



United States Government Accountability Office

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Report to the Ranking Member  
Subcommittee on Competition Policy,  
Antitrust, and Consumer Rights  
Committee on the Judiciary  
U.S. Senate

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December 2022

# ANTIDUMPING AND COUNTERVAILING DUTIES

## Process Design Helps Ensure Proceedings Are Based on Accurate and Complete Information

Accessible Version

# GAO Highlights

Highlights of [GAO-23-105794](#), a report to the Ranking Member, Subcommittee on Competition Policy, Antitrust, and Consumer Rights, Committee on the Judiciary, U.S. Senate

## Why GAO Did This Study

The United States and many of its trading partners have enacted laws to remedy the unfair trade practices of other countries and foreign companies that cause or threaten to cause material injury to domestic producers and workers. U.S. laws authorize the imposition of duties on certain imports that are dumped (i.e., sold at less than fair market value) and countervailing (offsetting) duties on certain imports subsidized by foreign governments. These duties are among the most commonly applied U.S. trade remedies. In fiscal year 2021, \$30.2 billion of imported goods were subject to AD/CV duties. As of March 2022, the United States had 657 active AD/CVD orders, affecting imports from 59 countries.

Some contend that domestic companies may sometimes file petitions without merit to obstruct domestic market competition. Others assert that such duties could have adverse effects on other economic sectors, such as increased costs for downstream purchasers. GAO was asked to review AD/CVD processes and domestic market competition considerations. This report details the processes U.S. agencies have in place to conduct AD/CVD proceedings and ensure the accuracy and completeness of AD/CVD petitions and related information. This report also examines how aspects of market competition factor into the AD/CVD process.

GAO reviewed agency guidance and policy documents. Additionally, GAO reviewed relevant legal documents and related sources and interviewed agency officials. GAO also analyzed data on AD/CVD case outcomes from fiscal years 2011 through 2021.

View [GAO-23-105794](#). For more information, contact Kimberly M. Gianopoulos at (202) 512-8612 or [gianopulosk@gao.gov](mailto:gianopulosk@gao.gov).

December 2022

# ANTIDUMPING AND COUNTERVAILING DUTIES

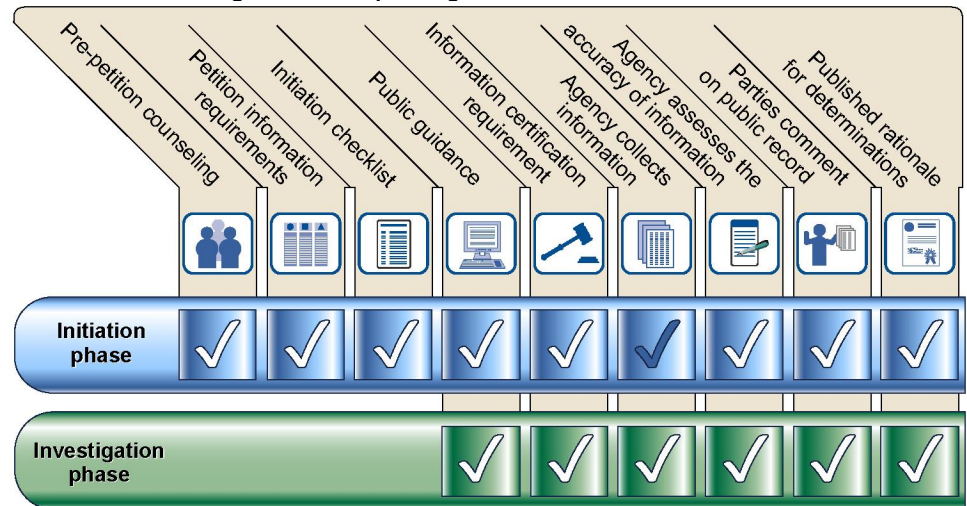
## Process Design Helps Ensure Proceedings Are Based on Accurate and Complete Information

### What GAO Found

The U.S. Department of Commerce and the U.S. International Trade Commission (USITC) jointly administer the antidumping and countervailing duties (AD/CVD) investigation process. Typically, Commerce determines whether to initiate an investigation after examining a petition filed on behalf of a domestic industry alleging unfair trade practices by foreign entities. In the investigation phase, Commerce conducts an investigation of dumping or subsidies, and USITC investigates material injury to the domestic industry.

Some features of the AD/CVD process design function as internal controls that may lessen the risk of the agencies initiating or conducting an investigation with inaccurate or incomplete information. These features relate to (1) communication of process requirements through pre-petition counseling and public guidance, (2) petition information requirements, (3) information certification requirements, (4) independent collection and corroboration of information, and (5) transparency of case information and of the rationale supporting agency determinations.

AD/CVD Process Design and Corresponding Features That Function as Internal Controls



- ✓ Process design feature applies to this phase
- ✓ Process design feature sometimes applies to this phase

Legend: AD/CVD = antidumping and countervailing duties

Source: GAO analysis of Department of Commerce and U.S. International Trade Commission documents. | GAO-23-105794

AD/CVD law contains no provision for USITC to consider potential negative economic effects of AD/CV duties on downstream purchasers (i.e., industries, retailers and consumers) when determining injury to domestic producers, according to USITC. However, USITC may solicit downstream purchaser information to analyze conditions of competition in the product's domestic market. USITC officials stated that this analysis plays a role in helping the agency determine whether the injury to domestic industry is by reason of the imported products.

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**Abbreviations**

AD/CVD	antidumping and countervailing duties
CBP	U.S. Customs and Border Protection
DOJ	Department of Justice
FTC	Federal Trade Commission
NAFTA	North American Free Trade Agreement
Tariff Act	Tariff Act of 1930, as amended
USITC	U.S. International Trade Commission
USMCA	United States–Mexico–Canada Agreement
WTO	World Trade Organization

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December 12, 2022

The Honorable Michael S. Lee  
Ranking Member  
Subcommittee on Competition Policy, Antitrust, and Consumer Rights  
Committee on the Judiciary  
United States Senate

Dear Mr. Lee:

The United States and many of its trading partners have enacted laws to remedy the unfair trade practices of other countries and foreign companies that cause material injury to domestic producers and workers.<sup>1</sup> U.S. laws authorize the imposition of antidumping duties on certain imports that are dumped (i.e., sold at less than fair market value) and countervailing (offsetting) duties on certain imports subsidized by foreign governments. Antidumping and countervailing duties (AD/CVD) are among the most commonly applied U.S. trade remedies. In fiscal year 2021, \$30.2 billion of imported goods were subject to these duties. As of March 31, 2022, the United States had 657 active AD/CVD orders, affecting imports from 59 countries.

Advocates for these duties contend that trade remedies help ensure a level playing field in a global economy and mitigate the adverse effect of unfair trade practices on domestic industries and workers. However, some contend that domestic companies may sometimes file petitions without merit to obstruct domestic market competition. Others assert that such duties could have adverse effects on other economic sectors, such as increased costs for downstream purchasers.

You asked us to review AD/CVD processes and domestic market competition considerations. This report examines (1) the processes U.S. agencies have in place to conduct AD/CVD proceedings, (2) the processes U.S. agencies have in place to ensure the accuracy and

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<sup>1</sup>Unless otherwise specified, for the purposes of this report we use the term “material injury” to include a finding that a domestic industry is materially injured or threatened with material injury, or that the establishment of an industry in the United States is materially retarded by reason of imports of that merchandise or sales (or the likelihood of sales) of that merchandise for imports of those goods.

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completeness of AD/CVD petitions and related information, and (3) how aspects of market competition factor into the AD/CVD process.

To address these objectives, we analyzed guidance and policy documents from the Department of Commerce and the U.S. International Trade Commission (USITC). Additionally, we reviewed applicable legal statutes, federal regulations, and academic articles. We also interviewed relevant officials at Commerce, USITC, the Department of Justice (DOJ), and the Federal Trade Commission (FTC).

In addition, we analyzed data on AD/CVD case outcomes from fiscal years 2011 through 2021, using data from the Department of Commerce International Trade Administration's AD/CVD Casework Salesforce Database. To obtain this information, we requested that Commerce and USITC collaborate to compile the case outcome data. In doing so, they added necessary categories, settled on common terminology, and verified data against Commerce's Petition Counseling System and USITC's Electronic Document Information System. To assess the reliability of this data, we interviewed agency officials and reviewed agency responses to questions about data reliability. We found that the data were sufficiently reliable for illustrating the nature and frequency of the various potential outcomes of AD/CVD petitions.

