

U.S. Antidumping Law

Presentation for “How Jiangsu Business Responds To Foreign Anti-Dumping Actions: Rules & Practice” on December 11, 2004, at The East China Hotel, 67 West Beijing Road, Nanjing, PRC

Dumping Margin

Dumping Margin: Differences between the foreign and domestic market prices

Dumping Margin = Normal Price (domestic price) – Export Price (foreign price).

Dumping Margin = $\frac{\text{Normal value} - \text{Export Price}}{\text{Export Price}} * 100$

Actionable Dumping

Is there a dumping?

Does that cause material injury to industry?

Is this dumping Actionable?

Dumping causes or threatens to cause material injury to an established industry in the importing country that competes with the exporter, or it materially retards the establishment of an industry that would compete with the exporter.

Grounds to Contest Antidumping Duty

1. No dumping
2. No Material Injury
3. Not actionable
4. The amount of duty is not inmeasurate

Normal Value

Home Market Sale

Third Country Sale

Constructed Value

Home Market Sale

Weighted average price in the home market

Comparable Price

In the ordinary course of trade
For the like product
Destined for consumption in the exporting country
Averaging and sampling may be used for a significant volume of sales or a significant number of price adjustments

Third Country Sale

No viable market at home
Less than 5% of the quantity sold in countries other than the U.S.
Foreign like product
Sold for exportation
To the countries other than the U.S.

Constructed Value

Costs of production (labor, raw materials, energy, and other utilities, representative capital costs).
Actual amount of profit
Selling, general and administrative expenses
Cost of container, coverings, and other expenses
A surrogate for profit and expenses if actual data is not available

Factors to Determine a Non-market Economy

Convertibility of the country's currency
Free bargaining of wages
Foreign investment
Extent of government ownership
Government control over allocation of resources, pricing and output decisions

Export Price

Export Price = Ex-factory Price

Make Adjustments to Calculate Comparable Price

Packaging and freight
Levels of trade (LOT)
Physical features of the merchandise
Taxation
Volume
Circumstances of Sale (COS)
Others

Additions to Normal Value

Overseas packing costs

Deduction From Normal Value

Internal packing charges

Internal freight charge

Rebated or uncollected taxes

Constructed Export Price Offset

Capped at the amount of indirect selling expenses incurred in United States

Deduction from Export Price (or Constructed Export Price)

Delivery expenses

Export taxes

U.S. import duties

Deduction Unique to Constructed Export Price

Selling commission

Direct Selling expenses (credit expenses, guarantees, warranties)

(credit expenses incurred during production of the subject merchandise, prior to shipment)

Selling expenses paid by seller on behalf of purchaser

Indirect selling expenses

Expenses and profit for further manufacturing in the U.S.

When to Use Constructed Export Price

The sale contract is between two entities in the U.S. and executed in the U.S.

The exporter/producer is affiliated with the buyer

The sale was between a U.S. affiliate of a foreign producer and unaffiliated U.S. purchaser

Addition to Export Price

Overseas packing costs

Rebated or uncollected import duties

CVDs imposed on subject merchandise

Contestable Concepts

Comparable price

Ordinary course of trade

Like product

Reasonable addition to the cost

What third country should be used to obtain a comparable price

Calculation of the cost

Calculation of NV for NME Countries

Isolate Each Factor of the Production Process

Choose a Surrogate Economy Country

At Comparable Level of Economic Development

And Produces Comparable Merchandise

Assign a value to each factor of production equal to its cost in the surrogate country

Add to those values an estimated amount for profit and general expenses

Separate Company-Specific Margin

Absence of government control on a *de jure*, and *de facto* basis

De Jure Absence of Government Control

No restrictive stipulations on individual exporters' business and export licenses

Legislative enactments decentralizing control of companies

Formal measures by the government decentralizing control of the companies

De facto Absence of Government Control

Each Exporter sets its own export prices Independently of the Government and Other Exporters

Each Exporter Can Keep the Proceeds From its Sales

Decisions regarding sales pricing, contracting, appointment of management personnel, disposition of profits are not reviewed nor approved by government.

Documents that can prove absence of government control

Government regulations, company business license, business plan, price negotiation documents, financial statements, organization charts, sample sales documents, product sales literature, Contracts, Invoices, Records of Payments, correspondence

Factors to Consider What Constitute Like Products

1. Physical appearance
2. Interchangeability
3. Channels of distribution
4. Customer Perception
5. Common Manufacturing facilities and production employees,
6. Price, where appropriate

Injury Determination

Domestic industry is being materially injured, or threatened with material injury, or the establishment of a domestic is materially retarded by reason of dumped products.

