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INTERNATIONAL TRADE LAW AND CONSULTING

**DEFENSE OF A NON-MARKET ECONOMY "NME"
ANTIDUMPING INVESTIGATION**

An antidumping investigation is unlike any other litigation that most companies will have experienced. The tight deadlines, unusual information requests, and particular data requirements are unique to this kind of proceeding. In addition, these cases involve on-site scrutiny by U.S. government officials with a low tolerance for error or misstatement and present an ever-present possibility of punitive assumptions being made where data is incomplete or insufficiently verifiable.

The defense of an antidumping duty investigation requires substantial effort and substantial expense. It involves investigations by two separate U.S. government agencies. The first is an investigation of sales and prices in the United States and the factors of production for the manufactured product, to establish whether U.S. prices are below the “normal value” -- which is the definition of dumping. This phase of the proceeding is done by the Department of Commerce (DOC). The second phase is an investigation of whether the imports at issue cause material injury to the U.S. industry. This phase of the investigation is done by the International Trade Commission (ITC) (see section on ITC Investigations).

Defending such a complex and unconventional investigation requires the assistance of U.S. legal counsel familiar with the peculiarities of U.S. antidumping law. The foreign respondent must dedicate a considerable amount of managerial time and attention to the multiple data requests that are involved. Depending on need, a case might also involve outside consultants, such as economists, computer specialists, or cost accountants familiar with DOC practice.

The following outline describes the primary tasks that a company and its legal counsel must complete at each stage of the antidumping investigation.

A. DOC Dumping Investigation

The U.S. Department of Commerce decides whether a company is dumping, and if so, imposes the dumping rate that must be deposited for future imports. DOC carries out a two-phase investigation into the pricing and sales practices of the company in the United States and into the factors of production in the home market. The DOC issues questionnaires which require submission of an extensive computer listing of each individual sale to the United States the company made during a six months investigation period, together with detailed supporting documentation and explanations. The company must also report the factors of production for the product, that is, list the quantity of each input that the company uses to produce the exported product. Such inputs include energy, raw materials, labor hours, etc. The DOC then values those inputs (using surrogate producers in other countries) to establish the normal value against the U.S. selling prices are compared. If the U.S. selling price for a particular product is below the normal value, the company is considered to be dumping.

Not every manufacturer or exporter in a country need be selected for the investigation, however. Usually the DOC tries to cover 40 to 50 percent of total U.S. sales volume from each country, and if it can do so with just a few large exporters, it will issue questionnaires only to those companies, those companies will receive their own individual rate. All other exporters will

receive the weighted average rate of those companies who are investigated. However, to qualify for the average rate, a non-investigated exporter must submit to DOC a separate rates application at the very beginning of the proceeding (i.e., within 60 days of the initiation of the case).

On the basis of the submitted information (and taking into account any objections by the petitioning U.S. industry), the DOC will establish a preliminary dumping rate, which is the percentage by which U.S. prices are found to be lower than the normal value. From that time forward, all imports of the product under investigation are subject to an antidumping duty deposit in the amount of the preliminary dumping rate.

After the company has submitted its questionnaire response, the DOC then conducts an extensive on-site verification of the data submitted, normally taking 5 to 10 days. Each item of information submitted must be verified from the company's records, and the DOC must assure itself as well that the company's accounting system, its purchasing and selling practices, and its cost accounting all meet the DOC's standards. Failure to satisfy the DOC in this verification can result in punitive assumptions being imposed, which can significantly increase the dumping margin. After the verification the DOC permits the parties to submit legal argumentation in the form of briefs and a hearing. Thereafter the DOC publishes its final dumping margin, which is substituted for the preliminary margin.

If a company's final margin is less than 2 percent, the case is terminated with respect to that company. Otherwise all future entries are subject to a duty deposit at the rate found. Each year thereafter, an annual review may be requested in which entries in the past year are examined in order to establish the actual dumping margin. The deposit rate is adjusted to reflect the new rate, and excess deposits may be refunded.

In responding to the DOC dumping investigation, the central tasks to be performed by a foreign company's legal counsel include the following:

- Internally review the company's selling and pricing practices to identify potentially important issues regarding product characteristics, selling practices, market differences, movement and sales expenses, and pricing;
- Provide the DOC with information and proposals regarding product matching and other issues relevant to the case;
- Prepare the Separate Rates application and provide other preliminary information to the DOC regarding the company's quantity and value of sales;
- If the company is selected as a mandatory respondent, prepare a detailed work plan to guide the company in collecting, checking, and formatting the data required in the investigation;
- Establish and maintain open dialogue with the DOC investigators in order to ensure their understanding of the data and encourage favorable determination of discretionary issues;

- Prepare for and respond to the DOC's initial dumping questionnaire. This will include a detailed narrative response providing information on the company's sales to the United States and the factors of production in China;
- Provide information regarding the choice of surrogate values to use in valuing the factors of production;
- Prepare computer files which provide details of the company's sales, selling expenses, production inputs, and other relevant data for the markets being investigated;
- Perform computer analysis of the data before submission to the DOC to ensure it is accurate and to determine how best to present various issues;
- Establish an estimate of the potential duty that can be anticipated under various scenarios, to identify significant issues in the case;
- Respond to one or more supplemental questionnaires requesting additional data and clarification;
- Prepare for on-site verification at the company's home office as well as at its U.S. importer or subsidiary (if any), including thorough review and internal audit to ensure that all submitted information is verifiable, organized, and presented in the required manner;
- Assist with verification, including responses to data and evidence requests and provision of supplemental information;
- Review the DOC's verification report for indications of issues requiring legal argumentation;
- Review preliminary determination as well as computer program used by the DOC to identify legal, factual, or programming errors;
- If dumping margins are found in preliminary determination, assist in complying with customs regulations;
- Prepare and submit legal briefs and participate in oral hearing advocating the legal position of the company;
- If final antidumping margins are found, assist in strategic analysis of future marketing and pricing decisions.
- Prepare case for appeal to the U.S. Court of International Trade if the DOC committed a procedural or substantive error in its conduct of the investigations

The DOC's investigation normally takes 7-8 months (if there are no postponements).