We conducted this performance audit from February 2022 to December 2022 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

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### AD/CVD Laws

U.S. laws authorize the assessment of antidumping duties on certain products exported to the United States at unfairly low prices (i.e., dumped) and countervailing duties on certain products exported to the United States that are subsidized by foreign governments. These duties are intended to remedy the unfair trade practices of other countries and foreign companies that cause or threaten to cause material injury to

domestic industries.<sup>2</sup> Commerce and USITC share responsibilities for conducting AD/CVD investigations, most of which are initiated based on petitions filed on behalf of a domestic industry.

- *Antidumping duty.* The Tariff Act of 1930, as amended (the Tariff Act), provides relief to a domestic industry by authorizing the assessment of antidumping duties on imports sold in the United States at less than fair value, in certain situations.<sup>3</sup> U.S. trade law permits the imposition of antidumping duties if (1) Commerce determines that the imported goods are being or are likely to be sold in the United States at less than fair value; and if (2) USITC determines that a U.S. industry is materially injured by reason of that merchandise. The law provides relief by authorizing the imposition of an antidumping duty on the dumped imports.<sup>4</sup>
- *Countervailing duty.* The Tariff Act provides relief to a domestic industry by authorizing the assessment of countervailing duties on products exported to the United States that are subsidized by foreign governments, in certain situations.<sup>5</sup> Specifically, the law provides that countervailing duties will be imposed if the following conditions are met:
  - If Commerce determines that the foreign government or any public entity within the foreign country is providing, directly or indirectly, a countervailable subsidy with regard to the manufacture, production, or export of the subject merchandise that is imported or sold (or likely to be sold) for importation into the United States, and
  - if, in the case of merchandise imported from a Subsidies Agreement country, USITC determines that a domestic

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<sup>2</sup>The authority for the imposition of these duties is found in the Tariff Act of 1930 (June 17, 1930), c.497, Title VII, as amended. Antidumping duties are authorized by 19 U.S.C. § 1673 and countervailing duties are authorized by 19 U.S.C. § 1671.

<sup>3</sup>19 U.S.C. § 1673.

<sup>4</sup>The law authorizes the imposition of a duty equal to the amount by which the normal value exceeds the export price for the merchandise. This amount is referred to as the “dumping margin.” See 19 U.S.C. § 1673.

<sup>5</sup>The law authorizes the imposition of a countervailing duty equal to the amount of the net countervailable subsidy on the subsidized imports. See 19 U.S.C. § 1671.

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industry is materially injured by reason of that merchandise.<sup>6</sup>

The AD/CVD laws implement U.S. international obligations under the World Trade Organization (WTO) Anti-Dumping Agreement, and the Agreement on Subsidies and Countervailing Measures.<sup>7</sup> Should the United States impose antidumping or countervailing duties on a product, the government of the exporting country may initiate dispute resolution proceedings against the United States pursuant to the WTO Understanding on Dispute Settlement if it believes that the United States has violated its obligations under the WTO agreements.<sup>8</sup>

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### Key Actors in the AD/CVD Process

The process for obtaining the imposition of antidumping or countervailing duties generally involves petitioners and interested parties who support or oppose the imposition of duties, trade law firms, Commerce, and USITC. Petitioners and interested parties in support of the imposition of AD/CV duties could include domestic manufacturers, producers, or wholesalers, or certain unions and trade associations.<sup>9</sup> Parties in opposition to the imposition of duties could include foreign exporters, foreign producers, U.S. importers of the articles under investigation, or governments of the exporting countries. Any person or entity not a party (i.e. nonparties) may participate in an AD/CVD investigation by submitting for consideration information pertinent to the investigation before the USITC. Nonparties

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<sup>6</sup>A Subsidies Agreement country is either a member of the World Trade Organization (WTO), or another country as defined by 19 U.S.C. § 1671(b).

<sup>7</sup>See 19 U.S.C. §§ 1671-71h, 1673-73h; *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Apr. 15, 1994); *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1868 U.N.T.S. 201 (Anti-Dumping Agreement); *Agreement on Subsidies and Countervailing Measures* (Apr. 15, 1994); and *Marrakesh Agreement Establishing the World Trade Organization*, Annex 1A, 1869 U.N.T.S. 14 (Countervailing Agreement).

<sup>8</sup>*Understanding on Rules and Procedures Governing the Settlement of Disputes* (Apr. 15, 1994), *Marrakesh Agreement Establishing the World Trade Organization*, Annex 2, 1869 U.N.T.S. 401.

<sup>9</sup>An antidumping or countervailing duty proceeding shall be initiated when a domestic interested party files a petition on behalf of an industry, which alleges the elements necessary for the imposition of the duty, and which is accompanied by information reasonably available to the petitioner supporting those allegations. See 19 U.S.C. §§ 1671a, 1673a, 1677(9), and 19 C.F.R. § 351.102(a)(17) for information about who would qualify to be a domestic interested party.



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could include industrial users of the product subject to investigation, trade associations, or other entities or individuals. Law firms that specialize in international trade frequently represent petitioners and the opposing parties before Commerce and USITC, the two agencies responsible for conducting AD/CVD investigations.<sup>10</sup>

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## Commerce Determines Whether to Initiate AD/CVD Investigations and Conducts Concurrent Investigations with USITC

The process for determining whether to impose an antidumping or countervailing duty consists of two key phases: (1) initiation and (2) investigation, according to Commerce officials. In the initiation phase, Commerce examines a petition filed on behalf of a domestic industry alleging unfair trade practices by foreign entities and determines whether to initiate an antidumping or countervailing duty investigation.<sup>11</sup> USITC is responsible for conducting an investigation of material injury to a domestic industry, while Commerce is responsible for conducting an investigation of alleged dumping or subsidies. If Commerce and USITC make affirmative final determinations, Commerce directs U.S. Customs and Border Protection (CBP) to assess an antidumping or countervailing duty on imported products. The agencies complete the final phases of the investigations typically within 12 to 18 months of initiation, according to Commerce guidance. Figure 1 outlines the AD/CVD process—from the filing of a petition and the determination of whether to initiate an investigation, to the multiple determinations made by Commerce and USITC in the investigation phase, up through USITC’s final injury

