

Law Offices of George R. Tuttle, P.C.

Presentation On U.S. Antidumping Laws And Regulations For Customs House Brokers

Presented by

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Overview of Antidumping

■ Brief History of Antidumping

- The first antidumping law was enacted in the U.S. in 1916 (“Antidumping Act of 1916”), which required “predatory intent.”
- The Antidumping Act of 1921 removed the predatory intent requirement, which was difficult to prove, and laid the groundwork for the antidumping laws that exist today.
- Current antidumping laws were modified to conform with the GATT and the WTO Antidumping Agreement.



Administration of Antidumping

- **U.S. Department of Commerce** (Commerce) ultimately decides whether an antidumping order should be issued, and if so, the amount of the antidumping duties.
- **U.S. International Trade Commission** (ITC) reviews whether there has been injury to the U.S. manufacturing industry of the product in issue.
- **U.S. Customs and Border Protection** (CBP) is charged with enforcing antidumping orders issued by Commerce (collecting antidumping duties, etc.).



Recent Dumping Actions

- Proposal by Commerce to Include Novelty Candles in the Scope of the AD Order on Petroleum Wax Candles from China
- Magnesia Carbon Bricks from China and Mexico: August 19, 2009: Initiation of AD Investigation
- Narrow Woven Ribbons from China and Taiwan: July 29, 2009: Initiation of AD Investigation
- Pre-stressed Concrete Strand from China: June 16, 2009: Initiation of AD Investigation
- Wire decking from China: July 2, 2009: Initiation of AD Investigation
- Certain steel grating from China: July 24, 2009: Initiation of AD and CVD Investigation



Dumping Defined

- Dumping occurs when:
 - The goods in issue are being exported from a particular country at prices that are less than "fair value."
 - **Fair value** can be determined by either
 - a) the price of the goods in the home market or
 - b) the cost of production.
 - In addition to the fair value issue, there must be a showing of **injury** to the U.S. industry as a result of the dumping.
 - The criteria for determining the fair value is different for market economy countries (e.g., Germany) than it is for non-market countries (e.g., China).



How Antidumping Rates are Assigned (1)

- **Example #1:**

- Suppose the price of the goods sold to the U.S. is \$1.00 per unit, and
- The fair value is \$1.30
- Conclusion: there is evidence of dumping.

- **Example #2:**

- Suppose the price of goods sold to the U.S. is \$1.30 per unit, and
- The fair value is \$1.00
- Conclusion: dumping does not exist.



How Antidumping Rates Are Assigned (2)

- Antidumping rates are expressed as a percentage (e.g., 15%) and calculated based upon the difference between the price to the U.S. and the fair value.
- **Example:**
 - Suppose the price to the U.S. is \$1.00, and
 - The fair value is \$1.30.
 - The AD rate would be 30% ($\$1.30 - \$1.00 = \$0.30 / \$1.00 = 30\%$).
 - The AD rate is referred to by Commerce as the “**margin**”.



How Antidumping Rates are Assigned (3)

- **Non-Market Economies**

- For non-market economy (NME) countries (such as China), Commerce ignores prices and costs in the non-market economy.
- Instead, Commerce uses market values of the “factors of production.”
- Specific exporters who are investigated can be assigned their own anti-dumping rate based upon their company data.
- In non-market economy cases, Commerce calculates a “country-wide rate” (e.g., “PRC-wide rate”) for non-investigated exporters.



How Antidumping Rates are Assigned (4)

- **Example:**

- In the AD Order of Non-Malleable Cast Iron Pipe Filings From China:
 - Shanghai Foreign Trade Enterprises Co., Ltd was assigned an AD rate of 6.34%.
 - The PRC-wide rate is 75.5%.
 - Sometimes a “**Section A**” rate will be established, which is for foreign exporters who are permitted to respond to just the “**Section A**” portion of Commerce’s extensive AD questionnaire (see AD order on Wooden Bedroom Furniture from China as an example).



How Antidumping Rates are Established (4)

- **Market Economy Countries**

- For market economy countries, there are generally two rates established:
 - company specific rates
 - and “all others” rates.

