

LAW OFFICES OF NITHYA NAGARAJAN, LLC

INTERNATIONAL TRADE LAW AND CONSULTING

Antitrust Guidelines For Clients in Antidumping/Countervailing Duty Trade Matters

The Law Offices of Nithya Nagarajan, LLC realizes that in antidumping/countervailing duty trade matters, competitors must sometimes combine forces or collaborate to effectively participate in proceedings before the Department of Commerce and/or the International Trade Commission. Such collaboration may be benign and in many cases even pro-competitive. However, there are instances where benign or pro-competitive collaboration may be considered suspect or anti-competitive behavior that may implicate the U.S. antitrust laws. We have developed these basic guidelines to help you ensure that participation and cooperation with other respondents in an antidumping/countervailing duty administrative matter does not lead to future antitrust concerns.

Perceived Anti-Competitive Behavior

Common actions that occur during strategy and planning meetings during the conduct of an antidumping/countervailing duty trade matter may be considered per se illegal in the context of an antitrust action. One of the most common actions is collaboration or agreement to conduct business in a particular manner. Common agreements include agreements to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. This is commonly referred to as explicit or tacit collusion. The U.S. Courts presume such agreements to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, precompetitive benefits, or overall competitive effects.

Agreements which are not considered per se illegal are examined under a rule of reason analysis. The central question is whether the relevant agreement between competitors likely harms competition. This analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances.

Potentially Suspect Behavior to be Avoided During Meetings

Situations where agreements may arise, albeit inadvertently, typically occur when respondents attempt to identify how to address an antidumping or countervailing duty administrative matter and still continue to import merchandise and continue to grow their business. We advise our clients not to discuss, for example, the following matters at meetings:

- future market allocation;
- import requirements by product category;
- possible pricing of imported merchandise as compared with other importers and/or respondents;
- import pricing to address the impact of the additional antidumping/countervailing duties assessed at the end of a proceeding.

This list is not exhaustive and is merely illustrative of the types of common market strategy discussions that arise during the conduct of an antidumping/countervailing duty trade matter.

Historic discussion or review of past actions including the state of the industry, market penetration, products imported, and market access are not considered suspect. If you have any questions as to whether certain discussions may implicate antitrust laws, do not hesitate to contact our attorneys.