Cumulatively assess the volume and effect of like imports from two or more countries is the imports compete with each other and with like products of the U.S. domestic industry.

Imports from a country is negligible if they account for less than 3% of the volume of all imports of such merchandise and if imports from all countries accounting for less than 35 do not exceed 7%.

Relevant Factors to Determine Material Injury

The volume of imports, the effect of imports on U.S. prices of like merchandise, and the effects that imports have on U.S. producers of like products, lost sales, market shares, profits, productivity i.e. actual and potential decline in output, return on investment, utilization of production capacity, effects on cash flow, employment, inventories, wages, growth, the ability to raise capital, investment, negative effects on the development and production activities of the U.S. industry,

Effect of imports on Price

Significant Price under-selling by the imported merchandise
Depresses prices to a significant degree or prevents price increases

Causation

Causal link between LTFV goods and material injury
Preclude subject imports from being a material factor if other sources of injury may have a predominant effect in producing harm. The other factors can be global oversupply, the learning curve, and non subject products, mismanagement of U.S. companies, etc.

Cumulate the Impact of Imports Subject to Antidumping investigation

ITC will assess cumulatively the volume and effects of imports from more than one country if these imports compete with each other.

ITC can cumulate the impact of imports subject to the antidumping investigation together with the impact of imports subject to the countervailing duty investigation.

Four Test of Cumulation

1. The degree of fungibility between the imports from the two countries
2. The presence of sales or offers to sell imports in the same geographic market from the two countries.
3. The existence of common or similar channels of distribution for imports from the two countries

4. Whether the imports from the two countries were simultaneously present in the market.

Who Initiate AD Investigations

Self Initiated by Department of Commerce (DOC)

Or a Petition Filed by an Interested Party such as:

1. a manufacturer, producer, or wholesaler in the U.S. of a like product
2. a certified or recognized union group of workers which is representative of the affected industry
3. A trade or business association with majority of members producing a like product
4. a coalition of firms, unions, or trade association representative of processors, or processors and growers.

Standing of a Petitioner

1. The domestic producers or workers who support the petition account for at least 25 percent of the total production of the like product, and
2. The domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by the portion of the industry expressing support for or opposition to the petition.

Procedural Process of Antidumping Case

File a petition with DOC and ITC

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DOC has **20 days** to decide if the petition is legally sufficient, if management has opposite view with the workers, DOC has **40 days** to decide initiation of investigation

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ITC make a determination whether there is reasonable indication of material injury within **45 days** of the date of filing of the petition or self-initiation, or within **25 days** after the date on which the ITC receives notice of initiation of the DOC has extended the period for initiation in order to poll the industry to determine standing.

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DOC conducts preliminary determination whether dumping is occurring within **140 days** after initiation. Reasonable Basis to believe that merchandise is being sold or is likely to be sold at less than fair value. (LTFV). If complicated, **190 days** after initiation.

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DOC order the suspension of liquidation of all entries of foreign merchandise, order the posting of a cash deposit, bond, or other appropriate security for each subsequent entry of the merchandise equal to the estimated margin of dumping

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DOC must issue its final LTFV determination within **75 days** after the date of its preliminary determination. **135 days** in case of extension.

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Within **120 days** of a DOC affirmative preliminary determination or **45 days** of a DOC affirmative final determination, whichever is longer, the ITC must make a final determination of material injury.

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DOC may suspend AD investigations based on agreements entered into with exporters

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DOC issue AD duty order within **7 days** of notice of an affirmative final ITC determination

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If it involves products from Canada and Mexico, NAFTA panel if either the U.S., Canadian or Mexican government requests.

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Otherwise, Judicial Review by U.S. Court of International Trade.

A summons and petition for review must be filed concurrently within **30 days** of publication of the final determination.

Stand of review: Whether the determination is supported by substantial evidence on the record or otherwise not in accordance with law; whether the preliminary determination is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

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U.S. Courts of Appeals for the Federal District

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WTO panel review

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WTO appellate body

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If WTO dispute settlement panel or appellate body finds an action by DOC or ITC is not in conformity with U.S. obligations, USTR may request DOC or ITC to render its determination not inconsistent with those WTO DSB findings or direct ITC to revoke an order or direct DOC to implement a determination.

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