

# **LAW OFFICES OF NITHYA NAGARAJAN, LLC**

## **INTERNATIONAL TRADE LAW AND CONSULTING**

### **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 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 complex administrative review process and enable them to have continued access to the U.S. market.

The defense of a countervailing duty review requires substantial effort by the companies examined or wishing to be examined. It involves analysis 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 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 CVD rate, and a significant business advantage over its competitors.

The DOC 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.

The key to a successful defense of a countervailing 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 countervailing 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.

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.