

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

**DEFENSE OF A NON-MARKET ECONOMY “NME”
ANTIDUMPING DUTY REVIEW**

An antidumping duty review is similar in many ways to an antidumping duty investigation and is still a complex proceeding unlike any litigation that most companies will have experienced. When the review involves a country classified by the U.S. Department of Commerce as a Non-Market Economy (or “NME”), such as China or Vietnam, the review involves distinct investigation methodologies that present additional difficulties. 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 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 unique administrative review process and enable them to have continued access to the U.S. market.

The defense of a NME antidumping duty review requires substantial effort and expense. It involves analysis by the U.S. Department of Commerce (DOC) into the sales and prices in the United States and the “factors 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 whether a company is dumping, and if so, imposes the dumping rate that sets what will be required as cash deposits of estimated antidumping duties with future imports. The 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 1- or 1 ½-year 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 which 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. The DOC usually 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. 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 (i.e. separate 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 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 research, analysis and key information regarding the choice of surrogate values to use in valuing the factors of production;
- Prepare computer files that 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 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 review normally takes 12-18 months to complete.