TRADE ROANOKE
Insurance for Trade and Transportation

Antidumping and Countervailing Duties

As an Importer, What You Don't Know *Can* Hurt You…

Antidumping duty (ADD) and countervailing duty (CVD) statutes, originally dating back as far as 1916 in the U.S., are intended to protect domestic industries and producers from certain forms of perceived unfair foreign competition. As currently codified, administered and interpreted by the courts, they also create conspicuous hazards which can be financially devastating to the unwary/unprepared importer. Just what are ADD and CVD – and what are the hidden financial pitfalls they create for importers and their sureties?

Antidumping Duty

Under U.S. law, many goods are subject to "ordinary duties" based on their classification under the Harmonized Tariff Schedule of the United States (HTSUS). However, U.S. law also addresses certain situations in which goods are being sold to the U.S. at prices below the "normal value" (sometimes also referred to as "fair value" or "fair market value"). This essentially refers to sales to the U.S. at prices lower than those at which the goods are sold in their home market. It can also refer to situations in which goods are technically being sold for an amount less than their cost of production as calculated under the ADD laws. Selling to the U.S. at less than normal value is referred to as "dumping." If dumping occurs and a domestic industry is being injured, the International Trade Administration (ITA) of the U.S. Department of Commerce (USDOC) may instruct U.S. Customs and Border Protection (CBP) to assess ADD in addition to any ordinary duties applicable to those goods. This additional duty is designed to eliminate the unfair advantage enjoyed by the foreign entity engaging in such questionable pricing practices.

Countervailing Duty

Like ADD, CVD is designed to combat unfair advantages favoring foreign competitors. If a foreign government is paying a subsidy, bounty or grant on exports of certain goods, the foreign entity receiving the funds is able to price those goods lower than a U.S. supplier not receiving such payments. The assessment of CVD in addition to ordinary duties offsets or "countervails" these subsidies. It's possible for ADD and CVD to be assessed on the same goods.

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To simplify the explanations and examples going forward, this overview will usually refer only to ADD. While there are some technical differences between ADD and CVD processes, they are generally similar. Suppliers of goods may be variously referred to as "producers," "manufacturers," "suppliers," "shippers," "exporters" or possibly other terms. In this paper, the terms "manufacturer" and "foreign exporter" are used because they are consistent with terminology used in the "References" section of the ACE Secure Data Portal. In the context of ADD/CVD, a "manufacturer" may be a farming entity, a fishing entity or some other enterprise not actually engaged in manufacturing operations.

How Does the ADD/CVD Process Work?

The process begins with an investigation, usually initiated in response to a petition filed by members of an industry (including producers of agriculture/aquaculture products) in the U.S. alleging that goods are being sold to the U.S. at less than normal value or with the benefit of a subsidy. Questionnaires are sent to the manufacturers/foreign exporters allegedly involved. Responses to the questionnaires and other data are evaluated by the ITA and the International Trade Commission (ITC), a separate U.S. agency. Preliminary and final determinations are made by the ITA as to whether or not dumping or sales with the benefit of subsidies are occurring. The ITC makes preliminary and final determinations as to whether such sales to the U.S. are causing or likely to cause injury to domestic industries. Whether or not the process continues depends upon the preliminary determinations by the ITC and ITA.

Pre-Order Phase
If both preliminary determinations are affirmative, the "provisional measures period" commences. The ITA instructs CBP to suspend liquidation of entries and assess ADD at preliminary rates. The ADD rate is essentially the "dumping margin" (difference between normal value and the price for sale to the U.S.) divided by the price for sale to the U.S. For example, if the price for sale to the U.S. is $100 and the normal value is $106, the difference is $6 making the ADD rate 6%. In the past, importers of record generally had two pre-order options:

1. Deposit the ADD in cash at the preliminary (pre-order) rate with the entry summary;

2. Post an additional single transaction bond (STB) in lieu of depositing the ADD in cash with entry summary.

As a result of a regulatory change, the STB option has essentially been eliminated in cases where the investigation was commenced on the basis of petitions filed on or after November 2, 2011. This change did not remove the STB option in connection with "new shipper reviews" although this may at some point be addressed legislatively.

