

Legal Sidebar

Softwood Lumber Dispute Lumbers On: Preliminary Countervailing Duties on Canadian Softwood Lumber Announced (Part I)

04/28/2017

According to [various news reports](#), on April 24, 2017, President Trump announced that the Administration would “be putting a 20% . . . tariff on softwood coming into the United States from Canada.” The U.S. Department of Commerce (“Commerce”) later [announced](#) it had reached a preliminary determination in its countervailing duty investigation of imports of softwood lumber from Canada, which it initiated on December 22, 2016. In the determination, Commerce indicated it preliminarily planned to impose countervailing duties ranging from 3.02% to 24.12% on softwood lumber produced by five specific Canadian producers that it had investigated individually and 19.88% on all other Canadian producers.

Part I of this two-part sidebar post provides a general background on countervailing duties and the procedures that result in the imposition of these types of duties. [Part II](#) of this sidebar explores the Canadian softwood lumber dispute in more detail, providing a history of this thirty-year dispute and details about the status of the current countervailing duty investigation.

What Are Countervailing Duties?

The United States imposes [countervailing duties](#) on imported goods that benefit from subsidies provided by foreign governments and/or [antidumping duties](#) on imported goods that are sold in the United States at less-than-fair value. As the U.S. Court of International Trade (“Trade Court”) has stated, both types of duties are intended to serve the [same purpose](#): to “level the playing field between U.S. manufacturers and their overseas competition. But each regime addresses a different problem.” That is, while antidumping duties address sales made at less-than-fair value, countervailing duties are intended to correct the distortive effects of subsidies (both of these types of duties are discussed in more detail in this [CRS Report](#)). In parallel countervailing duty investigations, Commerce investigates whether a countervailable subsidy has been provided, while the International Trade Commission (“Commission”) determines whether a U.S. domestic industry is materially injured or threatened with material injury by reason of the imports. If both investigations result in affirmative determinations, Commerce will issue a countervailing duty order on the goods.

How Do Countervailing Duty Investigations Proceed?

Duty investigations are typically [initiated](#) after a domestic industry files a petition with Commerce. After an investigation is initiated, the Commission has forty-five days from the time the petition was filed to reach its [preliminary injury determination](#), while Commerce has [sixty-five days](#) from the date the investigation is initiated to determine “whether there is a reasonable basis to believe or suspect that a countervailable subsidy is being provided.” Under the [relevant statute](#), a subsidy is a “financial contribution” that confers a benefit upon the recipient. Once Commerce identifies a subsidy, it must then determine if the subsidy is countervailable. [Only certain subsidies](#) are countervailable, including: (1) export subsidies that are “contingent upon export performance”; (2) import substitution subsidies that are “contingent upon the use of domestic goods over imported goods”; and (3) subsidies that are “specific . . . , in law or in

fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy.”

Next, [within seventy-five days](#) after Commerce reaches its preliminary determination, it must make a final determination of whether a countervailable subsidy is being provided. Concurrently, if Commerce reaches an affirmative preliminary determination, [the Commission](#) must reach its final injury determination before the later of the 120th day after Commerce makes its affirmative *preliminary* determination or the 45th day after the day Commerce reaches its affirmative *final* determination. If Commerce and the Commission both make *final* affirmative determinations, Commerce publishes the countervailing duty order in the *Federal Register*. All final determinations by Commerce and the Commission may be [challenged before the Trade Court](#).

How Are Countervailing Duties Collected?

The [U.S. Customs & Border Protection](#) (“Customs”) agency is responsible for collecting antidumping and countervailing duties. The U.S. duty assessment system is described in [federal regulations](#) and [case law](#) as “retrospective” because final liability for duties is determined after merchandise is imported. Specifically, under the [relevant statute](#), when merchandise is imported into the United States, the importer must deposit with Customs the *estimated* amount of duties that will ultimately be due, as opposed to making an actual payment of such duties. Customs will then [“liquidate”](#) the entries of imported goods within one year from the date of entry. The [pertinent regulation](#) defines liquidation as “the final computation or ascertainment of the duties . . . accruing on an entry,” after which the final amount due (if any) is calculated and billed, completing the import transaction.

[Under the trade laws](#), when both Commerce and the Commission make *preliminary* affirmative determinations, Commerce instructs Customs to take certain provisional measures, including suspending liquidation of covered goods and requiring cash deposits for entries of merchandise covered by the investigation. When Commerce later issues a final countervailing duty order, it will specify the effective date of the order; the order may apply retrospectively to entries that were suspended after the preliminary determination or prospectively from the date the Commission publishes its final determination.

What Are Critical Circumstances?

Under the [trade laws](#), goods that are imported *prior to* the publication of Commerce’s preliminary determination are generally not subject to duties. An exception is when Commerce determines that “critical circumstances” exist, in which case imports made up to [ninety days prior to the preliminary determination](#) can be made subject to duties. In other words, if the criteria for critical circumstances are met, duties are made effective ninety days earlier than the effective date of duties in the absence of critical circumstances. [Critical circumstances](#) exist when (1) a countervailable subsidy is inconsistent with the World Trade Organization’s (WTO) [Agreement on Subsidies and Countervailing Measures](#) and (2) “there have been massive imports of the subject merchandise over a relatively short period.” Under the [governing regulations](#), Commerce generally does not consider imports “massive” “unless the imports during the ‘relatively short period’ . . . have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration.” A “relatively short period” is generally “the period beginning on the date the proceeding begins and ending at least three months later.”

