

PROCEDURAL ASPECTS OF U.S. ANTIDUMPING & COUNTERVAILING DUTY LAW

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INITIATION OF INVESTIGATION

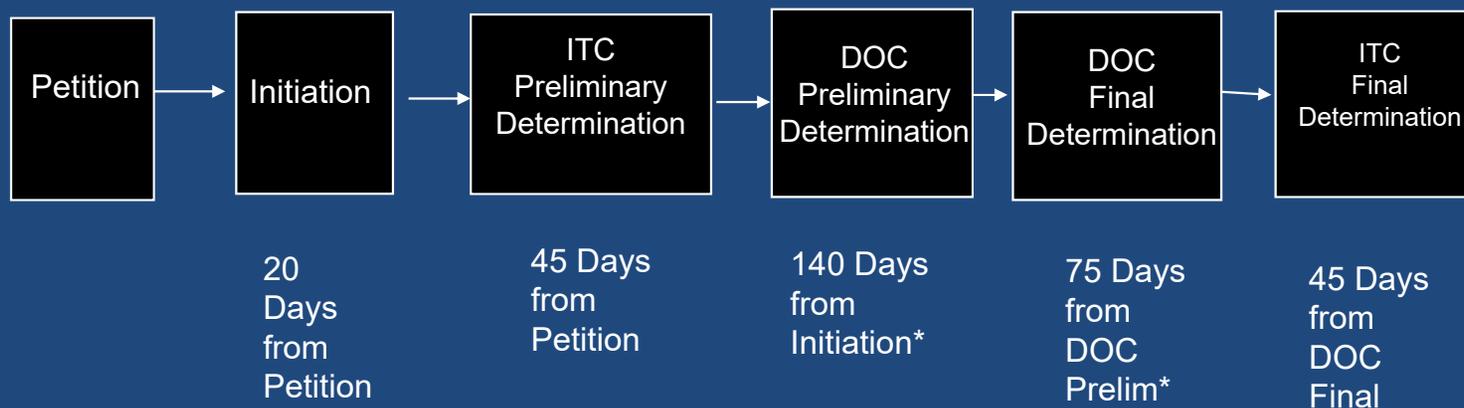
U.S. ADMINISTRATIVE FRAMEWORK

- Department of Commerce (“DOC”) and the International Trade Administration (“ITC”) simultaneously receive petitions from the affected U.S. industry
- AD/CVD investigations are almost always initiated in response to petitions filed by an affected U.S. industry, although under rare circumstances DOC may “self-initiate” a case

U.S. ADMINISTRATIVE FRAMEWORK

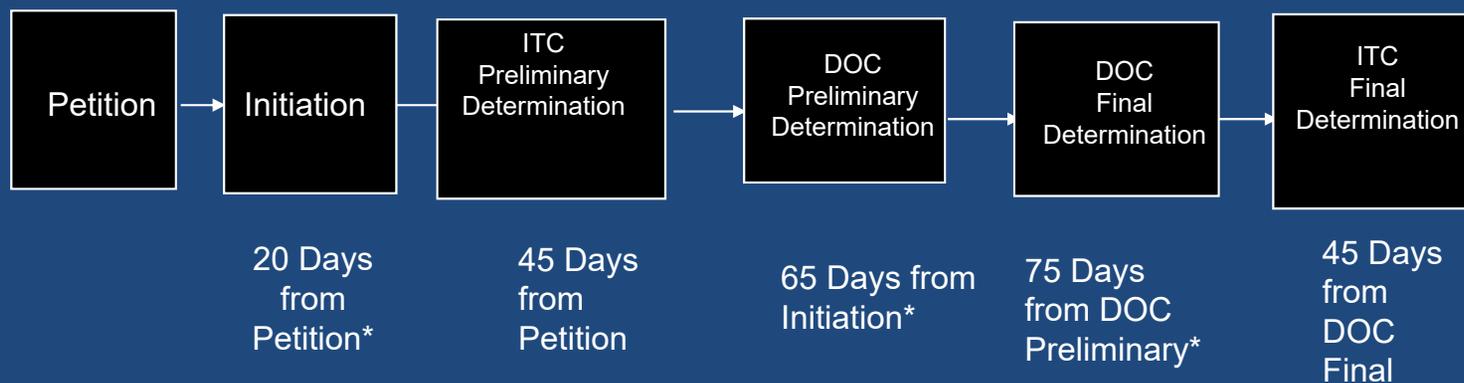
- DOC and the ITC make their determinations separately
- DOC determines whether and to what extent dumping is occurring
- International Trade Commission determines whether a U.S. industry competing with the allegedly dumped product has been materially injured, or threatened by such imports

