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Customs & Trade

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Department of Commerce: Saying We Will Do It Gives Us the Right to Do It

The International Trade Administration of the U.S. Department of Commerce (ITA or Commerce) appears to have adopted the following line of reasoning as the government is looking to hit some importers of wooden bedroom furniture (WBF) from the People's Republic of China (PRC or China) with an antidumping duty (AD) of 216.01% ad valorem: Saying we will do it gives us the right to do it. At the time of this writing, the ITA has issued a Preliminary Determination[1] stating its intention to do exactly that.

That AD rate in itself is not remarkable, as there have been many AD rates that have been calculated at more than 200% or even 300%. But what is somewhat unusual is that the estimated antidumping duties that these importers paid at the time of importation back in 2011, the annual period under review by the ITA, was only 6.68%. The "how" and "why" of that jump will take a bit of time, but there is no better place to begin than at the beginning, as Lewis Carroll would tell us. Indeed, a familiarity with Lewis Carroll is commended for an appreciation of the administrative practices in this corner of the customs and trade law, and a discussion of these issues is overdue.

Full disclosure: I am associated with a law firm representing an importer in the matter; only information in the public record is discussed here and the views expressed herein are my own.

Antidumping Law

Last month's column[2] discussed the antidumping law,[3] a trade remedy meant to be remedial rather than punitive, and this month we return to this dynamic topic. The law is intended to re-balance the playing field after a foreign competitor has acted unfairly, in this case having practiced international price discrimination. That conduct takes the form of selling products into the U.S. market at prices (the export price) less than the normal price, which is either the (1) comparison market price (either in the home market or in a viable third-country market) or (2) the constructed value (cost of production, average selling expenses plus a profit factor). There can be, and frequently are, intense debates among economists and other observers whether anyone at all should have to answer for these actions. After all, if this "dumping" results in lower cost products being introduced into the market, don't the consumers in that market benefit greatly? Isn't that a good thing? Why should the country of importation care if the foreign sellers are so misguided as to sell at a loss, for example?

That debate has been settled in the statute books for almost 100 years, and consumers are not the ones whose interests have been protected. Instead, the laws aid the domestic producers of the competing products and the workers employed by those producers.[4]

Administrative Process

The process—and some say it is all about the process—is quite intense. It is a game where many argue that there are three players. On one side are the petitioners, domestic producers or workers who file a petition simultaneously with Commerce and the International Trade Commission (ITC) alleging that goods are being dumped and that they have suffered or are threatened with suffering material injury. Commerce determines whether there is dumping and the ITC determines whether

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that dumping has caused the requisite injury. On the other side are the respondents, the foreign producers and exporters of the subject merchandise.

Many critics insist that there's a third participant, Commerce itself. Indeed, many go further and argue that the entire process, influenced by the activism of Commerce, is not neutral and fair but is prejudiced to the marrow against the foreign respondents. They reason that the rules are skewed against the respondents and that the ITA has a zero tolerance policy on delays or failures to meet the rigorous and short timeframes allotted for filing responses to questionnaires or other supplemental requests for information.[5] To be sure, the scale of some of these cases would be a drain on any administering agency. For example, the WBF case involves over 200 Chinese respondents. That need for control is one justification for the strict administration of the trade remedy statutes by the agencies. Plus, it must be acknowledged that a respondent who is less than fully cooperative will stymie any investigation.

The AD "proceeding" begins with the filing of the petition.[6] If the ITA determines that there is merit to the petition—that it has "sufficiency"[7]— that segment of the proceeding that is termed the "investigation" proceeds from the date of the initiation of the investigation[8] to the issuance of a preliminary determination[9] (normally 140 days after initiation of the investigation) through the final determination[10] (normally 75 days after the issuance of the preliminary determination), and ends, if dumping is found, with the publication of the AD Order that will signify affirmative determinations by both the ITA and the ITC.[11]

The process of ascertaining an AD duty rate is quite specific, with the ITA assigning to individual exporter or producer respondents who were individually investigated specific AD rates, or assigning weighted average rates to the non-investigated respondents that are termed "all others" rates.[12] There are also "combination rates" that are tied to particular goods from exporters that were made by particular producers (read factories). The suspension of liquidation at the point of an affirmative preliminary determination or final determination puts the affected entries in a holding pattern that subjects them to the full impact of any later AD Order.[13]

