



CHAMBERS
Global Practice Guides

International Trade

USA – Law and Practice

Contributed by
Braumiller Law Group, PLLC

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USA

LAW AND PRACTICE:

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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USA LAW AND PRACTICE

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Braumiller Law Group, PLLC focuses on international trade compliance and developing strategies to optimise global trade business practices. The firm assists clients in navigating the intricate maze of global trade regulations, thereby often saving them a substantial amount of money in potential compliance penalties or additional duties. In terms of international trade, the Braumiller Law Group's core services include: trade

policy (domestic and international trade regulation guidance); trade agreements (interpretation and development of compliance procedures); anti-dumping and countervailing duties (interpretation, compliance protocol, representation); internal reviews to measure compliance levels; analysis of foreign tax implications; Brazil market access and trade compliance consulting.

Authors



Adrienne Braumiller is the founder of the firm and brings more than 25 years' experience to bear on legal issues pertaining to customs, import, anti-dumping/countervailing duties, export, foreign trade zones, free trade agreements and

ITAR compliance. Over her long career, she has been involved in every aspect of import and export compliance, from developing compliance programmes to conducting audits and assessments, representing clients who are under investigation, submitting scope ruling requests related to anti-dumping/countervailing order, preparing and submitting voluntary disclosures, preparing and filing classification requests and licences, analysing whether specific transactions should be pursued, providing tailored training on specific import/export topics, addressing penalty assessments, and serving as an expert witness in a number of trade cases. Adrienne is a member of a good many highly distinguished professional bodies and has lectured extensively on strategic trade management.



Jennifer Horvath is a senior associate at the firm. She assists companies with a range of international trade issues, including advising Fortune-ranked companies on complex Customs and export issues. Her practice before US

Customs and Border Protection includes strategising voluntary disclosures (prior disclosure), protest filings, application of free-trade agreements (NAFTA, US, Korea, etc) and obtaining release of seized merchandise, as well as extensive experience in representing companies with tariff classifications across a range of industries. Jennifer guides clients in anti-dumping/countervailing duties issues, and obtaining scope determinations from the Department of Commerce. She has strong experience in Customs valuation issues, including valuation analysis unique to maquila transactions. Jennifer focuses on advising companies how to strengthen their import compliance programmes in a practical and effective manner. Her practice in export control issues has included helping companies navigate export control regulations, which include interpreting the US Export Administration Regulations (EAR), the International Traffic in Arms Regulations (ITAR), the Federal Trade Regulations (FTR),

and the Anti-Boycott regulations. She has assisted companies in building a comprehensive export compliance management programme to deal with export control issues and to limit companies' exposure to liability. Jennifer has partnered with companies in preparing voluntary disclosures to a variety of agencies and has conducted internal audits, prepared trainings related to export compliance, and aided companies in the classification of exports, analysing deemed export issues related to foreign-national employees, DDTC company registration, and obtaining licences for exports.



Paul Fudacz is a Senior Associate with the Braumiller Law Group with nearly 25 years of experience in international trade law. He specialises in customs and import regulatory issues, export controls and licensing, legal audits, supply chain

security initiatives and establishing and managing comprehensive regulatory compliance programmes. His recent practice has involved assisting clients in the aviation, polymer and chemical, material handling, electronics, oil and gas, solar cell, toy and recreational equipment and vehicular components industries. Paul has special expertise in the areas of HTS classification, anti-dumping and countervailing duties, customs valuation, customs seizures, bilateral and multilateral trade agreements, ACS Reconciliation, C-TPAT, Customs and FTC marking and ISA certification requirements. He also has considerable experience with EAR, ITAR, OFAC, and anti-boycott compliance. Beyond this area of practice, he assists clients in obtaining foreign trade-mark registrations. Paul is presently serving an appointment on the Northwest Ohio District Export Council and also serves on the Steering Committee of The University of Toledo's Export Success business development programme and is a presenter in the programme. Paul also serves as a mentor in the Ohio Supreme Court's Lawyer-to-Lawyer young lawyer development programme, and is frequently a speaker for various business development organisations, including the US Department of Commerce, the Ohio Department of Development's Northwest Ohio International Trade Assistance Center and the Northeast Ohio Trade & Economic Consortium.

1. Anti-Dumping

1.1 Anti-Dumping Measures

Article 9 of the World Trading Organisation (WTO) Anti-dumping Agreement governs the application and collection of antidumping duties and includes a provision known as the 'lesser duty rule.' This provision is not binding upon WTO Members. Under the lesser duty rule, national authorities may impose duties at a level lower than the margin of dumping as long as this level is adequate to remove injury to the domestic injury. The USA does not apply the lesser duty rule.