TIMING OF EVENTS IN ANTIDUMPING (“AD”) INVESTIGATIONS



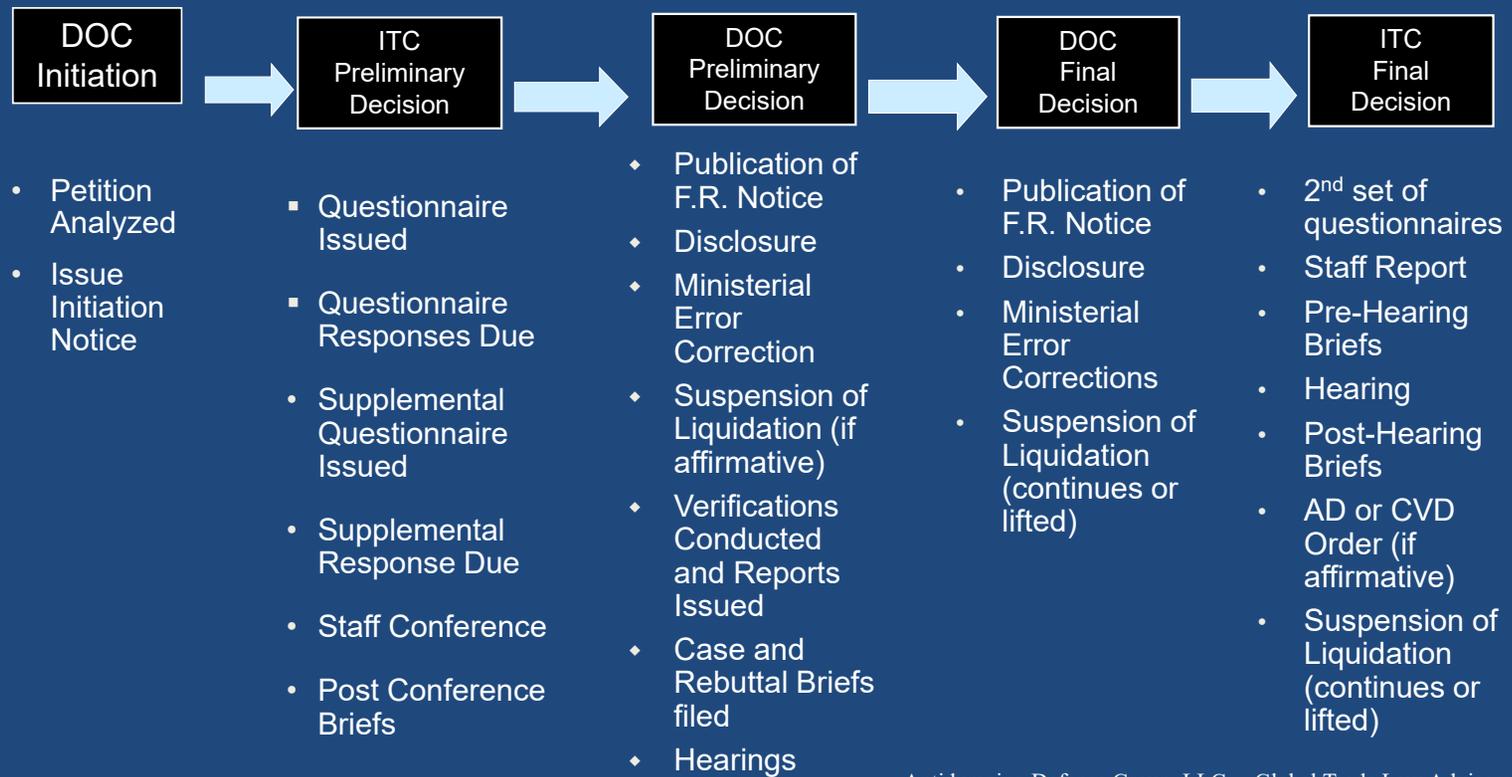
* May be extended under certain circumstances