Once there has been a final determination and AD Order, the ITA will no longer accept a bond or other security but will require a cash deposit in the amount of the estimated AD duty.[14] Payment of the cash deposit and the commitment to pay the AD duty that is ultimately assessed is an express condition for release of imported goods by Customs and Border Protection (CBP).[15]

Annual Reviews

Once there is an AD Order, the process becomes something like a perpetual motion machine, as there is a statutory requirement that the AD Order is not frozen in place for longer than one year. Congress requires an annual review to be conducted each anniversary of the month in which the AD Order was originally published. This means that each year, the petitioners, respondents, and ITA have at it anew. And for many of the respondents, there is an annually recurring anxiety. The critical issue is whether they will be individually investigated, because that process carries with it an "all or nothing at all" dimension. The respondents and importers can request a review and the petitioners can nominate which respondents they feel should be investigated. In fact, petitioners often will request a review of all the respondents, naming each and every one.

The statute requires that the ITA determine an individual weighted average dumping margin for each known exporter or producer[16] but, where impracticable, the ITA can determine the weighted average dumping margins by a sampling or by an investigation of those exporters or producers accounting for the largest volumes.[17] As noted, individual respondents can request an administrative review to be investigated and for non-market economy country (read China) (NME) cases,[18] the respondents must not only individually request an administrative review, but

also must file a separate rate application, and subsequently file separate rate certifications, to be eligible for a separate AD rate rather than the country-wide, government entity AD rate, which is usually the highest rate possible. Separate rate status is discussed below.

Given the large number of companies that conceivably could be investigated, the trick for many respondents is to request an administrative review but actually hope not to be selected as a mandatory respondent. The exporter or producer that is selected as a "mandatory respondent" faces all of the real hazards and very considerable costs of fully "cooperating" to the best of its ability—meeting all of the filing deadlines, responding to follow-up questions, and being subject to an on-site verification review by the ITA at its premises. The risks of not meeting this obligation in each and every respect is the imposition of an AD rate that is based on adverse facts available (AFA), as discussed below.

What the ITA has just done, and what this column is about, is to add another twist for mandatory respondents that jeopardizes their ability to win lower AD rates in NME cases.

NME Cases

In AD proceedings with NME countries, there is additional embroidery to an already busy statutory and regulatory scheme. This is because the NME nature of that home market will affect the calculation of the normal value, i.e., the home market price, of the goods. For that reason, the Department disregards home market sales and cost of production and instead uses factors of production (FOPs). Those are assigned values based on surrogate-country information, such as from India, Thailand, or the Philippines.[19]

Separate Rate Status

The other complicating factor in an NME case is whether a specific respondent is eligible for a separate rate of its own or whether it must be assigned the country-wide governmental entity rate. The ITA presumption is that all NME entities are government controlled, but this may be rebutted by showing that it is sufficiently independent.[20] This is not a minor issue. In the case of WBF from China, this PRC-wide rate is 216.01%.

So what does a "separate rate" status signify, and separate from what? The answer is that the entity's export activities are separate or freed from government control. Commerce requires companies operating in an NME such as China to submit documentation demonstrating their independence from government control. If a company does so, it receives a separate rate certification and its own rate. If a company fails to do so, it is assigned the rate applicable to all entities that the government controls, i.e., a country-wide rate, which, as noted, for WBF is 216.01%. This ITA practice, dating to 1991, has been sanctioned by the courts.[21]

How has the ITA reviewed separate rate status? As the courts have noted, Commerce's test for whether a company is eligible for a separate rate focuses on control over investment, pricing, and the output decision-making process at the individual firm.[22] The control that is at issue is generally said to embrace both de jure and de facto control—in law and in fact—over export activities.[23] But there is some suggestion that it actually comes down to de facto control only.[24]

The notion of separate rate status dating to 1997[25] that has been approved by the courts is dependent on a showing of independence from the government. That is until the Initiation Notices for Administrative Reviews commencing at the end of 2010.[26]

ITA's Notice Provision

For the administrative review of the WBF AD Order for January 1, 2011-December 31, 2011, the ITA applied these changed rules of the game. The key assertion in the Initiation Notice[27] and again in the Preliminary Determination is the insertion of an extra requirement beyond the filing of a separate rate application or certification:

> For exporters and producers who submit a separate-rate application certification and subsequently are selected as mandatory respondents, these exporters and producers *will no longer be eligible for separate rate status* unless they respond to all parts of the questionnaire as mandatory respondents (emphasis added).

The irony is that the companies at the receiving end are especially the importers who purchased the goods. While the exporters may be effectively blocked from the U.S. mar-

1 Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Administrative Review, 78 Fed. Reg. 8493, 8494 (February 6, 2013). (Preliminary Determination).

