

LAW OFFICES OF NITHYA NAGARAJAN, LLC

INTERNATIONAL TRADE LAW AND CONSULTING

DEFENDING A MARKET ECONOMY ANTIDUMPING DUTY REVIEW

An antidumping duty review is similar in many ways to an antidumping investigation but it is still a unique type of litigation that most companies will never have experienced. The review is conducted by the U.S. Department of Commerce (DOC) and involves complex investigation methodologies that present considerable difficulties. The tight deadlines, voluminous information requests, and particular data requirements are specialized to this kind of proceeding. The Law Offices of Nithya Nagarajan, LLC can assist companies with this administrative review process and enable them to have continued access to the U.S. market.

The defense of an antidumping duty review requires substantial effort and substantial expense. It involves analysis by the DOC into the sales and prices in the United States and in many instances the cost of production for the manufactured product. In the administrative review, the DOC seeks to establish whether U.S. prices are below normal value -- which is the definition of dumping. It also seeks to determine the liquidation rate for the merchandise that entered during the review period which is critical to companies as this is the ultimate bill that a company has to pay in terms of its antidumping duties.

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 DOC decides and determines the rate at which a company is dumping, and if so, imposes the dumping rate that sets the cash deposits of estimated antidumping duties for future imports. In the review it also sets the liquidation rate which is the amount that U.S. Customs will ultimately collect from the importers. In the review process, DOC examines the pricing and sales practices of the company in the United States and home market and in many instances the cost 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 1- or 1 ½-year investigation period, together with detailed supporting documentation and explanations. The company must also report its costs of production for the product, if an allegation is made that the company is selling its merchandise below cost. The DOC then compares the cost of the product to its home market selling price to determine if the sales are below cost. Then it pools the remaining home market sales to calculate a normal value. 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 administrative review. The DOC usually tries to cover a majority of the percentage 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. In recent years, the DOC has been selecting only the 2 largest exporters, regardless of how much market coverage they represent. All other exporters will receive the average rate of those companies who are investigated.

The key to a successful defense of an antidumping duty administrative review is to ensure that a company's submitted information is accurate and complete as this is the information that DOC will use to establish the preliminary dumping rate. In a review, this is only a preliminary rate (subject to legal argument and analysis by both sides) and does not affect the cash deposit rate already required on imports. DOC's analysis is intensive and exhaustive as DOC must assure itself 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 the administrative review process can result in punitive assumptions being imposed, which can significantly increase the dumping margin. After DOC completes its preliminary results, the parties submit legal argumentation in the form of briefs and a hearing in order to ensure that its issues are fully examined and analyzed for the final results. Thereafter the DOC publishes its final dumping margin, which is substituted for the antidumping duty margin imposed by the investigation or a previous review.

If a company's final margin in an antidumping duty review is calculated to be less than 0.5%, that company's exports will not be subject to the cash deposit requirement. Otherwise all future entries are subject to a cash deposit of estimated antidumping duties in an amount equal to the antidumping duty rate times the entered value of the merchandise. Excess deposits required by higher cash deposit rates will be refunded with interest.

In responding to the DOC antidumping duty review, the central tasks required of 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 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 its sales in the home market (i.e. India);
- Prepare computer files that provide details of the company's sales, selling expenses, production costs, 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 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 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 review normally takes 12-18 months (including any postponements).