1.2 Public Interest Considerations

US law does not require the International Trade Commission (ITC) and the Department of Commerce to make a further determination that the imposition of an antidumping measure is also in the public interest.

1.3 Provisional Anti-Dumping Duties

Assuming the ITC has made an affirmative preliminary determination, the Department of Commerce will generally make a preliminary determination within 160 days after the date on which the petition is filed in antidumping cases. The Department of Commerce's decision will be published in the Federal Register. If the Department of Commerce makes an affirmative finding, "It orders the suspension of liquidation of all entries of the subject imports that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of determination in the Federal Register. Importers are then required to post cash deposit or bond for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin". See U.S. International Trade Commission, Antidumping and Countervailing Duty Handbook, II-13 (June 2015).

1.4 Retrospective Anti-Dumping Duties

US investigating authorities may impose antidumping duties retrospectively. For example, "critical circumstances" is a provision in antidumping duty law that allows for "the limited retroactive imposition of duties if certain conditions are met". See U.S. International Trade Commission, Antidumping and Countervailing Duty Handbook, I-10 (June 2015). A petitioner in an antidumping investigation may allege the existence of critical circumstances in the petition phase or by amendment at any time more than 20 days before the date of Commerce's final determination.

1.5 Access to Confidential Information

Authorised representatives of interested parties to the proceedings may receive business proprietary information that was submitted to the ITC or Department of Commerce. Privileged and classified information, however, is exempt from release unless there is a clear and compelling need for the information. See U.S. International Trade Commission,

Summary of Statutory Provisions Related to Import Relief, 16 (August 2014).

1.6 Basis for Normal Value

In most circumstances, sales of the foreign like product in the home market are the most appropriate basis for determining normal value. However, in case normal value cannot be based on domestic prices, the Department of Commerce may rely on sales to a third country as the basis for normal value. See 19 CFR § 351.404. The Commerce Department will select a third country where sales of the foreign like product in that country are of "sufficient quantity" to form the basis of normal value. "Sufficient quantity" means that "the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by an exporter or producer in a country is 5% or more of the aggregate quantity (or value) of its sales of the subject merchandise to the United States". If prices in more than one third country are available, the Commerce Department generally will select the third country based on the following criteria:

- the foreign like product exported to a particular third country is more similar to the subject merchandise exported to the USA than is the foreign like product exported to other third countries;
- the volume of sales to a particular third country is larger than the volume of sales to other third countries; and
- such other factors as the Commerce Department considers appropriate.

1.7 Constructed Normal Value

In case normal value is constructed, the U.S. Department of Commerce determines normal value by constructing a value based on "the cost of manufacture, selling general and administrative expenses, and profit". See 19 CFR § 351.405. For instance, the Commerce Department will normally determine the value of a major input purchased from an affiliated person based on the higher of the following:

- the price paid by the exporter or producer to the affiliated person for the major input;
- the amount reflected in sales of the major input in the market under consideration;
- the cost to the affiliated person of producing the major input.

See 19 CFR § 351.407.

In determining the appropriate method for allocating costs among products, the Commerce Department may take into account production quantities, relative sales values, and other quantitative and qualitative factors associated with the manufacture and sale of the subject merchandise and

the foreign like product. The Commerce Department may disregard sales of the foreign like product made at prices less than the cost of production of that product. However, such sales are disregarded only if they are made in substantial quantities within a certain time period and are not at prices which permit recovery of costs within a reasonable period of time. See 19 CFR § 351.405. It is possible that the analysis of production quantities and other factors associated with the manufacture of the subject merchandise could involve the review of out-of-country data.

1.8 Claims for Level of Trade Adjustments

“When sales are made to disparate customer classes, any price differences may simply reflect the different nature of the customers’ businesses. The DOC addresses this issue by attempting to match prices of US and home-market sales at the same level of trade. When there are no home-market sales at the same level of trade, and comparisons must be made across such levels, the DOC will consider making a level-of-trade adjustment to account for the difference.” Of cases observed, level of trade (“LOT”) adjustments were not frequently granted as available data did not provide an appropriate basis for the Department of Commerce to make a LOT adjustment. See 2015 Enforcement and Compliance Antidumping Manual Chapter 8: Normal Value Illustrative Examples of Lot Analyses.

1.9 Anti-Dumping Duty

Typically, antidumping duties are paid upon importation during interim reviews.