TIMING OF EVENTS IN COUNTERVAILING DUTY (“CVD”) INVESTIGATIONS



* May be extended under certain circumstances

EVENTS IN AD & CVD INVESTIGATIONS



PETITION REQUIREMENTS

- Petition must be submitted *on behalf of* the domestic industry
 - Members of the domestic industry supporting the petition must represent at least 25% of total production of domestic like product
 - At least 50% of the domestic industry expressing its view must support the petition
- Petition must provide information available to the petitioners that demonstrates dumping and/or subsidies
 - Reviewing a petition is generally a check-the-box exercise

US GOVERNMENT NOTIFICATION UPON RECEIPT OF PETITION & INITIATION

- DOC notifies affected embassies upon receipt of petition and then again if a case is initiated, and invites the government of a country subject to a CVD investigation for consultations – mostly a waste of time
- For countries new to the process, DOC can provide an explanation of questionnaires
- ITC immediately begins its investigation upon receipt of petition

ITC PRELIMINARY-PHASE INVESTIGATION

INJURY DETERMINATIONS

- ITC determines whether a U.S. industry has suffered “material injury” or is threatened with material injury by reason of less than fair value or subsidized subject imports.
- For an antidumping or countervailing duty order to be issued, the ITC must issue an affirmative determination.
- If no affirmative determination, no AD/CVD order will issue, even if DOC finds a dumping or subsidy margin.

ITC STRUCTURE

- ITC has six commissioners appointed by Congress
 - Three Republican commissioners
 - Three Democratic commissioners
- Makes import injury determinations in antidumping/countervailing duty cases.
- Decides intellectual property disputes in Section 337 Investigations.

ITC INJURY DETERMINATIONS

- Preliminary Phase Determination
 - 45 days after filing of petition.
- Final Phase Determination
 - 120 days after DOC's preliminary determination or 45 days after DOC's final determination, whichever is later.
- Announced via a public vote by six commissioners.

PARTICIPANTS IN ITC INVESTIGATION

- Petitioners:
 - Domestic producers of like product
 - Unions
 - Trade associations consisting of U.S. producers
- Respondents (must file entry of appearance)
 - Importers
 - Foreign producers/exporters

PERIOD OF INVESTIGATION

- Prior three full years
- Most recent interim year (partial year)
 - will be compared to data from corresponding prior interim year.

NUMBER OF COUNTRIES IN PETITION

- At ITC, one petition may involve both antidumping and countervailing duty allegations
- A single petition may be directed at multiple countries.

PRELIMINARY PHASE OF INVESTIGATION

- Institution of investigation and scheduling
- Issuance of questionnaires
- Staff conference and filing of post-conference briefs
- Briefing and vote by Commissioners
- Issuance of Commission opinion

QUESTIONNAIRES

- Issued to U.S. producers, U.S. importers and foreign producers.
- U.S. producers and U.S. importers are required to submit a response (a subpoena or other order may be issued to compel a response).
- Foreign producers are not required to respond – however, the Commission may apply a facts available or adverse inference for noncompliance.

U.S. PRODUCER QUESTIONNAIRES

- Consists of four parts:

- (1) Organization and activities of firm and whether it supports petition
- (2) Production capacity, shipments, inventories; wages; employees.
- (3) Financial data - income and losses
- (4) Price-related data, lost sales/revenue

IMPORTER QUESTIONNAIRES

- Consists of three parts
 - (1) Organization and activities of the firm
 - (2) Import data, including quantity and value of commercial shipments; inventories
 - (3) Sales price data

FOREIGN PRODUCER QUESTIONNAIRES

- Consists of three parts
 - (1) Organization and activities of the firm in the foreign country
 - (2) Organization and activities of the firm in the United States
 - (3) Firm's capacity, production, exports to the United States, and inventories of subject merchandise.

PRELIMINARY STAFF CONFERENCE

- Held approximately three weeks after start of preliminary phase investigation
- The ITC staff conducts the staff conference (no Commissioners are present)
- Parties in support of petition and parties in opposition may give statements, including witness statements
- ITC staff may ask questions of witnesses and counsel for both sides.

POST-CONFERENCE BRIEF

- Due three days after staff conference
- Opportunity to provide legal argument
- Answer questions (factual or legal) posed by ITC staff at the staff conference

STAFF REPORT

- The ITC staff prepares a staff report containing objective and factual information for the Commissioners, based on information collected from questionnaire responses, public documents, field visits, and other sources.
- No direct recommendations on how the Commission should decide issues.