For a detailed discussion of how these principles apply to the Canadian softwood lumber dispute in particular, please proceed to [Part II](#) of this sidebar.

Posted at 04/28/2017 09:32 AM

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04/28/2017

As discussed in [Part I](#) of this two-part sidebar post, on April 24, 2017, the U.S. Department of Commerce (“Commerce”) [announced](#) it had reached a preliminary determination in its countervailing duty investigation of imports of softwood lumber from Canada, which it had initiated on December 22, 2016. The determination indicated that Commerce planned to impose countervailing duties ranging from 3.02% to 24.12% on softwood lumber produced by five specific Canadian producers that it had investigated individually and 19.88% on all other Canadian producers. While [Part I](#) provides a general background on countervailing duties and the procedures that result in the imposition of these types of duties, this sidebar explores the Canadian softwood lumber dispute in more detail, providing a history of this three-decade dispute and details about the status of the current countervailing duty investigation.

History of the Softwood Lumber Dispute

The current dispute between the United States and Canada is over thirty years old and has involved litigation before the federal courts, North American Free Trade Agreement (NAFTA) tribunals, and the WTO. [Some commentators](#) have observed that the two countries have fought over alleged Canadian lumber subsidies for over a hundred years. A comprehensive history of the present dispute is included in one of the U.S. Court of Appeals for the Federal Circuit’s opinions in the [Almond Bros. Lumber Co. v. United States](#) line of cases. This history begins in January 1986, when the Coalition for Fair Lumber Imports (an association of U.S. softwood lumber producers) filed petitions with Commerce alleging that Canadian softwood lumber exports were being subsidized. After an investigation, Commerce issued an affirmative preliminary determination. In response, Canada and the United States entered a Memorandum of Understanding under which the United States agreed to discontinue its duty investigations, and Canada agreed to impose a 15% tax on all softwood lumber exports.

Canada exercised its right to terminate the agreement in 1991, after which Commerce self-initiated another countervailing duty investigation, reaching a final affirmative determination in 1992. Canada appealed to binational panels established under the Canada-United States Free Trade Agreement (“FTA”), and the United States ultimately revoked its 1992 determinations. In 1995, however, Congress adopted legislation under new WTO agreements that in effect neutralized the binational panels’ findings. With the possibility of a new countervailing duty order, Canada and the United States entered into a new softwood lumber agreement in 1996. Under the 1996 agreement, Canada was permitted to export a set amount of softwood lumber duty free, but exports above this amount were subject to certain duties. The United States in turn agreed to refrain from initiating any duty antidumping and/or countervailing duty investigations and dismiss any petitions requesting such investigations.

Upon the expiration of the 1996 agreement in 2001, the Coalition for Fair Lumber Imports filed new petitions with Commerce seeking imposition of both antidumping and countervailing duty orders, which were issued in 2002. After another round of litigation before the FTA binational panels and a WTO Panel, the United States and Canada entered into the [2006 Softwood Lumber Agreement](#), under which the United States revoked its duty orders, and Canada again agreed to impose export charges on softwood lumber exported to the United States. Under a subsequent [extension](#), the

2006 Agreement expired on October 12, 2015.

On December 22, 2016, after receiving petitions seeking both [antidumping](#) and [countervailing](#) duty orders from the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (COALITION), an association of U.S. softwood lumber producers, Commerce initiated the investigations at hand. The COALITION alleged that “Canadian softwood lumber producers benefit from numerous Canadian government subsidies, which include subsidies that are contingent upon export performance,” and that the domestic industry’s injury “is illustrated by reduced market share; underselling and price suppression or depression; lost sales and revenues; mill closures and layoffs; and adverse impact on the domestic industry’s key trade and financial indicators, including financial performance, production, and capacity utilization.” COALITION also alleged that there was a reasonable basis to suspect that critical circumstances exist with regard to imports of Canadian softwood lumber.

What is the Status of the Countervailing Duty Investigation on Canadian Softwood Lumber?

As noted, on April 24, 2017, Commerce [announced](#) it reached its *preliminary* determination in its countervailing duty investigation. On April 26, 2017, Commerce published its affirmative preliminary finding of critical circumstances in both the [antidumping](#) and the [countervailing](#) duty investigations for some, but not all, of the Canadian producers, meaning the effective date of any duties for those companies would be ninety days prior to the publication of Commerce’s affirmative preliminary determinations in the investigations. A final determination in the countervailing duty investigation is still pending. The imposition of countervailing duties could potentially be avoided should the United States and Canada reach a new bilateral agreement, as they have in the past, or if they were to include softwood lumber provisions in any potential [renegotiation of NAFTA](#). Also pending is a preliminary determination in the companion antidumping duty investigation; after a postponement, that [determination](#) is due on June 23, 2017.

Notably, on April 24, 2017, Commerce also published a final affirmative determination in its expedited countervailing duty investigation of supercalendered paper from Canada, imposing a countervailing duty rate of 5.87% on one Canadian producer. On April 25, 2017, Commerce also published its [preliminary affirmative countervailing duty determination with a finding of critical circumstances](#) in its investigation of certain hardwood plywood products from China, setting a countervailing duty rate of 111.09% on a large number of Chinese producers of these products. As is evident, the softwood lumber investigation is but one of many countervailing duty investigations before Commerce. The final determinations in that investigation and its companion antidumping investigation are due on August 30, 2017. As noted, final determinations by Commerce and/or the Commission are subject to [challenge before the Trade Court](#).

Posted at 04/28/2017 09:38 AM