

U.S. Trade With China: Navigating The Complexities Of Antidumping And Countervailing Duties – Part II

The Editor interviews **Francis J. Sailer**, Partner, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP.

Part I of this interview appeared in the December 2006 issue of The Metropolitan Corporate Counsel and can be accessed online at www.metrocorpccounsel.com by putting "Sailer" in the site's search box.

Editor: What is the background and interplay of the antidumping and countervailing duty laws?

Sailer: First implemented in 1916 as part of the antitrust law, the U.S. antidumping law was given a life of its own, independent of the antitrust regime, in 1921. Originally only a few pages in length, the statutes now cover hundreds of pages. And, the proceedings under those laws have evolved from relatively simple regulatory proceedings that often dragged on for years into a highly regulated, politically sensitive and calendar-driven proceeding with relatively short statutory deadlines. The focus of these cases is on the market activities of individual companies.

The U.S. countervailing duty law dates back to the late 19th century. Like the antidumping law, the once little-known and seldom used trade measure has grown into an important tool for industries seeking protection from foreign-government subsidized competition, although its use has been diminished in the face of WTO agreements that have largely eliminated export subsidies.

Dumping occurs when a foreign company sells its product in the U.S. at prices below the so-called "normal value," and a domestic industry is injured or threatened to be injured by the "dumped" imports. The "dumping" is then offset by the imposition of an additional duty on imports of the dumped product. Countervailing duties (CVD), on the other hand, are designed to counteract the benefits afforded to foreign companies whose governments provide subsidies on the manufacture or export of goods to the U.S. if the subsidized imports are causing or threatening material injury to an industry in the U.S.

Thus, the focus of the CVD laws is not on the market activities of the foreign competition so much as on the market-distorting activities of governments that afford their indigenous producers an unfair competitive advantage. In the mid 1980s, the Commerce Department determined that countervailing duties would not apply to imports from a non-market economy because government control of the country's economic sectors make it impossible to determine what the value of the subsidy is in an economy that is "ridled with distortions."

Editor: Has the Commerce Department imposed countervailing duties on Chinese imports?

Sailer: In the early 1990s, with the virtual explosion of trade from China, the Commerce Department was faced with an increasing number of antidumping cases against Chinese products. While there

had long been notions of how to determine values in non-market economies, they all related to valuing inputs or finished products based on surrogate values obtained from a third country. But, as China opened to foreign investment, an increasing number of foreign companies began production in China using certain critical materials imported from outside China.

In a 1991 antidumping case involving oscillating and ceiling fans, the Commerce Department for the first time used the cost of imported inputs from a market economy supplier paid for in a market currency to value those inputs, rather than the third country "surrogate" value. You can see where this is going: if *actual* (rather than surrogate) values are used to calculate Chinese production costs, then aren't the distortions eliminated? Having gotten only minimal satisfaction from the antidumping case, the fans industry filed a CVD petition and argued that there was enough market orientation in the Chinese fan industry to identify and measure a subsidy.

Ultimately, however, in the fans case and in a second, nearly contemporaneous, case involving lug nuts, the Commerce Department reaffirmed its 1980s policy of not imposing countervailing duties on China because it was a non-market economy. Essentially the Department determined that whatever portion of the Chinese fans were of non-Chinese origin, there were still significant Chinese origin production inputs (certain materials and all of the labor and energy) that rendered the market so distorted as to remain beyond the reach of the CVD law.

But, the Commerce Department is being tested again. The fans cases are now nearly 15 years old; a lot has changed, and the changes are not only in China. Of course, Chinese suppliers continue to expand their markets and their market influence. And, China appears to have continued on its march toward greater market orientation. As with Japan 25 years ago, though, success causes friction, and in the face of increasing competition there arises a perception of the need for greater regulation and protection. There is an increasingly protectionist attitude in Washington toward trade with China as a result, so the time may be ripe for the Commerce Department to reevaluate whether it can and will invoke the CVD law against China.