- **Example:** AD Order on Light-Walled Rectangular Pipe and Tube from the Republic of Korea

- Dong-A Steel Pipe Co. Ltd: 30.66%
- All others: 15.79%



How is an antidumping order established? (1)

Phase 1: Filing the Petition



Phase 2: Preliminary Determinations by Commerce & ITC



Phase 3: Final Determinations by Commerce & ITC



How is an Antidumping order established? (2)

PHASE 1: The Filing Of The Petition

- Typically, a U.S. manufacturer or association of U.S. manufacturers prepares and files a petition with Commerce and the U.S. International Trade Commission (ITC) against the product in issue, alleging dumping and injury to the U.S. industry.
- The petition must describe the product for which dumping is alleged and the particular country or countries involved.
- Commerce and ITC review whether the petition is sufficient.



How is an antidumping order established? (3)

PHASE 1 (continued)

- The manufacturer or association of manufacturers is typically referred to as “the petitioner,” since they were the ones who filed the petition or complaint of dumping.
- Foreign manufacturers and exporters alleged to be dumping are referred to as the “respondents.”
- The review by Commerce and the ITC of the petition is referred to as the antidumping “investigation”.



How is an Antidumping order established? (4)

PHASE 2: Preliminary Determinations

- Both Commerce and the ITC will make preliminary determinations (“prelim”).
- The Commerce prelim will determine whether there were sales at less than fair value.
- The ITC prelim will determine whether there is injury to a U.S. industry.
- If the ITC prelim is negative the investigation ends.
- Even if Commerce’s prelim is negative, the investigation continues.



How is an Antidumping order established? (5)

PHASE 3: The Final Determinations

- Commerce and ITC each make final determinations.
- If either final is negative (no dumping or no injury), the entire investigation stops and no AD order is established.
- If both Commerce and ITC finals are affirmative, an AD order is published.
- Entire process, from filing a petition to issuance of final determinations, takes about 8-12 months.



When are AD duties required to be deposited? (1)

During An Investigation

- No AD duties are required to be deposited when the AD petition is filed.
- Deposit of AD duties must be made after an **affirmative** Commerce prelim is made.
- What is the start date for depositing AD duties?
- No deposit of AD duties if the Commerce prelim is negative.



When are AD duties required to be deposited? (2)

- **Federal Register notice announcing the Commerce affirmative prelim:**
 - The notice sets forth the deposit rates for specific exporters, and
 - The “all others rate” or the country-wide rate for exporters not investigated.
 - The start date for depositing AD duties is the date of the Federal Register notice.
 - In lieu of depositing cash, a AD bond can be filed—if the importer can obtain one from the surety.

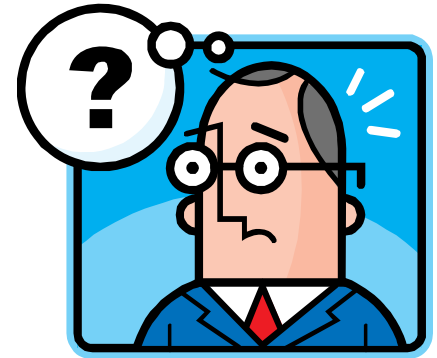
- **Exception:**
 - Retroactive deposit of duties must be made if the petitioner successfully argues that there are “critical circumstances”—90 days prior to prelim determination.

- Obtaining an AD bond from sureties

- **Advisory Tip:** Consider possibility of entering in-scope merchandise before publication of prelim determination.

Is a particular imported product subject to AD? (1)

- Can broker software be used to make this determination utilizing the HTS number?
- Scope of HTS number may be broader than scope description in AD order or investigation.
- The ultimate criteria: **scope description in the AD order**
- **Example 1:** AD order on petroleum wax candles from China
 - The HTS provision for candles in Subheading 3406.0000 covers all candles.
 - However, the AD order pertains just to petroleum wax candles and does not include candles that have no petroleum wax (i.e., 100% palm oil).





Is a particular imported product subject to AD? (2)

- Example 2: (AD Order On Polyethylene Retail Carrier Bags)
 - **Scope Description of Merchandise In the Order:** The subject merchandise is defined as non-sealable sacks and bags with handles (including drawstrings), without zippers or integral extruded closures, with or without gussets, with or without printing, of polyethylene film having a thickness no greater than 0.035 inch (0.889 mm) and no less than 0.00035 inch (0.00889 mm), and with no length or width shorter than 6 inches (15.24 cm) or longer than 40 inches (101.6 cm). The depth of the bag may be shorter than 6 inches but not longer than 40 inches (101.6 cm).
 - Imports of the subject merchandise are currently classifiable under statistical category 3923.21.0085 of the Harmonized Tariff Schedule of the U.S. (HTSUS). This subheading also covers products that are outside the scope of the order. Furthermore, although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of this order is dispositive.