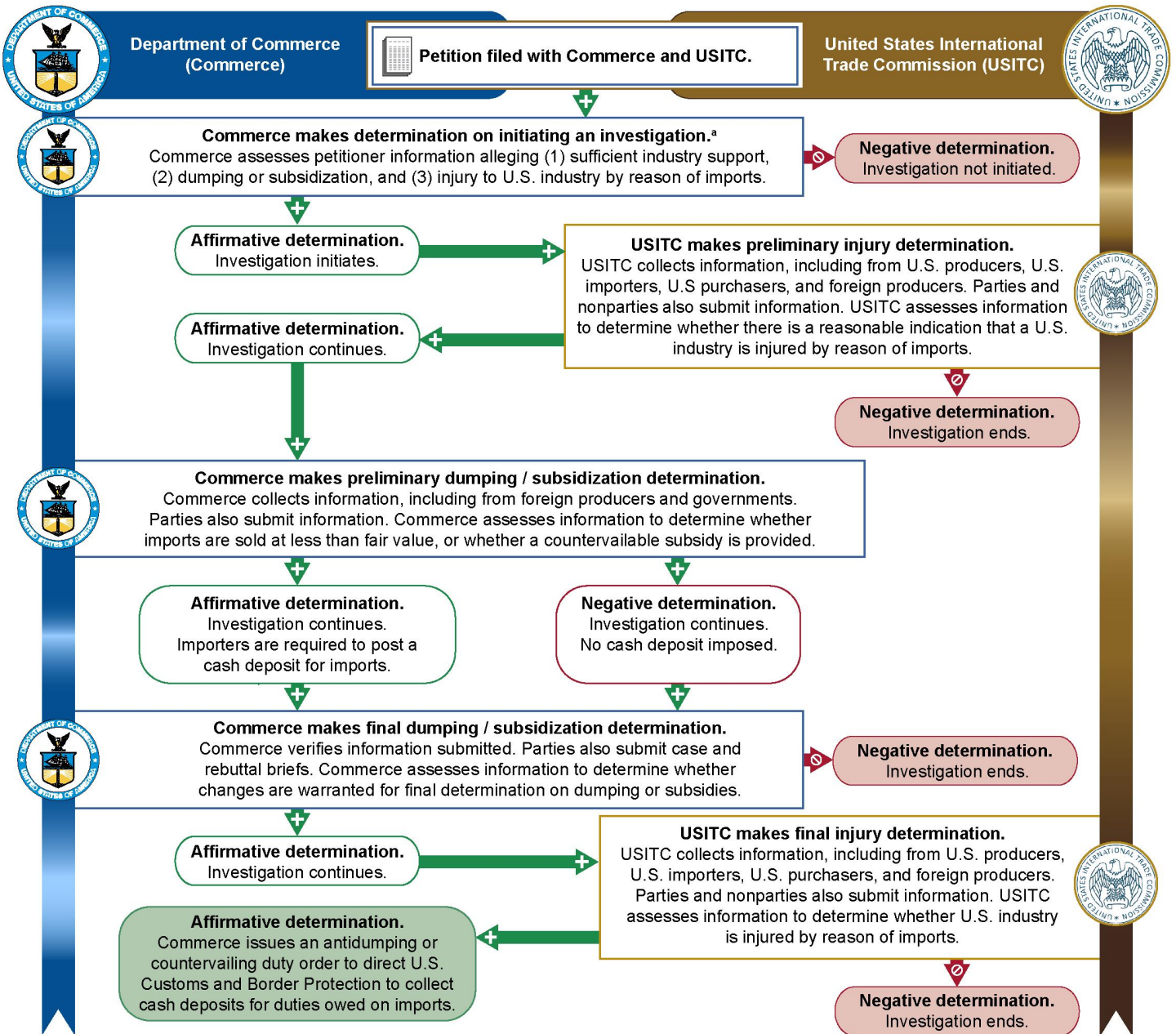
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<sup>10</sup>The Department of Justice (DOJ) has some ancillary involvement in aspects of AD/CV duties. According to officials, DOJ has provided legal antitrust advice to Commerce on various matters over the past 10 years, including on whether proposed suspension agreements are consistent with U.S. antitrust laws. DOJ also participates in trade policymaking through membership on the Trade Policy Staff Committee, an interagency body that develops and reviews policy papers and negotiating documents related to trade policy, and seeks advice from the public on policy decisions and negotiations through Federal Register notices and public hearings. Additionally, DOJ defends Commerce in domestic litigation related to its administration and enforcement of AD/CVD laws and supports Customs and Border Protection in its assessment of duties, seizure of improper imports, and classification and valuation of imported goods.

<sup>11</sup>Commerce is also authorized by statute to self-initiate investigations. 19 U.S.C. §§ 1671a(a), 1673a(a)(1). From fiscal years 2011 through 2021, Commerce self-initiated two investigations, both in fiscal year 2018.

determination. The figure also depicts the points at which an investigation can end because of a negative determination.

Figure 1: Antidumping and Countervailing Duty Determination Process



Source: GAO analysis of Commerce and USITC documents. | GAO-23-105794

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Note: Other developments, such as a suspension agreement or the withdrawal of a petition, can also end an investigation.

<sup>a</sup>Commerce is also authorized by statute to self-initiate investigations. 19 U.S.C. §§ 1671a(a), 1673a(a)(1).

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## Commerce Determines Whether Petition Meets Requirements for Initiating an AD/CVD Investigation

After a domestic interested party submits a petition alleging dumping or subsidization and material injury to Commerce and USITC, Commerce will examine the accuracy and adequacy of the petition and determine whether to initiate an investigation. Commerce initiates an investigation if the petition (a) alleges the elements necessary—as defined in statute and regulations—for the imposition of a duty, and (b) includes information “reasonably available” to the petitioner supporting those allegations. The petition must include, among other information,

- evidence that a set threshold of domestic producers support the petition,
- evidence of material injury to the domestic industry, and
- evidence of dumping or subsidization.

According to agency guidance, Commerce cannot consider extra-statutory factors when determining whether to initiate an investigation. Commerce and USITC provide online guidance and pre-petition counseling to potential petitioners explaining the petition requirements and the types of data needed.

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## USITC and Commerce Independently Collect Information for Their Respective Determinations

If Commerce initiates an investigation, both USITC and Commerce then conduct separate, concurrent investigations to make preliminary and final determinations on injury and dumping or subsidization, respectively.<sup>12</sup> For most determinations made in the course of the investigation phase, a negative determination from either agency results in both USITC and Commerce ending their investigations.<sup>13</sup> The agencies may terminate the

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<sup>12</sup>The agency begins preparing for an investigation when a petition is submitted, according to USITC officials.

<sup>13</sup>An AD/CVD investigation continues regardless of whether Commerce’s preliminary determination of dumping or subsidies is affirmative or negative. No investigations terminate because of a negative preliminary determination by Commerce.

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investigation if a petitioner chooses to withdraw a petition, although it is uncommon for a petitioner to do so (see app. 1).

### USITC Evaluates Injury by Assessing Volume of Imports, Price Effects, and Impact on the Domestic Industry

USITC evaluates whether the imports subject to the investigation have caused material injury to the domestic industry. USITC sends questionnaires to U.S. producers, U.S. importers, foreign producers, and U.S. purchasers, requesting data relevant to each questionnaire, including production-related data, employment data, financial data, price-related data, sales and shipment data, and information on the activities of the firm, among other items.<sup>14</sup>

USITC considers different factors depending on whether the determination involves present material injury, threat of material injury, or material retardation of the establishment of a U.S. industry. When considering whether material injury has occurred, the law directs USITC to consider: (1) the volume of imports of the subject merchandise, (2) the effect of subject imports on prices of domestic like products in the United States, and (3) the effect of subject imports on the domestic industry, in the context of production operations in the United States.<sup>15</sup> To determine a threat of injury, or material retardation, USITC uses other factors.<sup>16</sup>

### Commerce Collects Sales and Price Information to Make Dumping Calculations and Surveys Foreign Companies and Governments on Subsidies

To gather information needed to determine whether goods are being dumped, Commerce sends questionnaires to certain foreign producers and foreign exporters, collecting information such as sales data and cost of production data. Commerce calculates the prices of the imported goods in the United States and in foreign markets, making adjustments

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<sup>14</sup>Other industries, retailers, or consumers can be downstream purchasers of the subject product.

<sup>15</sup>The term “domestic like product” is defined by 19 U.S.C. § 1677(10) as “a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation...”

<sup>16</sup>To determine threat of material injury, the statute directs USITC to consider factors such as the likely prices of imports, or the likelihood of a significant rate of increase of the volume of imports. To determine whether there is material retardation of the establishment of an industry, USITC has considered factors such as when the U.S. industry began production, and whether production has been steady.

where appropriate, and determines that dumping is occurring if the price of the imported good in the United States (export price or constructed export price) is lower than its normal value. Normal value is the price of the good in the foreign producers' home market or third-country market, as appropriate. In certain circumstances, normal value may be based on a constructed value representing the foreign companies' cost of production, plus an amount for profit.

To gather information needed to determine whether countervailable subsidies are being provided, Commerce sends questionnaires to foreign producers, exporters, and governments, collecting information on subsidy programs. Commerce determines that countervailable subsidies exist if a foreign government or public entity provides a financial contribution conferring a benefit to the manufacture, production, or exportation of the goods under investigation and which is specific (e.g., tied to export performance or import substitution, or limited to certain industries or geographical regions). According to Commerce guidance, countervailable subsidies can take many forms, such as direct cash payments or loans at terms that are not reflective of market conditions.

If Commerce finds in its preliminary determination a "reasonable basis to believe or suspect" that subject imports are being dumped or that countervailable subsidies are being provided, it then directs CBP to collect cash deposits of the estimated dumping margin or subsidy rate.<sup>17</sup> The investigation continues after Commerce's preliminary determination on dumping or subsidization, regardless of whether the determination is affirmative or negative.

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<sup>17</sup>The "dumping margin" is the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise. The amount of subsidies the foreign producer receives from the government or public entity is the basis for the subsidy rate by which the subsidy is offset, or "countervailed," through higher import duties. Commerce also directs CBP to suspend liquidation of entries of merchandise subject to the determination that are entered, or withdrawn from warehouse, for consumption during a certain period. See 19 U.S.C. §§ 1671b(d)(2) and 1673b(d)(2).

