

## **AD/CVD SUNSET REVIEWS**

J. Kevin Horgan  
deKieffer & Horgan, Washington

One of the most significant changes made to the United States' antidumping and countervailing duty law by the Uruguay Round Agreements Act ("URAA") was the addition of "Sunset Reviews." The term refers to a new requirement that after an antidumping or countervailing duty order has been in place for five years it will be revoked unless: 1) the Department of Commerce ("DOC") determines that dumping or a countervailable subsidy would be likely to continue or recur; and 2) the International Trade Commission ("ITC") determines that material injury would be likely to continue or recur.<sup>1</sup>

The new requirement is not limited to newly-issued AD/CVD orders. The law requires DOC and ITC to conduct Sunset Reviews of all antidumping and countervailing duty orders that were in existence when the URAA became effective on January 1, 1995. The number of existing AD/CVD orders, referred to in the law as "transition orders," exceeds 350. For agencies which are already fully occupied by their current responsibilities, the prospect of conducting 350 Sunset Reviews all at once presents, to say the least, some interesting logistical problems.

Recognizing the difficulty presented by the impending surge of Sunset Reviews, the law contains some explicit instructions about how the agencies are to conduct the transition order Sunset Reviews. The law also invests the agencies with considerable discretion to conduct the reviews in a manner that will promote administrative efficiency. In the crush of work to begin on July 1, 1998, it will be up to interested private parties to see that their concerns are not sacrificed to appease the gods of administrative efficiency.

### **The Sequence and Groupings:**

The law requires that DOC and ITC begin conducting Sunset Reviews no later than July 1, 1998, initiate reviews as to all transition orders no later than January 1, 2000, and complete all transition reviews by June 30, 2001. Sunset Reviews for all 350 transition orders will be completed within this three-year period. The earliest point at which a transition order can be revoked is January 1, 2000.

The law states that the agencies should, to the extent practicable, review the oldest AD/CVD orders first. However, the sequence of the reviews will not necessarily be chronological. To promote administrative efficiency, the law authorizes DOC to determine, in consultation with the ITC, the sequence in which the transition reviews will be conducted. The law also authorizes the

ITC to determine, in consultation with DOC, whether and in what manner to group the reviews.

While this approach has obvious advantages in terms of efficiency in the collection and analysis of data, it will also influence the determinations on the merits, particularly with respect to ITC injury determinations. The Statement of Administrative Action ("SAA") accompanying the enactment of the URAA indicates that the Commission should consolidate reviews involving the same domestic like product, and may consolidate reviews involving related like products or identical or related producers. It is to be expected that once the Commission determines that it is appropriate to group a number of reviews together the DOC will initiate those reviews simultaneously. The decision to initiate a group of reviews on the same day has significant implications because the Commission may cumulatively assess the impact of imports of like products from all countries subject to AD/CVD orders if the reviews of those orders are initiated on the same day, provided the imports compete with one another and the domestic like product.

The SAA indicates that DOC will at some time reasonably in advance of the commencement of the initial transition reviews on July 1, 1998, publish for comment a notice of the proposed sequence and grouping of reviews. Interested parties should carefully scrutinize the proposed groupings and sequence because this apparently procedural step could have a dramatic impact on the outcome of Sunset Reviews. The Commerce Department's proposed antidumping regulations would expressly allow a domestic interested party to request that a Sunset Review of an AD/CVD order be initiated before its five year anniversary. The Commerce Department explains in the preamble to the proposed regulations that this provision is intended to allow the Department to initiate reviews simultaneously so that the Commission can cumulatively assess the impact of imports from various countries.

### **The Schedule:**

#### **Day 30:**

The law provides that at least 30 days prior the five-year anniversary month of an AD/CVD order, DOC will publish a notice that a Sunset Review is being initiated. The pre-initiation notice will require interested parties to file a statement:

- 1) indicating their willingness to participate in the review and provide the requested information;
- 2) describing what the party believes will be the likely effects of revocation; and
- 3) providing such other information and industry data as specified in the notice.

#### **Day 90:**

If no interested party responds to the notice of initiation, the Commerce Department will revoke the AD/CVD order that was the subject of the notice of initiation within 90 days.

**Day 120-150:**

If interested parties provide inadequate responses to a notice of initiation, DOC will issue a final determination with respect to dumping or subsidization within 120 days after initiation based on the facts available. Likewise, the Commission will, if it receives inadequate responses, issue a final injury determination based on the facts available within 150 days.

It is also possible for an interested party to waive participation in the Commerce Department's portion of a Sunset Review and participate only in the Commission's review of the material injury question. The effect of such a waiver will be a final determination by DOC that dumping and/or subsidization is likely to continue or recur if the order is revoked. If all respondents covered by an order waive participation in the DOC review, DOC will issue its affirmative final determination immediately. In a review of a CVD order, DOC will automatically issue a final affirmative determination that countervailable subsidies will continue or recur if the respondent government waives participation in the DOC portion of the review.

**Day 240:**

If adequate factual responses are received by DOC, the Department will issue its final determination respecting the likelihood that dumping or countervailable subsidies will recur within 240 days after initiation. The time for DOC's final determination may be extended to 330 days if the review is deemed to be extraordinarily complicated. DOC may treat a review as extraordinarily complicated if there are a large number of issues, the issues are complex, there are a large number of firms involved in the review, the orders under review have been grouped, or it is a review of transition order. The Department's proposed regulations state that the normal time limits do not apply to transition order reviews.

Upon request, DOC and the ITC will hold public hearings prior to the issuance of their final determinations. If the Commerce Department's determines that dumping or countervailable subsidies are not likely to continue or recur if an order is revoked, the order will be revoked without any further proceedings.

