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DEFENSE OF COUNTERVAILING DUTY ADMINISTRATIVE REVIEW

A U.S. anti-subsidy countervailing duty (CVD) administrative review is similar in many ways to the investigation process but is still a unique litigation process that most companies will not have experienced before. 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 a countervailing duty review requires substantial effort and substantial expense. It involves investigations by the U.S. Department of Commerce (DOC) into the amount and types of general and specific subsidies given by the host government to individual companies exporting merchandise subject to a countervailing duty order to the United States. The DOC not only examines an individual companies' records for the amount and types of subsidies received but it also reviews the laws and programs of the responding company's government and requires the host government to respond to extensive questionnaires. In the review, the DOC seeks to establish whether exports to the U.S. are continuing to be priced in a manner such that they are benefiting from either general or specific subsidies.

Defending such a complex and unconventional investigation requires the assistance of U.S. legal counsel familiar with the peculiarities of U.S. countervailing duty law. The foreign respondent and host government 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 countervailing duty review.

DOC Countervailing Duty Administrative Review.

The U.S. Department of Commerce decides whether a company receiving unlawful host government subsidies, and if so, calculates the countervailing duty rate that must be deposited for future imports. In a CVD administrative review, the DOC examines the government programs and benefits the company has availed itself of, and determines whether they are permissibly general, or impermissibly specific to that industry. If they are found to be unlawful, a duty or cash-deposit is imposed in the amount of the subsidy. The DOC issues various questionnaires, which require extensive responses to numerous questions. In addition, the responding company must submit computer data a listing of all monetary benefits received in the various government programs under review, all with detailed supporting documentation and explanations.

However, not every manufacturer or exporter in a country is selected by the DOC for the administrative review. Usually the DOC tries to cover 40-50 percent of total U.S. sales volume from each country, and if it can do so with just a few large companies, it will issue questionnaires only to those companies. All other companies will receive the average rate of those companies who are investigated. A company that is not required to submit a response may nevertheless wish to volunteer for the review, since a company that proves to have a subsidy rate of less than 0.5 percent is considered to have a margin of zero and can with diligent efforts be excluded from the countervailing duty case if they continue to prove that their margins are below this rate for three consecutive years. All other companies, whether reviewed or not, continue to be subject to the order and may have to continue participate in annual administrative reviews in the future to receive a lower rate.

After the company has submitted its questionnaire responses, 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 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 CVD 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 CVD margin, which becomes the new cash-deposit rate for all future entries

As noted above, if a company's final margin is less than 0.5 percent, the cash-deposit rate is considered to be zero 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 or CVD margin. The deposit rate is adjusted to reflect the new rate, and excess deposits may be refunded.

In responding to the DOC administrative review, the central tasks to be performed by a foreign company's or host government's legal counsel include the following:

- Prepare a detailed work plan to guide the company in collecting, checking, and formatting the data required in the administrative review;
- 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 countervailing duty questionnaire. This will include a detailed narrative response providing information on the company's accounting systems; program benefits received; and the total volume and value of sales and the total volume and value of export sales to the United States;
- Provide information about all government programs availed of, and all benefits received;

- Coordinate with the home government, which will also be required to provide subsidy information;
- 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, 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 the DOC to identify legal, factual, or programming errors;
- Prepare and submit legal briefs and participate in oral hearing advocating the legal position of the company;
- If final countervailing 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 administrative review process normally takes 10 to 12 months.