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### **DOJ, FTC, and the AD/CVD Process**

The Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) are charged with enforcement of federal antitrust laws.<sup>a</sup> According to the FTC, the objective of antitrust laws is to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up. According to DOJ, antitrust laws prohibit a variety of practices that restrain trade, such as price-fixing conspiracies, corporate mergers likely to reduce competitive vigor of particular markets, and predatory acts designed to achieve or maintain monopoly power.

DOJ and FTC have no direct role in the antidumping and countervailing duties (AD/CVD) process, which focuses on imports and their effect on domestic producers. However, U.S. agencies (and members of the public) can submit statements of interest on AD/CVD cases. According to DOJ officials, DOJ has submitted one statement of interest related to an AD/CVD investigation in the last 12 years. However, DOJ formally withdrew that statement shortly thereafter. Officials at Commerce could not recall another time a federal agency had issued a statement of interest on an AD/CVD case in the past 35 years.

Source: GAO analysis of legal statutes. | GAO-23-105794

<sup>a</sup>The three major federal antitrust laws are the Sherman Act, codified as amended at 15 U.S.C. §§ 1-7; the Clayton Act, codified as amended at 15 U.S.C. §§ 12-27; and the Federal Trade Commission Act, codified as amended at 15 U.S.C. §§ 41-58.

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## **AD/CVD Investigations Can End Because of Negative Findings or Other Factors**

Commerce and USITC both make final determinations. If Commerce makes an affirmative final determination of dumping or subsidization, and if USITC makes an affirmative final determination of injury to the domestic industry, then Commerce issues an order for CBP to collect offsetting duties equal to the dumping margin or subsidy rate determined by Commerce in its investigation. However, a negative final determination from either agency ends the investigation, and Commerce does not issue an AD/CVD order. Statute also requires USITC to terminate an investigation without an injury determination if it finds imports of the

subject merchandise are negligible.<sup>18</sup> Other developments such as a suspension agreement or the withdrawal of a petition can also end an investigation.<sup>19</sup> Table 1 shows AD/CVD process results for petitions filed in fiscal years 2011 through 2021, as of May 9, 2022. For more details, see appendix 1.

**Table 1: Antidumping and Countervailing Duty (AD/CVD) Process Results, Fiscal Years 2011–2021**

Category	Category Total
Total petitions submitted	585
Petitions withdrawn during initiation phase	0
Petitions denied for investigation	0
Petitions approved for investigation	585
Petitions withdrawn in the investigation phase, prior to USITC (preliminary) determination of injury	2
Investigations terminated because of USITC (preliminary) determination of negligibility	15
Investigations resulting in a negative USITC (preliminary) determination of injury	4
Subtotal of investigations not resulting in USITC (preliminary) affirmative determinations of injury	21
Affirmative USITC (preliminary) determinations of injury	564
Petitions withdrawn in the investigation phase, following USITC (preliminary) determination of injury	3
Investigations terminated because of negative Commerce (final) determination of dumping or subsidies	25
Investigations suspended because of Commerce’s implementation of a suspension agreement	2
Investigations terminated because of USITC (final) determination of negligibility	8
Investigations resulting in a negative USITC (final) determination of injury	79
Subtotal of investigations not resulting in USITC (final) affirmative determinations of injury	117
Affirmative USITC (final) determinations of injury	430
Total investigations resulting in AD/CVD orders	432 <sup>a</sup>

Legend: USITC = U.S. International Trade Commission;

Source: Department of Commerce and USITC data. | GAO-23-105794

Notes: The table above represents a snapshot of the lifecycle of all AD/CVD petitions filed from fiscal years 2011 through 2021 as of May 9, 2022. It does not include Commerce’s preliminary determination of dumping or countervailable subsidies because an investigation continues regardless

<sup>18</sup>Negligible imports are generally defined as imports from a country with respect to an investigation where such imports account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available. See 19 U.S.C. §§ 1671b(a)(1), 1671d(b)(1), 1673b(a)(1), and 1673d(b)(1).

<sup>19</sup>Commerce may enter into an agreement to suspend an AD/CVD investigation when the relevant parties to the case reach an agreement and when certain criteria are met. See 19 U.S.C. §§ 1671c and 1673c. According to Commerce, suspension agreements require ongoing monitoring by Commerce to ensure compliance and effectiveness. According to Commerce and USITC data, two AD/CVD investigations were suspended because of Commerce’s implementation of a suspension agreement between fiscal years 2011 and 2021.

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of the outcome of Commerce's preliminary determination (i.e., no investigation is terminated upon a negative preliminary determination by Commerce).

As of May 9, 2022, 16 of the 34 petitions filed in fiscal year 2021 had resulted in AD/CVD orders. The investigations related to the other 17 petitions had not yet reached the final determination phase at either Commerce or USITC.

<sup>a</sup>In fiscal year 2018, Commerce self-initiated two investigations, both of which resulted in AD/CVD orders. These self-initiated investigations are reflected in the reported number of investigations resulting in AD/CVD orders.

### Entities May Take Other Actions after AD/CVD Orders Go into Effect

If Commerce issues an AD/CVD order at the end of an investigation, the order is open to annual reviews that can establish the dumping margin or subsidy rate for the applicable review period. Specifically, each year, parties can request that Commerce review the final amount of duties owed and calculate new estimated cash deposit rates going forward (in a process known as an administrative review).<sup>20</sup> Additionally, Commerce and USITC must conduct a sunset review no later than 5 years after the publication of an order or a determination to continue an order.<sup>21</sup> During the sunset review, Commerce will determine whether dumping or subsidization would be likely to recur or continue if the order is revoked, and USITC will determine whether injury would be likely to continue or recur in the absence of an order.<sup>22</sup>

Interested parties who participated in an investigation may also challenge Commerce's or USITC's final determinations in U.S. courts—or, for cases involving merchandise from Canada or Mexico, before a binational panel constituted under Chapter 10 of the United States–Mexico–Canada Agreement (USMCA) (previously under Chapter 19 of the North American

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<sup>20</sup>Outside of the administrative review process, Commerce may conduct other types of reviews and inquiries during the course of a proceeding. For example, Commerce may conduct changed circumstances reviews where there are changed circumstances sufficient to warrant a review (e.g., where domestic interested parties have indicated that they no longer seek a remedy with respect to certain products), new shipper reviews to calculate rates for new shippers, scope inquiries to determine whether particular products fall within the scope of an AD/CVD order, and circumvention inquiries to determine whether merchandise is circumventing an AD/CVD order. See *generally* 19 U.S.C. §§ 1675, 1677j; 19 C.F.R. §§ 351.213, 351.214, 351.225, 351.226.

<sup>21</sup>19 U.S.C. § 1675(c) and 19 C.F.R. § 351.218.

<sup>22</sup>If Commerce and USITC both make affirmative findings, the order will remain in place. If either Commerce or USITC make a negative finding, the order will be revoked. See 19 C.F.R. § 351.218.



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Free Trade Agreement (NAFTA)).<sup>23</sup> Additionally, member countries of the WTO may challenge the applicable agency's determination before a WTO dispute settlement panel, according to Commerce and USITC officials. Officials also noted that for appeals in domestic courts or under the binational panel described above, the court or panel may either sustain the agency's determination or remand it to the agency for additional consideration. If the case is remanded, they further noted that the court or panel retains jurisdiction over the matter, reviews the agency's remand determination, and may order further remands. In litigation related to a final determination, parties may challenge Commerce's decision to initiate, as well as other findings of an investigation, according to the officials.

Separately, entities may allege that petitioners violated antitrust law while petitioning for AD/CVD relief. See text box for legal doctrine that may affect such litigation.

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<sup>23</sup>See 19 U.S.C. § 1516a(a)(1), (g). Parties may also challenge Commerce's final determination in reviews and inquiries conducted after an AD/CVD order goes into effect.