Several weeks ago, NewPage Corporation, an Ohio paper manufacturer, filed a CVD petition against imports from China and two market economy countries (Indonesia and Korea) of coated free sheet paper used by the commercial printing industry for high-quality books, gift wrap, advertising materials and the like. The petition asserts that the Chinese government is providing grants, loans, preferential tax programs and a variety of commercial benefits to manufacturers in China that should be offset by the imposition of countervailing duties. In light of



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the increasing globalization of China's economy, it will be interesting to see if the Commerce Department will apply countervailing duties to goods from a non-market economy.

Editor: Last month, you discussed the complexities of analyzing whether a transaction is a bona fide sale for purposes of antidumping regulations. How can a shipper help to ensure that its transaction will be viewed as a bona fide sale?

Sailer: The Commerce Department asserts that its bona fide analysis takes a holistic approach. It looks not only at the quantity and price of a Chinese producer's U.S. sales transactions, but also at the totality of the circumstances surrounding the sale. Thus, considerable care must be taken in structuring a transaction to reduce the risk of liability for high antidumping duties.

One can structure a legitimate transaction of a small, but commercially realistic, quantity. With respect to its bona fide analysis, the Commerce Department has said that just because a sale is small does not mean that the sale is not bona fide. This is sometimes essential since smaller shipments permit one to limit the amount of the cash deposits that may be required while awaiting the results of the Commerce Department's determination of the appropriate duty.

Pricing is another key factor. In one of the first cases where the Commerce Department undertook a bona fide analysis, our client, a Chinese manufacturer, was required to obtain its U.S. customer/importer's invoices to its customers. In that instance, the invoices demonstrated that the sales price from China to the importer was considerably lower than the price that the importer charged to its U.S. customer. The importer also provided the Commerce Department with invoices showing that it purchased the same products from other suppliers in the U.S. at prices at the same level as its price from our Chinese client. Nonetheless, the Commerce Department found the sale was not bona fide based on certain other ancillary issues. This only points up the care with which these transactions must be structured to limit potential liability.

Editor: Are there disparities in the antidumping margin calculations that

the Commerce Department may not be adequately addressing?

Sailer: Well, the surrogate value methodology does have a certain *Alice in Wonderland* character. In order to obtain surrogate values, the Commerce Department ordinarily uses public data, which are often derived from the surrogate country's import statistics. As an example, in a case involving pencils from China, the Department often uses Indian import statistics to derive a value for the pencil's lead core; import statistics covering *all* manner of pencil cores often reflect values of from \$9 to \$12 per kilogram even though alternative values obtained from other, more commercial, sources and that are routinely provided to the Department, show that the value for an ordinary pencil lead (or core) is from \$1.50 to \$2.00 per kilogram. Notwithstanding the tremendous price disparity, the Department continues to apply the non-specific import value, thus overstating a significant cost element by a factor of six or more. This kind of rote application of an easily obtained value reflects a tendency to disregard commercial realities, obviously to the great disadvantage of a foreign exporter and its U.S. customers and importers that have to pay the antidumping duty.

Editor: Thank you for sharing with our readers your insights into the antidumping and countervailing duty laws impacting U.S. trade with China. Please give some examples of how you've helped your clients to navigate through these complexities.

Sailer: We have taken companies from the brink of elimination from the U.S. market due to the potential application of a prohibitively high antidumping duty back to the status of market leaders simply by addressing the unique circumstances of their situations in the U.S. market and their situations back home. Structuring all of the elements of a transaction as appropriate to overcome the prejudicial application of an additional duty takes a high degree of knowledge of the rules of the game and a commitment to analyzing and presenting the details in such a way as to further the client's commercial needs. Every case stands on its own, and our job is to make the case that best fits the client's required outcome.

U.S. Customs & Trade Laws Present A Number Of Duty Savings Opportunities For Companies That Make The Investment To Explore Them.

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