1.10 Non-Market-Economy Countries (“NMEs”)

Nonmarket economy (“NME”) countries are treated differently from WTO members with market economy status. The US Department of Commerce defines a non-market economy as a foreign country that does not operate on market principles so sales of merchandise in country do not reflect the fair market value – ie, the market price is determined by the government rather than by the principles of supply and demand. The US Department of Commerce will consider the following six factors when determining whether a country is a NME:

- the ease of converting the country’s currency into another currency;
- the extent to which wage rates are determined by market forces;
- openness to joint ventures and other forms of investment;
- the extent of government ownership or control of the means of production;
- the extent of government control over pricing and output decisions; and
- any other factors the Department considers appropriate.

See 19 USC § 1677(18)(B).

Adjustments are made for distortions resulting from their nonmarket status. For example, normal value is determined by valuing the nonmarket economy producer’s factors against that of a market economy country. See 19 CFR § 351.408.

In most instances observed, the Department of Commerce’s use of out-of-country benchmarks was to address instances of market distortion already determined based on a government’s predominant role in the home market rather than to determine the existence of the distortions.

1.11 Section 15(a)(ii) of the Protocol of Accession of China

When China was inducted into the WTO, Section 15 of China’s Protocol of Accession (POA §15) allowed WTO members to designate China as a NME and assess the cost of production in China by using a fair valuation method. This allowed WTO members to calculate production costs using an alternative method, rather than relying on the normal price of production in the Chinese market. Given that the POA §15 expired on 11 December 2016, the current debate is whether the expiry automatically grants China market-economy status, or whether national law makes such a determination. At this time, the USA has decided it won’t grant China the official market economy status. As a result, China has filed a complaint against the USA with the WTO dispute settlement board.

1.12 Maximum Period of Validity of Anti-Dumping Measures

Antidumping measures are usually imposed for five years. However, the US International Trade Commission and Department of Commerce conduct sunset reviews no later than five years after an antidumping or countervailing duty order is issued to determine whether revoking the order would likely lead to continuation or recurrence of dumping, subsidies, or material injury. If revoking the order would likely lead to continuous dumping, the US International Trade Commission and Department of Commerce may extend the antidumping measures.

1.13 The Acceptance of Price Undertakings

A price undertaking is an agreement between the investigating authority and the exporter, whereby the latter agrees to raise the price to the extent that the investigating authority is satisfied that the dumping margin or the injurious effects of the dumping are eliminated. Investigations do not always result in the exporter accepting the price undertaking agreement and, as a result, the investigating authority may levy additional duties on their exports. Such duties can be collected retrospectively if there is an affirmative finding in a critical circumstances review.

2. Anti-Subsidy

2.1 Concurrent Anti-Subsidy and Anti-Dumping Investigations

It is common for the Department of Commerce and International Trade Commission to issue concurrent anti-subsidy and anti-dumping investigations targeting the same products. If an interested party files an antidumping and countervailing duty petition, the Commerce Department will typically initiate an investigation to determine whether both dumping and subsidies exist.

2.2 Subsidy Schemes

When a petition is submitted alleging actionable subsidies, the petition is based on information reasonably available to the petitioner; however, this information, in most instances, is incomplete and must be evaluated and further developed during the formal investigation process. The Tariff Act, which governs the filing of countervailing duty petitions, provides that “the petition may be amended at such time, and upon such conditions, as the administering authority and the Commission may permit”, indicating the scope of the petition may be amended without initiating a new investigation. See 19 USC § 1671a. As such, the International Trade Commission will not necessarily limit its investigation to the subsidy schemes mentioned in the notice of initiation.

2.3 Benefit Calculation in Case of NMEs

“Commerce uses data from within the subsidising country to measure the benefit of unfair subsidies using third country data only if data from the subsidising country is unreliable”. See Hearing on HR 1229, The Nonmarket Economy Trade Remedy Act of 2007 (15 March 2007).

3. Safeguards

3.1 The Safeguards Instrument

According to WTO dispute settlement agreements, the USA has been involved in 34 cases since 1997 citing Agreements on Safeguards.

3.2 Unforeseen Circumstances

One must demonstrate that unforeseen circumstances (or developments) and the effects of tariff concessions resulted in increased imports, causing or threatening to cause serious injury to the relevant domestic producers. See Article XIX:1(a) of GATT 1994.

3.3 Article XIX:1(a) of GATT 1994

Historical US practices related to international trade agreements have required language similar to Section XIX(a) permitting the withdrawal of concessions if increased imports resulted from obligations or concessions related to the particular trade agreement. Since 1947, all US trade agreements were required to contain similar “escape clause” language. By extension US authorities would interpret the “effect of the obligations incurred” as a causality whose acceptance led to increased imports and required protective measures, rather than an interpretation that the effect of the obligations prevented the adoption of preventive measures. See GATT Safeguards: A Critical Review of Article XIX and Its Implementation in Selected Countries.

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