### Noerr-Pennington and AD/CVD Litigation

In some instances, parties have alleged that petitioners violated the Sherman Act<sup>a</sup> when seeking antidumping and countervailing duty (AD/CVD) trade remedies at the Department of Commerce and the U.S. International Trade Commission.<sup>b</sup> A judicially created doctrine, commonly referred to as the Noerr-Pennington doctrine, may arise in these instances.<sup>c</sup> This doctrine provides immunity from liability under the Sherman Act for certain joint efforts by groups exercising their First Amendment right to petition the government for a redress of grievances.<sup>d</sup>

Courts have held that immunity would not extend to a petition that is found to be a “sham.” In this regard, the Supreme Court noted that “[u]nder the sham exception, activity ‘ostensibly directed toward influencing governmental action’ does not qualify for Noerr immunity if it ‘is a mere sham to cover ... an attempt to interfere directly with the business relationships of a competitor.’”<sup>e</sup>

The Supreme Court has laid out a two-part definition for determining that a petition is a “sham” such that Noerr-Pennington immunity would not be available. First, the lawsuit must be “objectively baseless” in the sense that no reasonable litigant could realistically expect success on the merits.<sup>f</sup> Second, the baseless suit must conceal an attempt to interfere directly with a competitor’s business relationships “through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.”<sup>g</sup> Whether the doctrine provides immunity for actions related to a specific AD/CVD investigation is determined on a case-specific basis by the courts.

Source: GAO analysis of legal statutes and decisions. | GAO-23-105794

<sup>a</sup>The Sherman Act, which was originally enacted in 1890, prohibits agreements among competitors that unreasonably restrain trade. The Sherman Act is codified as amended at 15 U.S.C. §§ 1-7.

<sup>b</sup>See, for example, *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir. 1999); and *Music Center S.N.C. Di Luciano Pisoni C. v. Prestini Musical Instruments Corp.*, 874 F. Supp. 543 (E.D.N.Y. 1995). Recently, a federal district court applied Noerr-Pennington immunity in dismissing an importer’s claim that petitioning domestic mattress firms violated antitrust laws. (*CVB, Inc. v. Corsican Mattress Co.*, No. 1:20-CV-00144 (D. Utah May 23, 2022), appeal docketed, No. 22-4054 (10th Cir. June 23, 2022)).

<sup>c</sup>See *E.R.R. Presidents’ Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). See also *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (extending protection to petitioning before “all departments of Government,” including the courts). While the Noerr-Pennington doctrine has broader application, our description here is limited to the doctrine as it arises in cases related to the actions of petitioners seeking AD/CVD trade remedies.

<sup>d</sup>U.S. Const. amend. 1.

<sup>e</sup>*Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, at 51 (1993) (citing *Noerr* 365 U.S. 127, at 144).

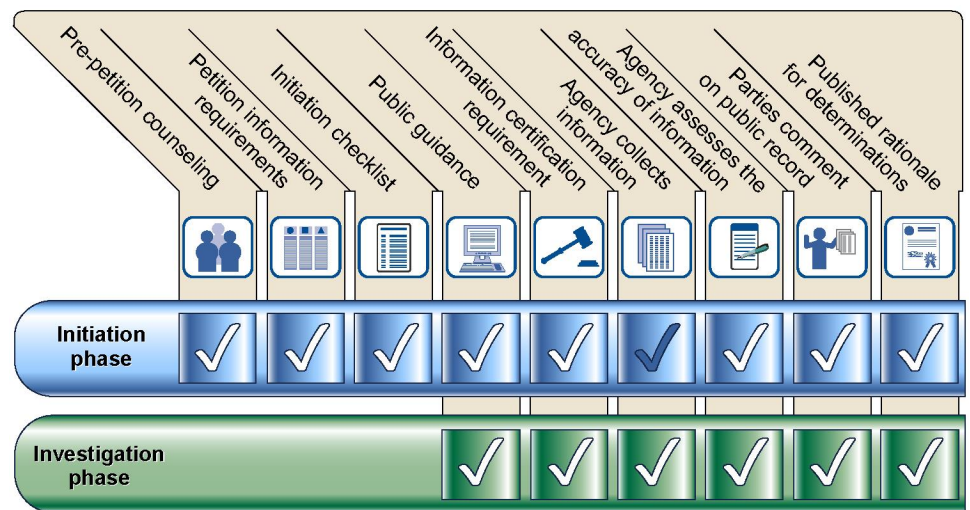
<sup>f</sup>*Professional Real Estate Investors, Inc.*, 508 U.S. at 60-61.

<sup>g</sup>*Id.*

## Features of the AD/CVD Process Design May Lessen the Risk of Proceedings Based on Inaccurate or Incomplete Information

Some features of the AD/CVD process design function as internal controls that help Commerce and USITC carry out their responsibilities related to AD/CVD proceedings. These features may lessen the risk of the agencies initiating or conducting an investigation based on incomplete or inaccurate information. These features may also lessen the risk of an industry filing a fraudulent or frivolous petition that is without merit. Figure 2 identifies these features and depicts how they apply to the initiation and investigation phases of the AD/CVD process.

**Figure 2: AD/CVD Process Design and Corresponding Features That Function as Internal Controls**



- ✓ Process design feature applies to this phase
- ✓ Process design feature sometimes applies to this phase

Legend: AD/CVD = antidumping and countervailing duties

Source: GAO analysis of Department of Commerce and U.S. International Trade Commission documents. | GAO-23-105794

Key features of the AD/CVD process design that function as internal controls relate to (1) communication of process requirements, (2) petition information requirements, (3) information certification requirements, (4) independent collection and corroboration of information and (5) transparency of case information.

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## Communication of Process Requirements

Commerce's and USITC's communication of process requirements helps ensure that petitioners are aware of statutory, regulatory, and administrative requirements, as well as steps of the process related to reviewing the accuracy of information. This communication may lessen the possibility that petitioners submit petitions that do not have the information and support required. The agencies communicate AD/CVD information to parties through public guidance and pre-petition counseling.

### Public Guidance

Online agency guidance helps inform petitioners of steps of the AD/CVD process and communicates to petitioners those aspects of the process that help ensure the agencies make determinations based on accurate and complete information. For example:

- Commerce guidance available online explains that, after the initiation of an AD/CVD investigation, Commerce issues questionnaires to obtain information from foreign producers of the imports under investigation and, in countervailing duty investigations, also issues questionnaires to the foreign government that is the subject of the investigation. The guidance informs readers that all interested parties have the opportunity to provide factual information and their arguments on the case record for Commerce's consideration. The guidance also describes steps Commerce takes to verify the information provided by foreign producers and governments.
- USITC's public AD/CVD handbook helps communicate steps of the process, including opportunities for parties to provide their views and other information. The handbook, available online, was developed to provide informal guidance to the public concerning the filing of a petition and the investigation and possible review that follow. USITC officials stated that the guidance is non-binding. While the handbook describes USITC's role, it also includes information about the steps Commerce takes and the factors it considers in making determinations. The handbook describes the stages of an AD/CVD investigation, as well as the determinations that Commerce and USITC make at each stage. The handbook also contains information about the factors the agencies consider when making each determination, and includes citations to relevant statutes and regulations. Additionally, the handbook

describes opportunities for parties and nonparties to provide their views and other information, for example, by participating in staff conferences and hearings and by submitting written statements at different stages of the investigation. With this guidance available publicly, petitioners may better understand the requirements for filing a petition and participating in a subsequent investigation. According to USITC, the handbook provides a general framework for processes, but the agency may choose to make changes on its own accord on a case-by-case basis.

### Pre-petition Counseling

Commerce and USITC both offer pre-petition counseling that can help potential petitioners understand the information required in a petition. The counseling can also inform petitioners of any deficiencies in a draft petition that would prevent initiation.

- Commerce's AD/CVD Petition Counseling Office aims to help potential petitioners understand AD/CVD laws and provides technical assistance with preparing and filing a petition. The office works to ensure that draft petitions comply with petition requirements that must be satisfied for Commerce to initiate an investigation; it also helps petitioners obtain publicly available data. However, the office does not compile petitions, according to agency officials.
- Commerce officials credited pre-petition counseling with helping prevent petitioners from submitting petitions that do not have the required information for Commerce to initiate an investigation. If a petition is submitted and it becomes clear that it does not meet the requirements for initiating an investigation, Commerce officials note that petitioners may prefer to withdraw their petitions rather than have the agency decline to initiate an investigation, a decision that would be published in the Federal Register.<sup>24</sup> Reluctance to file petitions that would not have the information required for Commerce to initiate an investigation may be one reason why, of 585 petitions submitted in the 10-year period from fiscal years 2011 through 2021, none have been withdrawn during the initiation phase, and none have been denied for investigation (see table 1). According to Commerce officials, pre-petition

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<sup>24</sup>According to Commerce officials, petitioners may also withdraw petitions if a circumstance arises in the industry that would remove the need for an AD/CVD investigation.