2 See "Hope Dims for Honest Trade in Bulbs," 24 JOIT 18 (April 2013).

3 19 U.S.C. sections 1673 *et seq.*

4 Apologists for the antidumping statute will argue that consumers are ultimately protected because the foreign dumper, if successful, would kill off the domestic producers and then be free to raise its prices at will, to the detriment of the consumers. The U.S. statute is the domestic legislation that implements the international consensus on the issue, the Agreement on Antidumping administered by the WTO. For more on the complexity of AD/CVD legislation, see Neville, *International Trade Laws of the United States: Statutes and Strategies* (Thomson Reuters/WG&L 2012), ch. 10 (written by Stuart M. Rosen)..

5 Many of the U.S. statutory provisions and administrative practices have been challenged at the WTO by its trading partners as being fundamentally unfair and contrary to the international standard.

6 19 C.F.R. section 351.102(b)(40).

7 19 C.F.R. section 351.203.

8 19 U.S.C. section 1673a.

9 19 U.S.C. section 1673b(b); 19 C.F.R. section 351.205.

10 19 U.S.C. section 1673d(a); 19 C.F.R. section 351.210.

11 19 C.F.R. sections 351.102(b)(30), 351.211.

12 At the preliminary determination, 19 U.S.C. sections 1673b(d)(1)(A)(i) and (ii), 1673d(c)(5), respectively. At the final determination, 19 U.S.C. sections 1673d(c)(1)(B)(i) and (ii), (c)(5), respectively.

13 19 U.S.C. section 1677b(d)(2) or 1677d(c)(1)(C).

14 19 C.F.R. section 351.211(a).

15 19 U.S.C. section 1673g(b)(4).

16 19 U.S.C. section 1677f-1(c)(1).

17 19 U.S.C. section 1677f-1(c)(2).

18 An NME country is defined in 19 U.S.C. section 1677(18)(A).

19 19 U.S.C. sections 1677b(c)(3) and (4).

20 "This presumption can only be overcome by a respondent's affirmative showing that it conducts its export activities without government control." Final Determination in Certain Cut-to-Length Carbon Steel Plate from Ukraine, 62 Fed. Reg. 61,754, 61,758 (November 19, 1997)

21 *Transcom, Inc.*, 294 F.3d 1371 (CA-F.C., 2002).

22 *Fuyao Glass Indus. Grp.*, 27 CIT 1892 at 1896 fn. 8 (2003), cited in *Qingdao Taifa Grp. Co.*, 760 F. Supp. 2d 1379 (CIT, 2010).

23 See, e.g., *Lifestyle Enter., Inc.*, 768 F. Supp. 2d 1286 (CIT, 2011) ("Lifestyle I").

ket going forward, it is the importers who will be getting billed later in 2013 from CBP for the difference in AD duty between the cash deposits at 6.68% made on their 2011 import purchases and the amount that will be due at 216.01%.

Each of the two Chinese companies met the first of these requirements and timely filed a separate rate certification, having previously filed separate rate applications, and subsequently filed separate rate certifications in administrative reviews for earlier annual periods. Moreover, that the ITA selected the two companies as mandatory respondents itself suggests a presumption of no state control. Further, in not continuing with the investigation, neither respondent affirmatively abandoned its separate rate status.[28]

There has been no evidence that the respondents' assertions of absence of de facto and de jure control have been impeached in any way. As a final point, the ITA could have verified this discrete question had it so elected. Indeed, the ITA reservation of the right to deny eligibility for separate rate status unless the respondent participates fully would allow the ITA to deny separate rate status even if a respondent's withdrawal had occurred after a separate rate status verification.

In the Preliminary Determination,[29] Commerce announced that the two mandatory respondents, Maoji and Huansheng, were not entitled to separate rate status because they had withdrawn from the proceeding. Commerce justified that denial of separate rate status because it had earlier stated in the Initiation Notice:

> [E]xporters and producers who submit a separate-rate application or certification and subsequently are selected as mandatory respondents ... will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents.