Is a particular imported product subject to AD? (3)

- **In summary:**

- The HTS number can be helpful in identifying products that might be subject to AD duties.
- However, **the written description of the scope description is controlling.**
- Antidumping investigations should be monitored on ITC's website at http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/active/index.htm
- Antidumping orders can be researched on Commerce's website at <http://info.usitc.gov/oinv/sunset.nsf/AllDocID/96DAF5A6C0C5290985256A0A004DEE7D?OpenDocument>



Importer Strategies in an Antidumping Investigation (1)

- **Importer Can Participate In An AD Investigation:**
 - **Example:** the importer could file comments taking the position that its imported product is outside the scope description or should be excluded because the product is not available from U.S. manufacturers.
- **Confer with Customs:**
 - If the importer believes the product is outside the scope, it can confer with CBP at the port of entry. However, advice received from CBP is non-binding as Commerce has the final say on whether the merchandise is in-scope.
- **Import from Another Country:**
 - If the preliminary determination is affirmative (there is dumping), the importer could consider sourcing the same product from a different country.



Importer Strategies in an Antidumping Investigation (2)

- **Replace In-scope Merchandise:**
 - The importer could replace in-scope merchandise with out-of-scope merchandise (make the good of stainless steel instead of carbon steel).

- **Buy From a Different Exporter:**
 - Importer could consider buying the product from one of the exporters who was assigned a lower AD rate. Note that the specific exporter could be assigned a different (higher or lower) rate in the final determination.



Importer Strategies In An AD Investigation (3)

- **Clear Goods Before the Affirmative Commerce Prelim Is Published**
 - Import in-scope merchandise before preliminary determination is published.
 - If in-scope merchandise is imported before preliminary determination is published, there are no AD duties (exception: critical circumstances).
- **Scope Requests**
 - Not available during an AD investigation.



Dealing with Antidumping Issues After an AD Order is Established (1)

- **Confer with CBP:**
 - Provide samples or technical literature of the imported merchandise to local CBP and discuss with CBP about whether the merchandise is outside the scope.

- **Import from an exporter who has been assigned a lower AD rate:**
 - Determine if the product in issue can be imported from an exporter who has been assigned a specific lower AD rate.
 - This carries a risk.



Dealing with Antidumping Issues after an AD Order is Established (2)

- **Import the same product from an exporter who has been excluded from an AD order.**
- **Import the same product from different country:**
 - AD orders pertain only to specified merchandise from a particular country.



Dealing with Antidumping Issues after an AD Order is Established (3)

- **Replace In-Scope Merchandise:**

- Determine if the importer can replace in-scope merchandise with out-of-scope products.
 - **Example:** Polyethylene Retail Carrier Bags that are 0.18 thick or less are within the scope.
 - Determine if carrier bags whose thickness is in excess of 0.18 can be imported.

- **Scope Requests:**

- Consider formal scope exclusion request with Commerce.
- Scope request must be filed in accordance with Commerce regulations.



Dealing with Antidumping Issues after an Antidumping Order is Established (4)

- Will need to include pictures of the imported article or samples, applicable facts, and arguments for exclusion.
- If the scope request is not complicated, Commerce can issue a decision within 4 months.
- Once issued, the holding can be applied retroactively if the entries are still unliquidated.



Administrative Reviews (1)

- An “**administrative review**” is a review by Commerce of **specifically requested manufacturers or exporters** in a particular antidumping order to determine if the manufacturers or exporters should be given a different company-specific antidumping rate.
- A request to Commerce to review a specific manufacturer or exporter can be made by any “**interested party**,” which would include the petitioner, an importer, or a foreign manufacturer or exporter.
- The requests must be filed in the “**anniversary month**” for that antidumping order.



Administrative Reviews (2)

- The **anniversary month** is based upon the month in the year in which the antidumping order was first established.
 - **Example:** The antidumping order on wooden bedroom furniture from China was published in the *Federal Register* on January 5, 2005.
 - The “anniversary month” is January.
- For the last review of WBF from China in 2009, requests for Commerce to conduct an administrative review of Chinese exporters of WBF had to be filed during the period of January 1-31, 2009.