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counseling is a significant reason the agency has declined to initiate only one petition in the past 20 years.

- USITC’s Trade Remedy Assistance Office provides technical assistance to eligible small businesses and other small entities, including informal advice and assistance, such as informal legal support. This assistance is intended to enable eligible entities to determine the appropriateness of pursuing remedies under the trade laws, to prepare petitions and complaints, and to seek to obtain the remedies and benefits available under the trade laws.<sup>25</sup> The office may provide examples of previous petitions and can review an entity’s petition and provide general advice on the necessary factors to be included, according to agency officials.

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## Petition Information Requirements

The amount of information needed to support allegations in a petition can be extensive, as petitioners must provide information on industry support, dumping or subsidy allegations, and allegations of material injury. Petitions may be hundreds or thousands of pages long, according to Commerce officials. The burden on the domestic industry, in terms of cost and resources, to bring petitions forward may serve as a deterrent against frivolous petitions. In a 2013 report on small and medium-sized enterprises’ pursuit of AD/CVD trade remedies, we found that the data required for a petition can be extensive and difficult to obtain.<sup>26</sup> Additionally, we reported that administrative burden and legal costs associated with the AD/CVD process can also pose challenges for some petitioners.

A petition must be filed by an interested party on behalf of a domestic industry, must allege the elements necessary for the imposition of the duty, and must be accompanied by information reasonably available to the petitioner supporting those allegations. In the initiation phase, Commerce reviews the following:

- *Evidence of industry support.* Petitions must include information, “to the extent reasonably available to the petitioner,”

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<sup>25</sup>USITC uses U.S. Small Business Administration standards to determine whether a small business or other small entity is eligible to receive assistance. Certain trade associations and worker organizations may also qualify for assistance.

<sup>26</sup>GAO, *Antidumping and Countervailing Duties: Key Challenges to Small and Medium-Sized Enterprises’ Pursuit of the Imposition of Trade Remedies*, [GAO-13-575](#) (Washington, D.C.: June 25, 2013).

demonstrating industry support of a petition. This requirement can help prevent a single firm from acting alone to file a fraudulent petition. The petitioner must identify the industry on behalf of which the petitioner is filing and the names and contact information of all known producers, including those represented by the petitioner. The petitioner must also include the total volume and value of U.S. production of the domestic like product, as well as the volume and value of the domestic like product produced by the petitioner and each domestic producer identified. Commerce will use this information in determining whether a petition has been filed with sufficient industry support. Commerce will find there is sufficient industry support if domestic producers or workers who support the petition account for (1) at least 25 percent of the total production of the domestic like product, and (2) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.<sup>27</sup>

- *Evidence of dumping or subsidization.* Petitions must include information alleging that goods are dumped or that foreign producers or exporters are receiving countervailable subsidies. When analyzing a dumping allegation, Commerce determines whether a petition contains reasonably available information and adequate supporting documentation relevant to its calculations, according to Commerce guidance. The guidance explains that these calculations include price of the foreign merchandise sold or offered in the U.S. market (i.e., export price or constructed export price) and the fair value (i.e., normal value) of the foreign merchandise. When evaluating evidence regarding dumping, the guidance notes that the agency looks at items such as U.S. price information and foreign home market or third-country price information. The guidance further details possible sources for price information including lost sale and call reports, sales offers, price lists, invoices, and market research reports. A petitioner can use publicly available data sources to value the cost of production and associated costs of materials, labor, energy, and packing, plus an amount for selling, general, and administrative expenses, overhead, and profit, according to the guidance. When analyzing a subsidy allegation, Commerce determines whether a petition contains reasonably available information and adequate supporting documentation relevant to the financial contribution,

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<sup>27</sup>19 U.S.C. §§ 1671a(c)(4), 1673a(c)(4).

benefit, and specificity of each countervailable subsidy alleged, according to Commerce guidance.

- *Evidence of material injury and causation.* Petitions must include reasonably available information to support the allegation that there is material injury to the domestic industry by reason of the allegedly dumped or subsidized imports. Commerce reviews the petition to see whether it contains sufficient evidence of material injury or threat of injury and causation that meets the requirements for initiation. Information related to the types of material injury the domestic industry has experienced, or is threatened with, could include data on price effects in the U.S. market, or declining net sales, profitability, and financial performance. Commerce guidance states that key elements of the injury allegation include
  - an analysis of subject import volume and value data for the past 3 years and year-to-date interim periods;
  - an analysis of market share, U.S. consumption, and prices;
  - evidence of the types of material injury the domestic industry has experienced, or is threatened with; and
  - a discussion of the causal link between the allegedly dumped or subsidized imports and the injury experienced by the domestic industry.

Commerce uses an initiation checklist to ensure that, in each proceeding, it systematically evaluates the accuracy and adequacy of information in each petition against requirements outlined in relevant laws and regulations. Commerce uses this checklist to compile information from the petition and indicate how the petitioner meets the specific requirements for initiation set forth in the regulations. The checklist includes Commerce's detailed analysis of the petitioner's allegations of industry support, dumping or subsidization, and injury. Commerce places the checklist on the record of the proceeding after initiation.

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## Information Certification Requirements

Information certification requirements help ensure that the information parties submit in an AD/CVD proceeding is accurate and complete, and inform parties of the possible criminal sanctions for false statements. In 2013, Commerce amended its regulation to ensure that parties and counsel/representatives are aware of potential consequences of false



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certifications.<sup>28</sup> Petitioners and any persons providing factual information in connection with a proceeding are required to certify that the factual information they submit is accurate and complete to the best of their knowledge. In doing so, they acknowledge possible criminal sanctions for willfully making false statements, and acknowledge that the information they provide is subject to verification or corroboration by Commerce.<sup>29</sup> Additionally, if a party is represented by counsel, each submission of factual information must also be accompanied by a counsel certification. Commerce's regulations include specific language for company and counsel certifications.

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## Independent Collection and Corroboration of Information

After the initiation phase, the agencies do not rely solely on the information provided in the petition. In the investigation phase, Commerce and USITC independently obtain relevant data to make determinations in an AD/CVD proceeding and evaluate the accuracy and adequacy of information provided by parties.

In the initiation phase, Commerce uses the initiation checklist, mentioned above, to document how the agency reviewed the accuracy of information provided. In doing so, Commerce may sometimes collect additional data by polling the industry to determine whether the industry support requirements for a petition are met. Commerce training includes information about checking the replicability of data provided in the petition and outlines opportunities for staff to check calculations.

If Commerce has concerns about facts submitted in a petition, it will take steps to clarify information, according to agency officials. For example, the agency may send a supplemental questionnaire to the petitioner to address discrepancies and to help Commerce assess the information provided. Agency officials said that there is typically considerable communication between Commerce staff and petitioners clarifying information, such as when Commerce checks industry support or other calculations. Such communication, whether through supplemental questionnaires or memoranda to the file, becomes part of the official

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<sup>28</sup>See 19 C.F.R. § 351.303(g).

<sup>29</sup>There is a different certification requirement for foreign governments that does not include the language about the potential for criminal sanctions under U.S. law.

record, according to Commerce officials.<sup>30</sup> If petitioners cannot provide supporting information, Commerce officials stated that they may not be able to rely on corresponding statements and may adjust calculations using the available information on the record. These features can help mitigate the risk of false information. Officials we interviewed said they could not recall any instances in which a petition contained information that was demonstrably false.

In the investigation phase, Commerce and USITC seek to independently collect additional information to make their determinations and evaluate the accuracy and adequacy of information submitted by parties, rather than relying on information provided in a petition, according to USITC and Commerce officials. For example, the agencies send questionnaires to collect information from domestic and foreign producers, U.S. importers and purchasers, and foreign governments, among others. According to USITC officials, staff contact respondents or seek further information from other sources if there are inconsistencies in responses. Similarly, Commerce verifies the adequacy and accuracy of questionnaire information by conducting an examination of the records of the party that provided information. It also interviews company personnel who prepared the responses and are familiar with the sources of the data.