COMMISSION VOTE

- A majority vote of the commissioners is a vote in the affirmative.
- An evenly divided vote (3-3) is a vote in the affirmative
- Five business days after the vote, the Commission must transmit its “views” or opinion to Commerce, which explains the basis for its determination.

DOC PRELIMINARY & FINAL DETERMINATIONS

DOC PERIOD OF INVESTIGATION

- Antidumping: the four most recently completed fiscal quarters as of the month preceding the month in which the petition was filed.
- Antidumping – non-market economy country: last two completed fiscal quarter
- Countervailing Duty: “the most recently completed fiscal year for the government and exporters or producers in question. If the exporters or producers have different fiscal years, the Secretary normally will rely on information pertaining to the most recently completed calendar year.”

DOC MANDATORY RESPONDENTS

- Where not practicable to examine each known producer/exporter, examination is limited to:
 - a statistically valid sample of producers/exporters, or
 - the producers/exporters accounting for the largest volume of the subject merchandise that can be reasonably examined
 - DOC now almost always selects only the two largest-volume exporters
- Suppliers may be required to respond
- Foreign Governments (CVD Cases)

QUESTIONNAIRE STRUCTURE

- Section A: General Information
- Section B: Comparison-Market Sales (market-economy countries only)
- Section C: U.S. Market Sales
- Section D: Cost of Production & Constructed Value
- Section E: Further Manufacturing in the United States
- Supplemental Questionnaires: to clarify responses or obtain

VERIFICATION

Investigations/New Shipper

- DOC is required by law to verify each respondent's questionnaire response
- Verifications are conducted **after** preliminary determinations in investigations

Administrative Reviews

- Verification only required every 3rd time for each respondent
- Verifications are conducted **before** preliminary determinations in reviews

VERIFICATION

DOC conducts and extensive examination of company books and records to accuracy and completeness:

- Confirm that all sales were reported & recorded in company accounts
- Confirm accuracy of individual transactions & factors of production
- Confirm accuracy of charges and adjustments

VERIFICATION

- Verification Outline
 - DOC identifies key topics and specific information to be reviewed at verification
 - Outline provided to respondents in advance of verification – typically DOC does not give a lot of time to prepare, but a lot of the verification requests have standard elements

VERIFICATION

- Locations for Verification
 - Company facilities where relevant documents are maintained
 - Facilities where key staff are located
 - May need to visit multiple facilities

May Include:

- All manufacturing facilities
- Suppliers
- Resellers

VERIFICATION

- Duration of Verification
 - Typically 5 working days for export price (EP) and factors of production (FOP) responses
 - Typically 5 working days for a cost of production verification

VERIFICATION

- Verification Report
 - DOC issues a comprehensive verification report of its findings that allows parties significant time and opportunity for interested parties to comment upon results
 - DOC sometimes leave out important aspects of the verification, so it is important to review and comment on the verification report when necessary.

SUBMISSION OF FACTUAL INFORMATION

- Interested parties can submit factual information to rebut, clarify, or correct factual information submitted by any other interested party at any time prior to the deadlines specified in the DOC's regulations
- Missing a deadline can be damaging, even fatal, to your defense
- DOC has discretion to extend deadlines

FORMS OF ARGUMENT IN DOC AD PROCEEDINGS

- **Ex-Parte Meetings** - may be requested at any time but are held at the DOC's discretion
- **Letters Filed by Parties** - may be submitted at any time
- **Case Briefs** - must be filed by the deadline specified in the preliminary determination; limited to facts already on the record; must raise all relevant issues
- **Rebuttal Briefs** - limited to issues raised in other parties' case briefs
- **Hearings** - normally public, but may include closed portion to address confidential information already on the record

ADVERSE FACTS AVAILABLE

- DOC penalizes companies with “adverse facts available” or “AFA” for failing to provide complete, accurate responses within the deadlines DOC sets, and in the manner required by DOC
- AFA is usually the worst, most prejudicial information DOC can find on the factual record – may be the difference between a 7% duty rate and a 375% duty rate
- DOC treats almost every respondent as if DOC suspected them of manipulating information – (some basis for this suspicion)
- Respondents must carefully prepare and submit responses and argumentation within deadlines to avoid AFA