**Day 360:**

If DOC issues an affirmative determination as to the recurrence or continuation of dumping and or subsidization, the Commission will within 360 days after initiation of a Sunset Review determine whether material injury would be likely to continue or recur if the subject order is revoked. The date for the Commission determination may also be extended by up to 90 days in extraordinarily complicated cases. In reviews where DOC extends the date for its determination, but the Commission does not, the Commission's determination will be made within 120 days after DOC's determination.

**The Standards:**

Determinations whether or not to revoke an AD/CVD order pursuant to a Sunset Review are to be made on a country-wide, rather than a company-specific basis. While it will still be possible

for individual companies to have AD/CVD orders revoked only as to them in accordance with the normal periodic administrative review process, Sunset Reviews will decide whether orders should be revoked on a country-wide basis.

### **1. Likelihood that Dumping or Countervailable Subsidies Will Continue or Recur**

The Commerce Department will be assuming a new role as a forecaster when it begins conducting Sunset Reviews. In the past, DOC antidumping and countervailing duty investigations and reviews have been based on a historical analysis of past activities by respondent parties. The question was simply had dumping occurred or had countervailable subsidies been received. In Sunset Reviews, the Department will for the first time become a prognosticator intent on divining whether the revocation of an AD/CVD order will lead to a recurrence or continuation of dumping or subsidies.

The law directs the Department to consider during a Sunset Review of a countervailing duty order:

- a) The net countervailable subsidy determined in the investigation and subsequent reviews; and
- b) Any changes in the program that gave rise to the net countervailable subsidy.

The Department may also consider, upon good cause, programs determined to be countervailable in other investigations and programs newly-alleged to confer countervailable subsidies.

Similarly, the law directs the Department to consider during a Sunset Review of an antidumping duty order:

- a) The weighted-average dumping margins determined in the investigation and subsequent reviews; and
- b) The volume of imports of the subject merchandise before and after issuance of the antidumping duty order.

The Department may also consider other price, cost, market and/or economic factors it deems relevant.

In both cases, the law provides that a finding of zero or *de minimis* margins and/or subsidy rates is not dispositive of the question whether dumping or countervailable subsidies are likely to continue or recur. The SAA indicates also that an individual company's renunciation of a subsidy program will not be dispositive regarding the likelihood of a recurrence of countervailable subsidies as long as the program which resulted in the subsidy continues to exist. On the other hand, statutory changes which terminate countervailable programs would be highly probative of the likelihood that subsidies could recur.

The SAA also indicates that the relationship between margins of dumping and volumes of imports will be very significant in the determination of whether dumping is likely to continue or recur. The SAA states that zero or *de minimis* margins of dumping coupled with increases in imports of subject merchandise would indicate a diminished likelihood that dumping will recur. Facts indicating a likelihood that dumping will recur would include: a cessation of imports after publication of an order; consistently high margins of dumping; or small import volumes combined with low margins of dumping. The last factual scenario would, in the SAA's view,

indicate that foreign exporters could not increase their market share without dumping.

In the interest of administrative efficiency, the Department will be permitted to use proprietary data submitted in prior administrative proceedings in its analysis of the likelihood that dumping or countervailable subsidies will continue or recur. At the conclusion of its proceedings, the Department will provide to the Commission the Department's estimation of the amount of the net countervailable subsidy and/or margin of dumping that is likely to prevail if the order is revoked.

## **2. Likelihood that Material Injury Will Continue or Recur**

Unlike DOC, the International Trade Commission has for many years incorporated a predictive aspect into its material injury determinations because it must often determine whether unfairly traded imports present a threat of material injury to the domestic industry producing the like product. The SAA makes clear, however, that the determination in a Sunset Review of whether material injury is likely to continue or recur if an AD/CVD order is revoked is not to be made upon the same basis as the Commission's threat analysis.

In an antidumping or countervailing duty investigation, the Commission will only make an affirmative threat finding if material injury to the domestic industry is "imminent." In a Sunset Review, the Commission must determine whether the revocation of an AD/CVD order is likely to result in a continuation or recurrence of material injury to the domestic industry "within a reasonably foreseeable time." The length of a "reasonably foreseeable time" is not specified.

In making its assessment, the Commission is directed to take into account: its prior injury determination; whether any improvement in the state of the industry is related to the order; whether the domestic industry is "vulnerable" to injury if the order is revoked; and any finding by the Commerce Department regarding duty absorption by an importer related to the foreign producer or exporter. The Commission is also directed to consider:

- a) VOLUME of imports, including any changes in capacity, inventories, import barriers in other countries, and the potential for product shifting;
- b) PRICE, including whether there is likely to be significant price underselling, price suppression or depression; and
- c) IMPACT on the domestic industry, including likely negative effects in terms of market share, production, sales, profits, productivity, cash flow, inventories, capacity utilization, capital formation and product development.

The Commission may consider the magnitude of dumping and the amount of the net countervailable subsidy that DOC determined was likely to continue or recur. It may also cumulatively assess the likelihood of material injury resulting from the revocation of multiple antidumping or countervailing duty orders covering imports of like products from several different countries if, as mentioned above, Sunset Reviews of such orders are initiated on the same day.

**Judicial Review:**

An interested party that is aggrieved by a final determination in a Sunset Review may seek review of that determination in the United States Court of International Trade or, if the subject imported merchandise is from Canada or Mexico, before a binational panel established for that purpose under the terms of the North American Free Trade Agreement. Review is based on the administrative record. Sunset Review determinations based on the facts available as a result of inadequate responses can only be overturned if the agency's action was arbitrary or capricious. Determinations based on a normal record must be in accordance with law and supported by substantial evidence in the administrative record.

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Endnote:

1. The agencies will also conduct Sunset Reviews of all suspension agreements entered into in lieu of an antidumping or countervailing duty order.

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