The importer's liability for ADD on pre-order entries is capped at the deposit rate, even if the "final" ADD rate at liquidation is determined to be higher. If the final ADD rate is lower than the deposit rate, the importer will (upon liquidation) receive a refund of the excess ADD originally deposited.

Post-Order Phase
As the process continues, "final" determinations as to dumping and injury are made. If both are affirmative, the ITA publishes an "antidumping order" and instructs CBP to assess ADD at "final" rates. The post-order phase is different from the pre-order phase in at least one important respect – importer liability for ADD on post-order entries is not capped at the deposit rate. The ADD paid at time of entry summary is merely an estimated amount. If the ADD rate at liquidation is lower than the initial amount paid, the importer will receive a refund. But if there is an increase to the ADD rate at liquidation, the importer has unlimited liability for payment of additional ADD.

The ADD/CVD "Rate Problem"

Rates are Not Truly Final
Once an antidumping order is in place (most antidumping orders remain in place for many years), "interested parties" (e.g., manufacturers/foreign exporters, importers, members of domestic industry) may request an administrative review of ADD rates on an annual basis. An admin review takes 12 to 18 months to complete. Upon completion of each review, ADD rates may increase, remain the same, or decrease. If the ADD rate increases, the importer is liable for the difference between the ADD originally deposited and the ADD calculated at liquidation, plus statutory interest from the date the original deposit was due.

Adverse Facts Available
Further aggravating the situation is the ITA's freedom to use "adverse facts available" in arriving at normal values. If an "interested party" (basically, a manufacturer or foreign exporter) withholds or fails to provide required information or if the ITA is unable to verify information submitted, it "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." In essence, this means the ITA has great freedom to "assume the worst" in assigning a normal value to goods subject to an ADD order in the event of non-cooperation or questionable responses. An importer ends up paying a dear price when his manufacturer/foreign exporter does not (or through insolvency or otherwise is unable to) "play ball" with the ITA. An example of how this can have profoundly unfavorable results for an importer is included in the discussion of "NMEs" below.

Whose Rate Is It Anyway?
An ADD rate may be a manufacturer-specific rate, a foreign exporter-specific rate, a "weighted average" rate applicable to a number of manufacturers/foreign exporters or an "all others" ("countrywide") rate. When a manufacturer/foreign exporter provides an inadequate response to an admin review questionnaire or fails to respond at all, the result may be that the manufacturers/foreign exporters are transferred from their own specific rate to a weighted average or "all others" rate upon conclusion of the admin review.

Non-Market Economies (NMEs)

ADD rates, especially on goods from NMEs such as China or Vietnam, can exceed 100%. This is due in significant part to the use of "surrogate country" costs of production in calculating NME normal values. When a production facility (e.g., factory, farm) is owned wholly or in part by the government, it is difficult to assign a value to the resulting economic benefits accruing to that entity. Therefore, the ITA uses cost of production data from market-economy countries in their calculations. This can result in significant distortions of "normal values." As of this writing, the weighted average rate applicable to shipments of wooden bedroom furniture from many manufacturers/foreign exporters in China is 7.24%. However, the "all others" or "PRC-wide" rate for these commodities (calculated using surrogate country costs of production) is 216.01%. Using our wooden bedroom furniture example, if the deposit rate at time of entry was the weighted average rate (or a similarly low entity-specific rate) and the entry liquidates at the "all others" rate, the additional ADD owed will be more than twice the value of the goods (plus interest from date of original ADD deposit). The concept of a manufacturer selling its products for one third of what it cost to produce them is strongly counter-intuitive/irrational. However, the actual law in this context pays no attention to factors of intuition and rationality. (This example is not hypothetical. In an actual case, an importer filed seven entries of wooden bedroom furniture from China over a 16 week period, depositing ADD at the rate of 7.24%. The entries liquidated at 216.01% and the importer received increased duty bills totaling $1,417,069.46.)