If an interested party fails to comply with the agencies' requests for information, the agencies may reach their determinations by using "an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."<sup>31</sup> This information can come, for example, from the petition, a final determination from the investigation, or any other information placed on the record. If the agencies rely on secondary information rather than information independently obtained in the course of an investigation, they may be required to corroborate that information from independent sources that are reasonably at their disposal to the extent practicable.<sup>32</sup> The independent collection of data and the corroboration of secondary information may guard against the

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<sup>30</sup>Amending a petition is permissible under the statute and Commerce's regulations. See 19 U.S.C. §§ 1671a(b)(1) and 1673a(b)(1); see also 19 C.F.R. § 351.202(e). According to Commerce, all amendments and supplemental submissions filed by the petitioner, in addition to the originally filed petition document, are considered part of the "petition" as a whole. Further, Commerce bases its initiation decision on information contained in the petition as a whole (including any amendments or supplements).

<sup>31</sup>See 19 U.S.C. § 1677e(b)(1).

<sup>32</sup>See 19 U.S.C. § 1677e(c).

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possibility of conducting an investigation using inaccurate or incomplete data.

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## Transparency of Case Information

The transparency in the AD/CVD process design stems from multiple opportunities for both the agencies and parties to review and comment on or challenge case information. Through Commerce's and USITC's electronic filing databases, all nonconfidential information on the record of all investigations is available to parties and the public, according to Commerce and USITC officials. At various stages of the investigation, parties have the opportunity to comment on and challenge information presented in an investigation. The public case record and requirement for agencies to publish the facts and conclusions supporting their determinations provides transparency to all parties and the public on how the agencies make evaluations.

For example, in the initiation phase, Commerce checks industry support calculations, but parties opposed to the imposition of duties may also challenge the calculations. Commerce officials report that it is common for parties to challenge the level of industry support for a petition, and Commerce may request additional information from the petitioner to demonstrate sufficient industry support. Commerce maintains an official record of each AD/CVD proceeding that includes, among other things, all factual information obtained during the course of each segment of a proceeding. The official record may include information that is public, business proprietary, privileged, or classified. Commerce also maintains a public record of each AD/CVD proceeding that contains public information, including public versions of transcripts and determinations. Further, any concerns communicated by Commerce to the petitioners are formally included on the public record, to the extent they are based on public information, according to Commerce officials.

In the investigation phase, parties and nonparties have opportunities to present legal and factual arguments, for example, by participating in hearings before USITC or submitting written statements that become part of the public record. Parties in support and in opposition to the imposition of AD/CV duties also have opportunities to comment on information on the public record and rebut opposing statements. For example, in 2013, we reported that trade lawyers may ask Commerce to send a supplemental questionnaire to collect additional data from the foreign producer if they discover that data collected by Commerce from foreign

respondents may not be accurate.<sup>33</sup> Before USITC makes its final determination, parties also have the opportunity to make final comments on the accuracy, reliability, or probative value of information on the record on which they have not previously had an opportunity to comment. Additionally, parties to Commerce's proceedings may file case and rebuttal briefs with arguments for the agency to consider in a final determination, according to Commerce officials.

Commerce and USITC are required to publish notice of their initiation, preliminary, and final determinations, as well as the public facts and conclusions supporting those determinations, in the Federal Register.<sup>34</sup> Additionally, the initiation checklist that Commerce uses to systematically evaluate a petition becomes a part of the record, and Commerce publishes it online. In the investigation phase, Commerce is required to publish information on the methodology it uses to calculate dumping margins and countervailable subsidy rates. USITC is also required to publish the facts and conclusions supporting its material injury determination. USITC also provides all parties to the investigation public versions of the USITC staff report and confidential access to certain authorized applicants under an administrative protective order. The staff report presents and analyzes statistical data and other information collected through questionnaires, field visits, interviews, and issues raised by parties in the proceedings.

Commerce and USITC officials we spoke with did not see false or misleading petition information as an issue, in part because of the features of the AD/CVD process design that contribute to transparency. While firms may submit information with discrepancies, USITC officials stated that they follow up with firms or review other sources when this occurs, and opposing parties may flag inconsistencies in the case file. Similarly, Commerce officials stated that they clarify information with firms or seek alternative data, and firms are actively adding to and rebutting information on the record. This activity is documented and publicly available online.

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## The Law Contains No Provision for USITC to Consider an Order's Potential Effects on

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<sup>33</sup>[GAO-13-575](#).

<sup>34</sup>See 19 U.S.C. § 1677f.

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## Downstream Purchasers, Though Domestic Market Information May Inform Its Injury Determination

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### Purchaser Information and Conditions of Market Competition May Inform USITC's Determination of Injury to Domestic Industry

During its investigation, USITC solicits downstream purchaser information in an effort to understand conditions of competition in the product's domestic market and to determine potential injury to the domestic industry. This information can include quantitative data (e.g., purchasing volumes or the percentage of a manufacturer's total production cost accounted for by the product) as well as qualitative information on the conditions of the market (e.g., business cycle seasonality or major factors affecting product purchases). USITC staff combine purchaser responses to USITC's questionnaires with information gleaned from U.S. importers and producers, as well as other market information, to analyze how the domestic market for the product in question operates, according to USITC officials. USITC's final AD/CVD opinions includes the results of this analysis in the section on "Conditions of Competition in the U.S. Market". These analyses of market conditions can differ depending on the subject product and can include a variety of information such as demand and supply considerations, product substitutability, marketing trends, channels of distribution, and other factors.

USITC officials stated that this analysis of market conditions plays a role in determining whether the injury to the domestic industry is by reason of imports of the subject merchandise. There may be other economic factors producing adverse effects on the domestic industry, such as non-subject imports; changes in technology, demand, or consumer tastes; competition among domestic producers; or management decisions by domestic producers, according to USITC.

In addition to USITC's solicitation and analysis of purchaser information, purchasers and other nonparties may also submit relevant information during case proceedings. USITC staff generally hold a public conference approximately 3 weeks into the preliminary phase of an investigation where parties can present arguments for or against the imposition of AD/CV duties. According to USITC officials, the conference also provides an opportunity for USITC staff to ask initial questions of the parties and begin building their own understanding of the case. Nonparties may

request permission in advance of the conference to present a brief statement of their position and may submit a written statement afterwards. If the investigation progresses to a final determination, USITC holds a public hearing. As with the public conference, nonparties may request permission to present their views at the hearing and may submit pre- or post-hearing written statements. All information submitted at these proceedings becomes part of the case's official public record. Whether solicited by USITC or volunteered during proceedings, purchaser information provides essential context to USITC's injury determination, according to USITC officials.

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### U.S. AD/CVD Law Does Not Contemplate USITC Considering Economic Effects on Downstream Purchasers

The current AD/CVD law contains no provision for USITC to consider potential negative economic effects on downstream purchasers (i.e., industries, retailers and consumers) when determining injury to domestic producers, according to USITC officials. Officials stated that USITC's injury determination focuses exclusively on injury to domestic producers.

By contrast, the officials noted that USITC also conducts global safeguard investigations under Section 201 of the Trade Act of 1974, where, after USITC determines serious injury to the domestic industry, the case goes to the President.<sup>35</sup> When making a final Section 201 determination, the law requires the President to consider U.S. national economic and security interests, including the proposed remedy's possible impact on U.S. consumers and on other U.S. industries, among other things.<sup>36</sup> However, such consideration is not a part of AD/CVD law, according to USITC.

According to Commerce and USITC, the WTO Agreements permit WTO member states to consider the interest of the public when adopting a measure affecting their domestic industry, trade, and economy. Such consideration is sometimes termed a "public interest test," the concept of which, according to Commerce, is to balance the economic interests of various operators such as consumers of imported products, producers of

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<sup>35</sup>See 19 U.S.C. § 2251.

<sup>36</sup>See 19 U.S.C. § 2253. Section 201 or "safeguard" actions are actions the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs. These could include, for example, the imposition of additional tariffs or quotas on imports.

the subject merchandise, exporters, and possibly organizations or entities that represent consumers. For example, the European Union, New Zealand, Canada, and the United Kingdom include some form of public interest testing as part of their AD/CVD process, according to their public websites.

