

International trade and arbitration and the impact on business

Yohai Baisburd
Partner
yohai.baisburd@dentons.com
D +1 202 408 3245

Thomas Howell
Senior Counsel
thomas.howell@dentons.com
D +1 202 496 7338

Allen Green
Partner
allen.green@dentons.com
D +1 202 496 7523

Mark Lunn
Partner
mark.lunn@dentons.com
D +1 202 408 7091

Major trade remedy laws

- Antidumping duty
 - Selling a product in the United States at less than normal value (generally price in the home market).
 - Must also show injury to the domestic industry—by reason of unfairly traded imports
- Countervailing duty
 - Provides remedy against government subsidies to imports.
 - Must also show injury

Antidumping and countervailing duties: the Department of Commerce determines dumping and subsidization

- Antidumping duties
 - Provides a remedy against unfairly traded imports (dumped)
 - Selling in the US at a price that is below normal value. In comparing the price for the same product in the United States if the price in the US is lower than the home market price then the product is "dumped"
 - Products sold below fully absorbed cost of production are generally "dumped."
- Countervailing duties
 - Provides a remedy against imports that are subsidized
 - Subsidy -- financial contribution to a recipient that is:
 - Specific to a company, group of companies, industry or group of industries

Injury: International Trade Commission (ITC) determines if injury is occurring

- Before antidumping or countervailing duties can be imposed must also show that the domestic industry is injured or threatened with material injury by reason of dumped or subsidized imports.
- In considering the issue of injury the ITC considers
 - Volume of Imports both in terms of absolute volume and import trends over time (usually three years)
 - Import prices (under/over-selling)
 - Financial health of the US industry
 - Employment
 - Investment and closures
 - R&D
- The new law clarified the injury definition to state that the ITC can find injury in cases where the US industry is making money.

Remedy

- In most cases, the remedy for both an AD and a CVD case is additional duties equal to the level of dumping or subsidization (less any amount found for export subsidies).
 - Example, If both AD and CVD cases are filed and DOC finds 10% dumping and 5% domestic subsidies and 3% export subsidies -- additional duty is 15%.
 - Petitioners do not have to file both AD and CVD cases.
- Can have a negotiated settlement called a suspension agreement that generally requires imports to be above some set normal value based on the cost of production of the goods.
- Duties remain in place at least five years and generally much longer.

Impact on business

How can a trade case help or hurt your business?

As the US petitioner:

- A trade case results in increased duties and therefore imports covered by an AD/CVD order become more expensive, allowing US producer to increase prices.
- Duties are paid by the importer so importers are reluctant to pay additional duties, which are actually estimates.
 - Final duties are not calculated until after an administrative review several years later.
 - Imports will often decrease even on the rumor of a case.
 - Generally creates uncertainty in the market.
- The level of protection depends on the quantity of imports covered (how many countries were included in the investigation) and the amount of the duties.

Impact on foreign producer

- **Depending on the size of the margin**
 - May be locked out of US for years
 - Have to go through administrative review process possibly for years
 - Increase cost of doing business in the United States
 - May face investigations in other countries as sales shift from the US to other market

Impact on importers/consumers

- Higher costs
- Supply chain disruption

Customs compliance

Customs entry process – key terms

- Importation is not the same as entry.
- **Importation** refers to the process of physically bringing goods into the territory of the United States.
- **Entry** is the formal process through which imported goods are cleared through Customs.
- **Liquidation** refers to the final determination by CBP as to the admission, classification, valuation and duties owed.
 - **Actual liquidation** – CBP liquidates the entry.
 - **Deemed liquidation** – By statute, because CBP did not actually liquidate in a timely fashion.

Customs entry process – retrospective system

- At entry the importer pays estimated duties (including cash deposits of AD/CVD duties).
- The final duty liability is determined at liquidation.
- **Liquidation**
 - CBP must liquidate entries within one year of the date of entry unless:
 - Liquidation is suspended through AD/CVD order, or
 - Court order
 - If CBP fails to liquidate on time, the entries are deemed liquidated by operation of law and the estimated duties posted at the time of entry become the final assessed duties.

Importer has duty of “reasonable care”

- **Reasonable care**

- The importer of record must exercise “reasonable care” by filing accurate information so that CBP may:
 - Determine whether the merchandise may be released from CBP’s custody
 - Properly assess duties, collect accurate statistics, and determine whether any other applicable requirement of law is met
- The importer of record must exercise “reasonable care” in providing information and documentation regarding:
 - Classification
 - Valuation
 - Country of origin
 - Any information required by CBP to perform its functions

Customs penalties

- Lack of reasonable care = potential penalties
 - Fraud
 - Up to domestic value of the goods
 - Gross negligence
 - Up to 4x duty loss or domestic value of the goods
 - Up to 40% of the dutiable value of the goods
 - Negligence
 - Up to 2x duty loss or domestic value of the goods
 - Up to 20% of the dutiable value of the goods
- Plus, duties (if applicable)
- False statements could also lead to False Claims Act exposure

Role of Customs broker

- Customs brokers play an important but limited role in the entry process:
 - Prepare entry summaries
 - File entry documents
 - May advise importers re: classification, country of origin, etc.
- However –
 - Importers of record are responsible for the accuracy of the information submitted to CBP
 - Importers of record are liable for duties, fees, fines, and penalties
 - Importers of record must exercise reasonable care in supervising Customs broker
 - Customs broker has very little “skin in the game.” Typically, their liability is limited to \$50 per entry.