HEARINGS

- An opportunity, held upon request, for interested parties to *orally* present their views
- All issues discussed by parties in a hearing must have been raised by the parties in their case briefs or rebuttal case briefs
- No new factual information is permitted at the hearing phase of a proceeding
- Generally a waste of time unless DOC has not understood how factual information ties together

HEARINGS

- A verbatim transcript of the public session of all hearings is available to the public
- A hearing may be closed to non-attorneys if confidential information will be discussed
- If a portion of a hearing is closed, the transcript for the closed session *only* will be considered business proprietary and therefore subject to the regulations which govern administrative protective orders

ACCESS TO INFORMATION

- Regulations require that public versions be made available of all submissions, including submissions placed on the record by DOC or ITC
 - There are specific rules for ranging and/or redacting confidential data
 - The protection of confidential data is vigorously enforced (Trade Secrets Act, disqualification from appearing before the DOC/ITC)

ACCESS TO INFORMATION

- DOC & ITC maintains complete confidential and public records of all submissions and documents generated in each proceeding
- Public record is available online (DOC & ITC websites)
- Federal Register notices
- Service by parties
- Disclosure to parties

ACCESS TO CONFIDENTIAL INFORMATION

- Under certain circumstances, legal representatives for interested parties are allowed access to confidential information submitted to the DOC in the course of an AD proceeding
- Access to confidential information is permitted to provide legal representatives an opportunity to understand the facts and calculations underlying the case and to defend their parties' interests in the proceeding
- Legal representatives must be licensed to practice law in the United States to obtain access

ACCESS TO CONFIDENTIAL INFORMATION

- The Administrative Protective Order (APO) is the legal mechanism by which DOC & ITC control the limited disclosure of business proprietary information in AD/CVD proceedings to the legal representatives of interested parties
- The representative of an interested party may not reveal APO protected information to officials of the interested party that it represents
- Significant penalties may be applied to violators of an APO

ACCESS TO INFORMATION - ONLINE RESOURCES

- Federal Register – The FR is published in hard copy and electronically on the internet
 - (<http://www.gpoaccess.gov>)
- Trade Enforcement & Compliance Website
 - (<http://www.trade.gov/enforcement/>)
- International Trade Commission Website
 - (<http://www.usitc.gov>)

DOC DETERMINATIONS

- Preliminary and final determinations announce the Department findings and decisions in an AD or CVD investigation
- Both domestic and foreign interested parties have the right to receive materials used to calculate margins under Administrative Protective Order (APO)

HOW DOC DETERMINATIONS ARE ANNOUNCED

- Interested parties are notified by phone on “release date,” normally noon the day after the signature of the decision; determination issued through online docket
- Preliminary and final determinations are published in the Federal Register typically within 5-7 days following release
- Copies of Federal Register notice and decision memorandum (for final determinations) made available on release date and noted on Import Administration website
- Fact Sheets are also available on Import Administration’s website

PRELIMINARY DETERMINATIONS

- Preliminary margin/deposit rate for each respondent
- Preliminary scope determination
- Preliminary calculation methodologies determined
- If alleged, preliminary critical circumstances determination
- Preliminary cost of production analysis results
- Preliminary "All-Others" rate
- Any adjustments to the submitted data which the DOC has preliminarily deemed appropriate
- Suspension of liquidation (if affirmative)

MINISTERIAL ERRORS IN PRELIMINARY DETERMINATIONS

- Ministerial Errors are generally calculation or copying errors, but also may include anything DOC deems to be a ministerial error
- Methodological issues are not subject correction via ministerial error allegations
- DOC will only correct a ministerial error in the Preliminary Determination if the error accounts for more than 5 percentage points, more than 25% of the calculated duty rate, or is the difference between an affirmative duty rate and a *de minimis* or zero duty rate

FINAL DETERMINATIONS

- Final margin/deposit rate for each respondent
- Final scope determination
- Final calculation methodologies determined
- If alleged, final critical circumstances determination
- Final cost of production analysis results
- Notification of final "all-others" rate

FINAL DETERMINATIONS

- Notification of continuation of suspension of liquidation, if final determination is affirmative
- Notification of termination of suspension of liquidation, if final determination is negative
- Final decisions on issues and adjustments preliminarily decided in the preliminary determination
- Summary and statement of DOC position on each issue raised by parties in briefs, rebuttal briefs and hearing
- Department findings during investigation stage