Administrative Reviews (3)

- Once the anniversary month closes, Commerce will publish in the *Federal Register* a **notice of initiation of the administrative review** and will name the companies to be reviewed.
- The administrative review will review the AD rate for **entries in the 12-month period prior to the anniversary month of the review.**
- Petitioners (U.S. manufacturers) will often try to include all known exporters in the request for the administrative review.
- Commerce will generally include all of the companies named in the request from the petitioner.



Administrative Reviews (3)

- Only companies named in the notice are reviewed by Commerce.
- What is reviewed?
 - Commerce reviews importations from the **named** companies in the 12 months preceding the anniversary month.
 - Importations from manufacturers not named are liquidated according to the normal liquidation cycle.



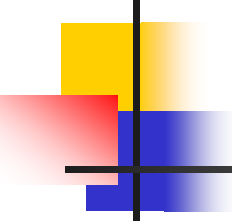
Administrative Reviews (4)

- Examples Using The WBF AD Order:
 - **Example 1:** Shanghai Furniture Ltd., is named in the review, and thus, importations of WBF where Shanghai Furniture Ltd. was the exporter remains **suspended** from liquidation.
 - **Example 2:** Ningbo Furniture Ltd. is not named in the review. Importations of WBF exported by Ningbo Furniture during the 12-month period of review are liquidated based upon CBP's normal liquidation policies.



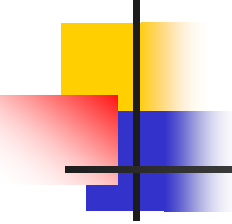
Administrative Reviews (5)

- Withdrawal of requests:
 - A party who files a request to Commerce to review a specific company can withdraw the request within **90 days** from the date of the *Federal Register* notice of initiation.
- Litigation and NAFTA Appeals
 - An interested party who **actively participated** in the administrative review can litigate the final determination in court.
 - NAFTA appeals can be filed if the administrative reviews involve Canada or Mexico.



Deposit of AD duties at the time of entry vs. final AD duties owing on the entry (1)

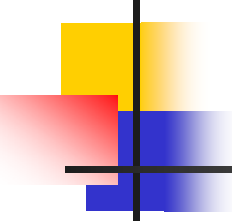
- Importing in-scope merchandise is always a risk
 - If the exporter has been reviewed, the AD duties (**cash—no bonds**) to be deposited are based upon the most recently completed administrative review for the exporter in issue. If the exporter has not been reviewed, the AD duties to be deposited are based on the most recent all other or country wide rates.
 - The AD duties deposited at the time of entry are not necessarily the final duties owing on the entry.
 - Final AD duties may not be known for more than 2 years.



Deposit of AD duties at the time of entry vs. final AD duties owing on the entry (2)

- **The Final AD Duties:**

- The final AD duties for the entry can be lower or higher.
- If the final duties are lower, a refund will be issued (with interest).
- If the final duties are higher, then the importer will get a bill for the additional AD duties (with interest).



Deposit of AD duties at the time of entry vs. final AD duties owing on the entry (3)

- **Example: Getting an unwanted surprise**
 - A company imported polyethylene retail carrier bags from King Pac in Thailand in June 2007.
 - Final determination for previous period of review was published in the *Federal Register* on Jan. 17, 2007.
 - This review indicated that the deposit rate for importations from King Pac after Jan. 17, 2007 would be at the 6.10% rate.
 - The goods were entered by the importer in June 2007 with a AD deposit rate of 6.10%.

Deposit of AD duties at the time of entry vs. final AD duties owing on the entry (4)

- The final determination for the next administrative review was published on January 15, 2009.
- This review covered importations from August 1, 2006 through July 31, 2007.
- The final results determined that the final AD rate for King Pac was **122.88%**.
- This was about a **20-fold increase in the AD duties owing!**





“Section A” Rates (1)

- Occasionally, in some AD orders (i.e., WBF from China), Commerce will give an opportunity for exporters to obtain a “Section A” rate.
- “Section A” rates may be used by Commerce where there is a large number of exporters.
- An applicant (the exporter) must respond to the “Section A” portion of the AD questionnaire.



