.00.00, 1702.90, and 2106.90.99 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and U.S. Customs Service (U.S. Customs) purposes, the Department’s written description of the merchandise under investigation is dispositive.

Source: 66 FR 63672
Note that HTSUS numbers are subject to change.

Applying for a Scope Ruling

When there is doubt about whether or not a product is liable for AD/CVD, an importer can appeal directly to the [International Trade Administration](#) for a written, binding scope ruling.

Any interested party may apply for a scope ruling, with “interested party” defined by law to include:

- A foreign manufacturer, producer, or exporter, or the United States importer of subject merchandise, or a trade or business association in which a majority of the members are producers, exporters, or importers of such merchandise;
- The government of a country in which such merchandise is produced or manufactured, or from which such merchandise is exported;

- A manufacturer, producer, or wholesaler in the United States of domestic-like products;
- A certified union or recognized union or group of workers that is a representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic-like product;
- A trade or business association, a majority of whose members manufacture, produce, or wholesale a domestic-like product in the United States; and
- An association, a majority of whose members are composed of interested parties with respect to a domestic-like product.

A scope ruling request must include specific and detailed information that includes:

- A statement clarifying interested party status;
- A detailed description of the product, including its technical characteristics and uses (this may include a photo of the product, copies of product brochure, and technical specifications)
- Identification of the current U.S. harmonized tariff schedule classification number for the product subject to the inquiry
- A statement of the interested party's position as to whether the product is within the scope of the order.

A request must also meet other ITA requirements, including serving a copy of the scope ruling request to all parties on

the [Comprehensive Scope Service List](#), which is a list of all parties who have participated in any segment of an anti-dumping or countervailing duty proceeding involving the subject merchandise.

An application must be submitted electronically via the Anti-dumping and Countervailing Duty Centralized Electronic Service System (ACCESS). Once the request has been received, the ITA must either issue a final ruling or issue a scope inquiry within 45 days.

According to customs and global trade experts at [Torres Law](#):

- If a scope inquiry is initiated, Comprehensive Scope Service List parties will be notified, comments will be solicited, and a final ruling will typically be issued within 120 days of initiation of the inquiry.
- If a final ruling determines the product falls within the scope of the AD/CVD order, then steps will commence to collect a cash deposit of estimated duties owed, pursuant to the AD/CVD order.

Since the scope ruling process can be complicated, and requires compliance with several legal steps, most parties seek guidance from an experienced customs broker or attorney.

Disagreements over Applicability of Anti-Dumping/Countervailing Duties

In some instances, an importer may disagree with a CBP determination that a product falls within the scope of a prior AD/CVD ruling. When that happens, an importer has a few options available:

1. Apply to the International Trade Administration for a binding scope ruling.
2. If you believe CBP misapplied the terms of a scope order, you may file a protest with CBP within 180 days after the entry has liquidated.
3. If you believe you are owed a refund for having paid a rate of duty that was too high, you can request an administrative review from the Commerce Department to determine the correct AD/CVD liability. It's important to note that Commerce sets final AD/CVD rates, and CBP collects duties based on that direction.
4. Countries can seek relief from the [World Trade Organization](#) (WTO). Any nation that believes it has been negatively impacted by another nation's unfair trade actions can seek dispute settlement through the international trade agency. A recent example of this involves an appeal by South Korea to the WTO regarding anti-dumping duties imposed by the United States on steel pipe used in the oil industry. After a three-year review, the [WTO ruled](#) that while anti-dumping fees were warranted, the U.S. Department of Commerce had incorrectly calculated the tariffs.

What Happens If My Goods Are Subject to Anti-Dumping/ Countervailing Duties?

The Customs and Border Protection agency is responsible for collecting anti-dumping and countervailing duties.



Once it is determined that a shipment is subject to AD/CVD an importer will be assessed an estimated rate of duty, rather than the final amount (CBP points out that the United States is the only country that follows this practice). Final duties are often not determined until two to three years later, once CBP receives final instructions from the Commerce Department.

This means an importer may face an additional invoice for AD/CVD several years after a product has been imported.

In addition, an importer is required to certify to CBP that the exporter has not reimbursed the importer for the assessed AD/CVD. If this statement of certification is not submitted, CBP will fine the importer two times the original amount owed once the final rate of duty is finalized.

Enforcement

The job of enforcing anti-dumping and countervailing duties orders falls to Customs and Border Protection. Because of the potentially critical impact of the issue, CBP has listed AD/CVD as a Priority Trade Issue (PTI), which is defined as “a high-risk area that can cause significant revenue loss, harm the U.S. economy, or threaten the health and safety of the American people.”

As such, CBP has established two primary goals:

- To detect and deter circumvention of AD/CVD law
- To liquidate final duties in a timely and accurate manner while at the same time facilitating legitimate trade

CBP takes its role very seriously. In an annual [report to Congress](#) on this topic, Acting Commissioner of CBP Kevin McAleenan noted that during fiscal year 2015 alone, CBP conducted 92 audits that identified almost \$70 million in AD/CVD discrepancies and levied monetary penalties totaling more than \$51 million.

The Commissioner also noted that approximately \$2.6 billion in owed AD/CVD remain outstanding. While there are many reasons for this – a company many have become insolvent or moved – others are actively trying to avoid paying the owed funds.

For one thing, AD/CVD rates can be quite high, in some cases exceeding 400 percent of the value of the merchandise. [CBP notes](#) that such high duty rates sometimes “motivate importers to circumvent the duties and illegally import their goods.”

Make no mistake though, CBP is determined to collect all outstanding duties and has an energized partner in the Trump administration. In March 2017, President Trump signed an executive order to empower CBP to subject importers who fail to pay AD/CVD to enhanced bonding requirements or other legal measures.

Conclusion

When President Trump announced in January 2018 that new tariffs (not anti-dumping or countervailing duties) would be imposed on imports of washing machines and solar panels, he noted that a surge in imports had harmed domestic manufacturers. The President's action was consistent with his policy of strict enforcement of U.S. trade laws, as evidenced by the increased number of unfair trade investigations that have been undertaken so far by the Trump administration.

"The President's action makes clear that the Trump administration will always defend American workers, farmers, ranchers and businesses," U.S. Trade Representative Robert Lighthizer said in a [statement](#) that accompanied the announcement.

U.S. importers need to heed these words. While the U.S. government has always prioritized protection of U.S. companies against imports that are sold at below market prices, or unfairly subsidized, the Trump administration clearly intends to raise the bar with regard to trade policy enforcement.

Businesses can protect themselves against vulnerability to anti-dumping/countervailing duties by (a) familiarizing themselves with the issue; (b) understanding who their suppliers are; and (c) enlisting an experienced trade professional for ongoing guidance and counsel.

CBP estimates that [4 percent](#) of all imports are subject to anti-dumping or countervailing duties. That may not sound like much, but given the steep consequences for failing to comply with AD/CVD orders, time spent by a business to understand its potential risk will be time well spent.

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