Customs compliance priorities

- AD/CVD enforcement
- Customs valuation
 - Related party transactions
- Intellectual property rights
- Classification
- FTA/GSP origin claims

Trans-Pacific Partnership (TPP)

Trans-Pacific Partnership (TPP)

- Objective is plurilateral Free Trade Agreement embracing Pacific Rim, facilitating formation of regional supply chains
- Current participants: US, Japan, Canada, Mexico, Australia, New Zealand, Vietnam, Brunei, Singapore, Malaysia, Peru
- Potential participants: South Korea, Taiwan, Philippines, Thailand, Colombia
- China role uncertain
- Current participants account for 40% of global GDP, 1/3 of all trade
- Peterson Institute estimate: TPP will boost participants' exports by 7% (\$440 billion)

TPP scope

- Trade in goods and services
 - Tariff agreement will cover all goods
 - Services rules will cover all services
- “Cross-cutting” issues (regulatory coherence, transparency, SMEs, competition laws, standards)
- E-commerce and telecommunications
- Investment, including investor-state dispute settlement
- Intellectual property protection
- Trade facilitation/Customs
- Government procurement
- Trade and the environment

TPP status

- Negotiations completed October 2015
- US Trade Promotion Authority (TPA) enacted June 2015 enabling “fast track” congressional consideration
- Status of texts uncertain because they have not been released
- Prospects for ratification will depend on public, legislative reaction to texts when they are released

Drafting an international arbitration clause or agreement

Drafting an international arbitration clause or agreement

- Consent
- Scope
 - “All disputes” clause
 - “Any controversy, dispute, or claim arising out of, relating to or in connection with this contract or the performance, enforcement, breach, termination or validity thereof, including the determination of the scope of the contract to arbitrate, shall be determined by arbitration . . .”

Drafting an international arbitration clause or agreement (cont'd)

- Use of an arbitral institution or proceeding ad hoc
- Major institutions:
 - ICC International Court of Arbitration
 - London Court of International Arbitration
 - American Arbitration Association (International Rules)
 - International Center for Settlement of Investment Disputes (ICSID)

Drafting an international arbitration clause or agreement (cont'd)

Interim relief

- To preserve status quo
 - Arbitral tribunal powers
 - National court powers
- Consider requiring compulsory negotiation or non-binding mediation prior to a binding arbitration
 - Principals must participate
 - Short time period

Drafting an international arbitration clause or agreement (cont'd)

- Standard ICC clause
 - All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said Rules.

Drafting an international arbitration clause or agreement (cont'd)

- Standard LCIA clause
 - Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

Drafting an international arbitration clause or agreement (cont'd)

- Standard LCIA clause (cont'd)
 - The number of arbitrators shall be [one/three]. The place of arbitration shall be [city/state]. The language to be used in the arbitral proceedings shall be [].
The governing law of the contract shall be the substantive law of [].

Contacts



Yohai Baisburd

Partner
Washington, DC
D +1 202 408 3245
yohai.baisburd@dentons.com



Allen Green

Partner
Washington, DC
D +1 202 496 7523
allen.green@dentons.com



Thomas Howell

Senior Counsel
Washington, DC
D +1 202 496 7338
thomas.howell@dentons.com



Mark Lunn

Partner
Washington, DC
D +1 202 408 7091
mark.lunn@dentons.com

Thank you

The Dentons logo, consisting of the word "DENTONS" in white, uppercase, sans-serif font, enclosed within a purple arrow-shaped graphic pointing to the right.

Dentons US LLP
1301 K Street, NW
Suite 600, East Tower
Washington, DC 20005-3364
United States

Dentons is a global law firm driven to provide a competitive edge in an increasingly complex and interconnected world. A top 20 firm on the Acritas 2014 Global Elite Brand Index, Dentons is committed to challenging the status quo in delivering consistent and uncompromising quality in new and inventive ways. Dentons' clients now benefit from 3,000 lawyers and professionals in more than 80 locations spanning 50-plus countries. With a legacy of legal experience that dates back to 1742 and builds on the strengths of our foundational firms—Salans, Fraser Milner Casgrain (FMC), SNR Denton and McKenna Long & Aldridge—the Firm serves the local, regional and global needs of private and public clients. www.dentons.com.