Section “A” Rates (2)

- In order to obtain a “Section A” rate, there must have been at least one commercial shipment of in-scope merchandise during the period in review.
- Only the exporter can be assigned a “Section A” rate.
- Exporters previously granted a “Section A” rate may need to complete an application for recertification.
- Responses to “Section A” applications must be timely filed and complete.



Non-reimbursement Statements (1)

- Must a non-reimbursement statement be filed?
- Regulations require that a non-reimbursement statement be filed by the importer for the AD entry.
 - The purpose is to certify to CBP that the foreign exporter has not reimbursed the importer for the AD duties.
 - Such reimbursement affects the calculations of the AD duties.
- Time for filing the non-reimbursement statement
 - The statement must be filed before the entry is liquidated.
 - Current CBP policy is to disallow acceptance of the statement after the date of liquidation.



Non-reimbursement Statements (2)

- If statement is not submitted to CBP by the date of liquidation or not received at all, CBP's policy is to assess **double** the AD duties.
- If the statement is submitted after liquidation, can a protest be filed?
 - CBP's policy is that this is not a protestable matter. Even if the statement is filed with the protest, CBP will deny the protest.



Liquidation of a suspended AD entry after an administrative review has been finalized (1)

- Entries involving **named** exporters or manufacturers will remain suspended from liquidation while an administrative review is being conducted.
- Some entries may remain suspended beyond the normal liquidation cycle if it is not known whether an administrative review will be conducted.
- Once an administrative review is finalized, Commerce will issue liquidation instructions to CBP on the suspended entries.
- CBP Headquarters will then issue liquidation instructions to the field.
- **The rule:** CBP has 6 months from the date Commerce publishes notice in the Federal Register on the removal of suspension of liquidation.



Liquidation of a suspended AD entry after an administrative review has been finalized (2)

- If CBP does not liquidate within the 6 month period, the entry is liquidated as entered.
- **Example 1:**
 - Retail polyethylene bags were entered with a AD deposit rate of 6.10%.
 - An administrative review is conducted and the final rate is 122.88%.
 - Commerce publishes notice in the Federal Register.
 - CBP liquidates the entries within the 6 month period.
 - **The result:** the importer owes additional AD duties (plus interest) at the 122.88% rate.



Liquidation of a suspended AD entry after an administrative review has been finalized (3)

- **Example 2:**

- Same facts as above, but CBP fails to liquidate within the 6 month period.
- **The result:** the entry is deemed liquidated as a matter of law at the entered AD deposit rate (6.10%), and the importer owes no additional AD duties.



Correcting an entry or filing a prior disclosure if it is discovered that entry includes in-scope merchandise (1)

- What should broker do if it suspects that the merchandise may be subject to AD?
 - Review scope description with the importer.
 - Possibly consult with attorney who specializes in AD law.
 - Consult with Customs.
- What should be done if it is concluded that the merchandise is subject to AD?
- **Situation 1:** Broker has filed an “01” entry (no dumping) on a product that the broker now believes is within the scope of an AD order
 - If the entry is a recent entry, broker can correct the entry and designate it as an “03” entry



Correcting an entry or filing a prior disclosure if it is discovered that Entry includes in-scope merchandise (2)

- **Situation 2:** Broker has been filing “01” entries (no dumping) for a long period of time but then discovers that the merchandise is in-scope merchandise.
 - Broker may want to evaluate filing a **prior disclosure** if there is a substantial amount involved. Before filing a prior disclosure, importers should consider consulting attorneys with AD and Customs expertise. If a prior disclosure is filed, errors could be corrected via a Post Entry Amendment (PEA) on entries that are still unliquidated.



Sunset Reviews

- Under the WTO AD and Subsidies Agreements, member countries are required to conduct **Sunset Reviews** of AD and countervailing duty orders.
- Within 5 years after an AD order is issued, a **Sunset Review** must be conducted by the government to determine if the termination of the order would result in the continuation or recurrence of dumping.
- The **Sunset Review** is simultaneously conducted by Commerce and ITC.
- At the conclusion of the **Sunset Review**, Commerce determines whether the AD order should be continued or revoked.



A few take-home points

- There is always a risk in importing in-scope merchandise.
- The published deposit rate is not necessarily the final rate.
- It's important to stay informed about AD investigations.
- Brokers should familiarize themselves with the methods of possibly reducing or avoiding AD duties.
- Expert advice can save time and money.

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