DISCLOSURES

- Within five days of the determination, parties under APO are served with calculation memos, programs, and any other material necessary to reproduce the DOC's calculations
- Also, if requested, DOC will meet with the interested parties and explain the calculations and decisions made in the determination

MINISTERIAL ERRORS IN PRELIMINARY DETERMINATIONS

- Ministerial errors in the final determination may also be corrected, without limitation on effect (can make small difference in duty rate)
- Both respondents and petitioners have five days after the receipt of disclosure documents to request corrections
- Purpose is to avoid litigation on small issues that can be easily identified and corrected without involving judicial review

ITC FINAL-PHASE INVESTIGATION

FINAL PHASE OF INVESTIGATION

- Consists of eight parts
 - (1) Scheduling of Final Phase
 - (2) Questionnaires
 - (3) Prehearing Staff Report
 - (4) Hearing and briefs
 - (5) Final Staff Report
 - (6) Closing of Record and Final Comments by parties
 - (7) Commission Briefing and Vote
 - (8) Commission Views

QUESTIONNAIRES

- Issued to U.S. producers, U.S. importers, Foreign producers/exporters, and U.S. purchasers
- Draft questionnaires sent to parties for comment prior to issuance.
- Purchaser questionnaires sent to all significant purchasers of product.
- Purchaser questions include competition and differences and similarities between domestic and imported products.

PREHEARING REPORT AND BRIEFS

- ITC Staff will compile a Prehearing Report based on record information, questionnaire responses, and other sources.
- Parties may file a Prehearing Brief with legal arguments and factual information.
- This is parties' primary opportunity to set forth their case to the Commission, prior to hearing.

COMMISSION HEARING

- All sitting Commissioners will participate in hearing, which is a fact-finding proceeding.
- Interested parties may present views and provide testimony to Commission.
- Commissioners may ask questions directly to parties and their witnesses.

POSTHEARING BRIEF

- Parties may file a posthearing brief after the Commission Hearing
- Opportunity to provide more detailed answers to Commissioners' questions posed at the hearing.

FINAL STAFF REPORT

- ITC staff updates the prehearing report to include information from hearing, pre- and posthearing briefs, questionnaire revisions.
- Provides the basis for the Commission's final determination.

CLOSING OF FACTUAL RECORD AND FINAL COMMENTS

- The factual record closes 4 business days after the Staff Report is issued
- No new factual information may be submitted after that time.
- Parties may file final comments on any new factual information submitted after the Staff Report is issued approximately two business days after factual record closes.

COMMISSION VOTE AND VIEWS

- Commission holds a public vote approximately three days after final comments are submitted and about eight days before its Views are due to Commerce.
- After vote, the Commission prepares its Final Views, which explains the basis for its determination.
- The Views are issued to Commerce by the statutory deadline.

LAST STEPS

U.S. CUSTOMS ROLE & DUTY DEPOSIT REQUIREMENTS

- On the date of the publication in the Federal Register of an affirmative preliminary determination, DOC directs Customs and Border Protection (CBP) to suspend liquidation on the product under investigation and to begin collecting a deposit based on the preliminary antidumping margin
- Following an affirmative final determination, CBP continues to suspend liquidation and collect deposits at the final rate, as directed by the DOC
- “Liquidation” is the final assessment of duties (sending the final bill)

U.S. CUSTOMS'S ROLE & DEPOSIT REQUIREMENTS

- CBP collects deposits and liquidates entries, but does not have a role in the calculation of antidumping margins.
- CBP also refunds deposits if the amount deposited is higher than the final calculate duty rate. This typically happens in administrative reviews after the antidumping duty order is in place.

ANTIDUMPING DUTY ORDER

- An Antidumping Duty Order is the public announcement that the DOC will instruct CBP to assess duties pursuant to the affirmative final determinations of the DOC and ITC
- Orders are generally issued within 7 days after the ITC notifies the DOC of an affirmative injury determination
- The Order establishes date on which duty requirement become effective, provides notice to parties and CBP that duties will be imposed

RECOURSE FOLLOWING FINAL DETERMINATION & ORDER

- Seek DOC correction of ministerial errors
- Appeal decision to Court of International Trade (CIT)
- Request administrative review
- Request changed circumstances review
- WTO appeal

TIME FOR A BREAK

谢谢

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