According to Commerce officials, public interest testing has been a subject of conversation at the WTO. For example, in 2005, some WTO members proposed the inclusion of a public interest provision in the WTO Anti-Dumping Agreement; this would require an importing member to take the effects of an antidumping measure on other sectors of its economy into consideration before applying the measure.<sup>37</sup> In particular, the proposal focused on providing persons who may be affected by an antidumping measure the opportunity to comment on the matter and to have their views considered before an antidumping measure is applied. The proposal suggested some factors that could guide comments, including increased costs for the industrial users, consumers, importers, wholesalers, and retailers of the product under investigation.

However, according to Commerce officials, the U.S. government has consistently opposed the integration of a public interest test into WTO rules for AD/CVD decision-making. For example, Commerce officials provided talking points outlining the U.S. position on this issue, which they said had been delivered at the WTO and in other public forums. One concern noted in the talking points is that it can also be in the public interest to prevent injurious pricing or subsidization in international trade. Specifically, there was concern that, while taking the side of consumer groups or users and traders of the dumped imports could result in a short-term windfall, there could be longer-term consequences of not addressing injurious pricing or subsidization. For example, in the long term, cheap imports might be supplanted by monopolistically priced imports that could injure the public as well.

Furthermore, the talking points cited the concern that a mandatory public interest test could politicize the use of AD/CVD measures, as this kind of consideration is generally inherently policy-oriented, political, and subjective. They also mentioned that some countries had raised concerns as to whether such public interest analyses could be conducted objectively. Finally, the talking points posited that consideration of the public's interest is best expressed through the laws that a government chooses to adopt and the manner in which such laws are administered.

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<sup>37</sup>World Trade Organization, Negotiating Group on Rules, *Further Submission on Public Interest*, TN/RL/GEN/53, (July 1, 2005).

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Moreover, the U.S. position was that WTO member governments were free to implement public interest testing if they so chose, but that it should not be a mandatory element of all WTO members' AD/CVD processes.

Commerce and USITC officials characterized their AD/CVD investigations as independent, fact-based, and in conformance with existing law. They also noted the various opportunities during AD/CVD proceedings for outside entities to make their concerns known, as discussed above. Commerce officials further stated that political considerations (including consumer or downstream industry interests) should not factor into AD/CVD determinations.

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## Agency Comments

We provided a draft of this report for review and comment to Commerce, DOJ, FTC, and USITC. Commerce, DOJ and USITC did not provide written comments on the draft report but provided a number of technical comments that we incorporated as appropriate. FTC did not provide written or technical comments to the draft report.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 28 days from the report date. At that time, we will send copies to the appropriate congressional committees, the Secretary of Commerce, the Attorney General of the United States, the Chair of FTC, and the Chairman of USITC. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-8612 or at [gianopoulosk@gao.gov](mailto:gianopoulosk@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix II.

Sincerely yours,



Kimberly M. Gianopoulos  
Director, International Affairs and Trade



# Appendix I: Antidumping and Countervailing Duty Process Results

Table 2 shows totals for antidumping and countervailing duties (AD/CVD) process results as of May 9, 2022, for petitions filed in fiscal years 2011 through 2021.

**Table 2: Antidumping and Countervailing Duty (AD/CVD) Process Results, Fiscal Years 2011–2021**

Category	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	Total
<b>Total petitions submitted</b>	<b>16</b>	<b>25</b>	<b>57</b>	<b>31</b>	<b>64</b>	<b>58</b>	<b>77</b>	<b>56</b>	<b>53</b>	<b>114</b>	<b>34</b>	<b>585</b>
Petitions withdrawn in the initiation phase	0	0	0	0	0	0	0	0	0	0	0	0
Petitions denied for investigation	0	0	0	0	0	0	0	0	0	0	0	0
Petitions approved for investigation	16	25	57	31	64	58	77	56	53	114	34	<b>585</b>
Petitions withdrawn in the investigation phase, prior to USITC (preliminary) determination of injury	0	0	0	0	0	0	1	1	0	0	0	<b>2</b>
Investigations terminated because of USITC (preliminary) determination of negligibility	0	0	0	4	1	4	0	2	4	0	0	<b>15</b>
Investigations resulting in a negative USITC (preliminary) determination of injury	0	0	0	0	0	0	3	1	0	0	0	<b>4</b>
<b>Subtotal of investigations not resulting in USITC (preliminary) affirmative determinations of injury</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>4</b>	<b>1</b>	<b>4</b>	<b>4</b>	<b>4</b>	<b>4</b>	<b>0</b>	<b>0</b>	<b>21</b>

**Appendix I: Antidumping and Countervailing  
Duty Process Results**

<b>Category</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>2021</b>	<b>Total</b>
Affirmative USITC (preliminary) determinations of injury	16	25	57	27	63	54	73	52	49	114	34	<b>564</b>
Petitions withdrawn in the investigation phase, following USITC (preliminary) determination of injury	0	0	2	0	0	0	0	0	0	0	1	<b>3</b>
Investigations terminated because of negative Commerce (final) determination of dumping or subsidies	0	1	8	4	3	0	1	2	1	5	0	<b>25</b>
Investigations suspended because of Commerce's implementation of a suspension agreement	0	0	0	2	0	0	0	0	0	0	0	<b>2</b>
Investigations terminated because of USITC (final) determination of negligibility	0	0	2	0	3	2	0	0	0	1	0	<b>8</b>
Investigations resulting in a negative USITC (final) determination of injury	8	10	18	4	3	3	19	0	12	2	0	<b>79</b>
<b>Subtotal of investigations not resulting in USITC (final) affirmative determinations of injury</b>	<b>8</b>	<b>11</b>	<b>30</b>	<b>10</b>	<b>9</b>	<b>5</b>	<b>20</b>	<b>2</b>	<b>13</b>	<b>8</b>	<b>1</b>	<b>117</b>
Affirmative USITC (final) determinations of injury	8	14	27	17	54	49	53	50	36	106	16	<b>430</b>
<b>Total investigations resulting in AD/CVD orders</b>	<b>8</b>	<b>14</b>	<b>27</b>	<b>17</b>	<b>54</b>	<b>49<sup>a</sup></b>	<b>53</b>	<b>52<sup>b</sup></b>	<b>36</b>	<b>106</b>	<b>16<sup>c</sup></b>	<b>432</b>

Legend: USITC = U.S. International Trade Commission  
Source: Commerce and USITC data. | GAO-23-105794

Notes: The table above represents a snapshot of the lifecycle of all AD/CVD petitions filed from fiscal years 2011 through 2021 as of May 9, 2022. It does not include Commerce's preliminary determination of dumping or countervailable subsidies because an investigation continues regardless of the outcome of Commerce's preliminary determination (i.e., no investigations terminate because of

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**Appendix I: Antidumping and Countervailing  
Duty Process Results**

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this determination). Commerce and USITC provided comments to clarify these data, which are reflected in the notes below. There are a few instances where USITC found that Commerce's scope of investigation covered more than one domestic like product, according to Commerce officials. In these cases, USITC made distinct injury determinations for each domestic like product covered by the scope; as a result, the AD/CVD orders issued by Commerce may not have covered the same subset of products.

<sup>a</sup>The number of investigations resulting in AD/CVD orders reported for petitions filed in fiscal year 2016 includes AD/CVD orders that were ultimately issued following remand determinations in a proceeding on truck and bus tires from China.

<sup>b</sup>In fiscal year 2018, Commerce self-initiated two investigations, both of which resulted in AD/CVD orders. These self-initiated investigations are reflected in the reported number of investigations resulting in AD/CVD orders.

<sup>c</sup>As of May 9, 2022, 16 of the 34 petitions filed in fiscal year 2021 had resulted in AD/CVD orders. The investigations related to the other 17 petitions had not yet reached the final determination phase at either Commerce or USITC.

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## Appendix II: GAO Contact and Staff Acknowledgments

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### GAO Contact

Kimberly M. Gianopoulos, (202) 512-8612 or [gianopoulosk@gao.gov](mailto:gianopoulosk@gao.gov)

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### Staff Acknowledgments

In addition to the contact named above, Adam Cowles (Assistant Director), David Hancock (Analyst-in-Charge), Tania Uruchima, Debbie Chung, Neil Doherty, Terry Richardson, and Nicole Willems made key contributions to this report.

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