> After we selected Shanghai Maoji Imp and Exp Co., Ltd ("Maoji") and Dongguan Huansheng Furniture Co., Ltd ("Huansheng") as mandatory companies, Maoji failed to answer all sections of the Department's antidumping questionnaire and failed to respond to a supplemental Section A questionnaire while Huansheng failed to answer two supplemental questionnaires and withdrew from participating in the review. Therefore, neither Maoji nor Huansheng has established its eligibility for a separate rate and we will treat both companies as part of the PRC-wide entity. The PRC-wide entity rate is 216.01 percent.[30]

The lineage of this Notice can be traced directly to the *Lifestyle* cases.[31]

Lifestyle Cases (2011-2012)

The trade law jurisprudence makes it clear that the ITA's discretion is not unfettered. The reviewing courts have drawn some bright lines. Perhaps the closest authority is the decision in *Lifestyle I*, for it is in that case and the later *Lifestyle* decisions that the notice or lack of notice to mandatory respondents about the consequences of withdrawal figured prominently.

In *Lifestyle I*, the respondent exporter Orient requested to withdraw the confidential version of its questionnaire response, but not its separate rate certification, and informed Commerce that it would significantly limit its participation in the review. Over the objections of petitioners, the Court of International Trade acknowledged that Orient was entitled to a separate rate status, stating that the ITA had

> granted the exporter Orient its separate rate status on the basis that Commerce "did not clearly inform Orient ... of [its] obligation" to otherwise respond to the AD questionnaire. Orient had affirmatively demonstrated an absence of de jure or de facto government control. Commerce concluded in the Final Results Orient had effectively demonstrated de jure and de facto independence from the government (internal citations omitted).

Absent any other factual statement inserted between or juxtaposed with these two statements, (1) Commerce failed to give notice, and (2) Orient affirmatively demonstrated an absence of de jure or de facto governmental control, one must conclude that the ITA's position was that its failure to give notice itself affirmatively demonstrated de jure or de facto governmental control and, thus, eligibility for separate rate status.

Indeed, the Department's puzzling statement prompted the court to say:

> Whatever the merits of Commerce's reasoning, Orient did not fail to provide information in regard to its separate status. Orient's failure in other respects does not undermine this showing. See *Gerber Food (Yunnan) Co. v. United States*, 387 F. Supp. 2d 1270, 1287-88 (CIT 2005); *Shandong Huarong Gen. Grp. Corp. v. United States*, 27 CIT 1568, 1594-95 (2003).

The relevant jurisprudence establishes that the only factor that can lead to a denial of separate rate status is a sign that the entity is under the de facto or de jure control of the state. The key assertion in the Initiation Notice and again in the Preliminary Determination is:

> [E]xporters and producers *will no longer be eligible for separate rate status* unless they respond to all parts of the questionnaire as mandatory respondents (emphasis added).

This assertion departs from that long line of cases in which the reviewing courts have supported the practice of the ITA in NME cases, and have placed the burden on the exporters and producers[32] far behind. Those cases stand for the

24 See *Qingdao Taifa Grp. Co., supra* note 22, at fn. 4.

25 *Fuyao Glass, supra* note 22.

26 See, e.g., *Initiation of Antidumping and Countervailing Duty Administrative and Request for Revocation in Part,* 75 Fed. Reg. 81565 (December 28, 2010) (Fresh Garlic from the People's Republic of China). See also Neville, *supra* note 2.

27 Initiation Notice, 77 Fed. Reg. 12235, 12237 (February 29, 2012).

28 Indeed, Shanghai Maoji wrote in its letter to the ITA that it was no longer participating, expressing a reservation of separate rate status: "For all the above-mentioned reasons, Maoji hopes DOC can maintain Maoji's Separate Rate Status."

29 78 Fed. Reg. 8493, 8494 (February 6, 2013).

30 *Id.*

31 *Lifestyle Enter., Inc.,* Slip Op. 13-17, 2013 WL 440835 (CIT, 2013) (Lifestyle IV); *Lifestyle Enter., Inc,* 865 F. Supp. 2d 1284 (CIT, 2012) ("Lifestyle III"); *Lifestyle Enter., Inc.,* 844 F. Supp. 2d 1283 (CIT, 2012) ("Lifestyle II"); Lifestyle I, *supra* note 23.

32 See, e.g., *Sigma Corp.,* 117 F.3d 1401, 1405–1406 (CA-F.C., 1997).

33 See, e.g., *Transcom., supra* note 21, at 1373.

34 See *Fuyao Glass, supra* note 22, where the CIT referred to the 1997 final determination in Certain Cut-to-Length Carbon Steel Plate from Ukraine, 62 Fed. Reg. 61,754, 61,758-59 (November 19, 1997) (complete discussion of de facto and de jure factors).

35 *Shandong Huarong Gen. Grp. Corp.,* 27 CIT 1568, 1594-1595 (2003).

