

LAW OFFICES OF NITHYA NAGARAJAN, LLC
INTERNATIONAL TRADE LAW AND CONSULTING

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

A non-market economy antidumping investigation is unlike any other litigation and requires specialized experience and knowledge to defend. The time-sensitive 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 an ever-present possibility of punitive assumptions being made where data is incomplete or insufficiently verifiable. The Law Offices of Nithya Nagarajan, LLC can assist companies with this entire process enabling them to have continued access to the U.S. market.

The defense of an antidumping duty investigation requires substantial effort and substantial expense. It involves investigations by two separate U.S. government agencies.

(1) The first is an investigation of sales and prices in the United States and the costs 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 conducted by the U.S. Department of Commerce (DOC).

(2) The second is an investigation of whether the imports at issue cause material injury to the U.S. industry. This phase of the investigation is conducted by the International Trade Commission (ITC) and is discussed separately in the section on ITC Investigations.

Both agencies must make affirmative determinations in order for the investigatory process to be completed and an antidumping order on all future imports to be instituted.

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. However, if the foreign respondent devotes the necessary resources and time to this process, it may be rewarded with a lower AD rate, and a significant business advantage over its competitors. The case also involves outside consultants, such as economists, computer specialists, or cost accountants familiar with DOC practice.

Many firms will promise an easy or guaranteed success in an antidumping duty investigation, but in reality that is not possible as a NME antidumping duty investigation involves significant variables and decisions by the United States Government that are not in the control of the company. Rather a company involved or subject to an antidumping duty investigation must, along with its legal counsel, focus on ensuring that it is able to provide the most accurate and detailed information possible in its information requests.

If a company is found to be dumping, DOC will issue a preliminary affirmative determination that establishes a preliminary dumping rate. From the preliminary determination forward, all imports of the product under investigation are subject to an antidumping duty deposit in the amount of the preliminary dumping rate. After further analysis and an on-site verification, 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.

Another aspect of an NME investigation, which is unique to an NME case, is the Separate Rate Investigation, in which the DOC determines whether or not a particular company demonstrates independence with respect to its export activities such that it should be eligible for either an individually calculated rate, or a rate based on a weighted average of the rates applied to other investigated companies. Such "separate rates" are often significantly lower than the NME-wide rate under a particular antidumping duty order. However, to qualify for the average rate, a non-investigated exporter must submit to DOC a separate rate application at the very beginning of the proceeding (i.e., within **30 days** of the initiation of the case).

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

- 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 a 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.
- Prepare and respond to the DOC's information requests on 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.
- Provide research, data analysis, and other 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 the 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). If there are postponements then the investigation will take up to 12 months to complete.