Goods that Are Resold

Manufacturers are required to report sales to the U.S., but in some cases may fail to do so. This is of special concern when a "re-seller" is involved (the importer buys from a party that is not the actual manufacturer). The result may be that, although the goods were imported with ADD deposited at the actual manufacturer's specific rate, the entry liquidates at a much higher ADD rate because the sale wasn't reported. The importer is fully liable for the increase. By way of example, assume a Chinese manufacturer sells furniture to a Chinese wholesaler who is presumably selling to Chinese buyers (and, on the basis of that assumption, does not report the sales to the ITA). Assume that this wholesaler either directly or through another intermediary in fact ultimately sells the furniture to a U.S. buyer communicating correct information as to the identity of the Chinese manufacturer. The importer may mistakenly assume that he should use the manufacturer-specific rate (which may be the weighted-average rate of 7.24% assigned to a group of manufacturers of which this particular manufacturer is a member or the manufacturer's own favorable rate). However, because the sale was not reported, the ITA considers itself legally entitled to assume the PRC-wide rate should apply and will ultimately instruct CBP to liquidate the entry at the PRC-wide rate of 216.01%.

Reimbursement Certificates

In all instances, the importer must file a statement certifying that he has not entered into an agreement to be reimbursed for ADD paid. If the certification is not filed prior to liquidation, CBP will presume that the importer is being reimbursed and assess ADD at double the regular ADD rate. (This certificate is not required for CVD unless the goods are subject to both ADD and CVD.) In certain circumstances, one year manufacturer-specific blanket certificates of reimbursement may be acceptable. On November 23, 2011, the ITA clarified that valid reimbursement certificates may be submitted in a CBP protest in order to rebut the presumption of reimbursement. CBP issued a March 9, 2012 CBP notice entitled Guidance for Reimbursement Certificates. The language of this would appear to clearly indicate that CBP must grant a protest with respect to this issue when importers:

- File a timely protest challenging CBP's doubling of duties for failure to provide a reimbursement certificate.
- Provide a valid reimbursement certificate with the protest.

Nevertheless, we strongly urge importers to file valid reimbursement certificates at the earliest possible date (and in any event prior to liquidation) in order to protect themselves and their sureties, as well as to avoid unnecessary complications upon liquidation.

Further Complications and Hidden Exposures

Liquidation Delays

From the preliminary affirmative determination point onward, liquidation of entries is suspended indefinitely by operation of law and, in some instances involving litigation, by court order. Completion of administrative and judicial processes routinely results in an interval of years between entry date and liquidation. It is impossible to ascertain a true cost of goods sold in the meantime.

Critical Circumstances

There are sometimes findings of "critical circumstances." This has to do with spikes in import volumes immediately following the initiation of an ADD investigation. When critical circumstances apply, entries made less than 90 days prior to the preliminary determinations may also be subject to ADD.

Drawback

ADD is not recoverable via drawback.

Protest

CBP does not determine the ADD rate used at liquidation, it merely carries out the ITA's instructions. Except as previously discussed, supplemental ADD assessments upon liquidation are not generally subject to CBP protest so long as CBP has complied with these instructions. Request for judicial review of ADD rates must be made shortly (within 30 days) after the conclusion of the ITA's (not CBP's) administrative actions. As a practical matter, by the time the importer has received an increased duty bill from CBP, it is far too late to seek administrative or judicial resolution of ADD rate controversies.

Precautions Importers Can Take to Minimize Exposure

- Establish a relationship with a qualified, reputable, licensed customs broker and competent customs counsel before you start importing. If you're already importing and don't have a good broker and customs attorney, now is the time to forge those ties.
- Avoid dealing in goods subject to ADD or CVD whenever possible. Give your suppliers instructions to refrain from including goods subject to ADD/CVD in any shipments to you.
- If you cannot avoid ADD/CVD imports, it is important to carefully qualify your manufacturers/foreign exporters. Ensure that they are active participants in ADD/CVD administrative and, when applicable, judicial processes. Make sure they are solvent and maintain constant communication with them to avoid problems.
- Where possible, purchase on terms which require another party (such as the manufacturer), not you, to be the importer of record.
- Discuss with your customs broker how to best monitor your ongoing financial exposure related to unliquidated entries in general.

For more information on ADD/CVD, visit http://www.roanoketrade.com/sites.htm.

For more information, please contact us at 1-800-ROANOKE, ext. 1066 or infospot@roanokegroup.com