36 *Id.* at 1594. In support of its determination that the companies would receive the PRC-wide antidumping duty margin based on facts available, Commerce stated that "due to the nature of [the companies'] verification failures, and the inadequacy of [their] cooperation, the integrity of [the companies'] reported data on the whole is compromised." 66 Fed. Reg. 48,026, at 48,028 (2001) (Huarong and LMC).

37 *Nippon Steel Corp.,* 337 F.3d 1373, 1381 (CA-F.C., 2003)

38 *Jiangsu Changbao Steel Tube Co., Ltd. and Jiangsu Changbao Precision Tube Co., Ltd.* , 884 F. Supp. 2d 1295 (CIT, 2012).

39 See Lifestyle III, *supra* note 31.

40 See *Gallant Ocean (Thail.) Co.,* 602 F.3d 1319 (CA-F.C., 2010) (rate selected by the ITA cannot result in a punitive, aberrational, or uncorroborated dumping margin) and cases cited therein.

proposition that separate rate status is all about—indeed is only about—whether the respondent is independent of the state entity.[33]

The reviewing courts have made it quite clear that the ITA cannot substitute responsiveness on other, quite distinct questionnaire sections as a criterion for eligibility for separate rate status and its underlying notion of the relative independence of the subject respondent. Indeed, one is left to wonder whether the ITA has made this criterion of responsiveness to other questionnaire sections the sole criterion, instead of a showing of the independence of the NME state entity, or has inserted it as an additional criterion to the factors that the courts have previously acknowledged[34] in that context. Some observers feel that the ITA's asserted authority in the Initiation Notice to declare respondents ineligible for separate rate status is a punitive measure that will be stricken by the reviewing courts if the ITA fails to reverse itself.

An earlier court, in *Shandong Huarong*,[35] which was cited as precedent in *Lifestyle I*, dealt with the conflation of entitlement to separate rate status and the justification for the use of adverse facts available. In *Shandong Huarong*, the Court of International Trade prevented the ITA from conflating the two entirely separate issues of separate rate status and an adverse facts-available rate due to missing or unverified sales data and factors of production.[36] Thus,

> the findings that justified the use of facts available and a resort to adverse facts available with respect to the Companies' sales data and factors of production, cannot be used to accord similar treatment to issues relating to the Companies' evidence of independence from state control. Specifically, the record shows that the Companies each submitted evidence of their entitlement to separate rates with their questionnaire responses, and at verification Commerce found such evidence was not "compromised."

Moreover, citing Federal Circuit authority,[37] that court made it abundantly clear that the only relevant failure to file documents that justified a denial of separate rate status and to support a presumption of state control was the failure to file the separate rate questionnaire responses themselves.

This matter does not present a circumstance where the separate rate status documents had actually been verified, as they were in *Shandong Huarong*. The rejoinder is that the ITA had previously accepted the two respondents' separate rate status and it could have verified its separate rate status in this proceeding had it chosen to do so. Finally, nothing in the record suggests that there was any element of state control, which is and should be the only factor that should disqualify it from a separate rate status.

There could be a case where the lack of veracity of a respondent's submissions and other evidence on the record would justify the ITA holding that the documents submitted to establish separate rate status were likewise infected. That was the situation in the recent *Changbao* decision.[38] That seems reasonable. On those facts, to grant separate rate status when it would fly in the face of documents that were simply not credible might be irresponsible. But the circumstance of facts on the record shown to be unreliable on investigation, as in *Changbao*, is entirely distinguishable and provides no legal support for the bare ITA notice that a failure to fully participate in all phases of the investigation would bar separate rate status.

The ITA's simple announcement that it would pull separate rate status is no basis to reject the status of these two respondents, who stated on the record that they were unable to secure information from the large number of producers who actually manufactured the goods rather than were unwilling to continue their participation. Still, they withdrew from the proceeding and they should face some change in their AD rate.

AFA Rate

If separate rate status were to be accorded to these and similarly situated mandatory respondents, *Lifestyle III*[39] dictates that the actual AFA rate assigned to the respondents must be supported by substantial evidence, corroborated, and tested. Unless it meets those tests, it should not go from 6.68% to 216.01%, the same 3,000% increase that troubled the Court of International Trade in *Lifestyle III*, for these companies. The courts require that an AFA rate, while a disincentive, may not be punitive.[40] The AFA must reflect the respondent's commercial reality, and here there is presumably enough primary (the respondents' own) and secondary (other companies') information on the record for that purpose. ●