

“Precautions and Considerations for Chinese Exporters faced with Antidumping Charges in the United States”

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Introduction

The very first antidumping lawsuit against the People's Republic of China was in 1979. Since then, China has become a common target of dumping charges for most of its major trading partners. There have been over 422 cases that have been brought against Chinese enterprises involving more than \$10 billion worth of products, although this is only a small portion of total exports the impact has been negative and devastating to many Chinese industry. The European Union leads the attack, followed closely by the United States. This being the case it is important for Chinese exporters today to understand the US antidumping laws in order to take preventive measures to avoid being imposed with astronomical antidumping duties by US governmental agencies. The agencies for which the fate of many Chinese industries faced with dumping charges lie with the Department of Commerce ('DOC') and the International Trade Commission ('ITC'). This article will compare and contrast the attitudes of the DOC, ITC and the Court of the International Trade ('CIT'). It will then conclude by providing some practical preventive measures derived from precedent cases from the CIT that can be taken into account by future Chinese industries wishing to export to the US.

Comparison of the Attitudes of DOC, ITC and CIT toward Antidumping Cases

Department of Commerce and International Trade Commission

In almost 90 percent of the cases brought to date, the DOC has found that a foreign exporter/producer is dumping.¹ Therefore according to W. Perry² the main objective is to get the dumping margin as low as possible at the DOC. The dumping margin is the percentage by which the foreign exporter's prices in the United States are found to be lower than the

¹W.E. Perry, Williams, Mullen, Christian & Dobbins, “*US Antidumping Law: The Most Powerful Trade Law*” at <http://www.gsblaw.com/resource>

² William Perry, now a partner in the law firm Williams, Mullen, Christian & Dobbins, previously worked in the Office of Antidumping Investigations at the US Department of Commerce and in the General Counsel's office at the US International Trade Commission.

prices in their home market, or the percentage by which the exporter is selling at less than the cost of production.³

For antidumping measures to be imposed under US law, two major requirements must be satisfied:

1. the DOC must find that imports are being dumped; and
2. the ITC must find that the domestic industry is materially injured or threatened with material injury, or else that the development of an industry is materially retarded, by reason of dumped imports.⁴

Due to the fact that 90% of cases are imposed with antidumping duties at the DOC stage it has been suggested that the only chance for a foreign exporter to completely win a case at the ITC is on the basis of lack of injury to US industry. For example in cases where the DOC had found levels of dumping in the range of 160 to 276 percent, cases could be argued in favor of the respondents where it can be shown in the ITC's determination that there was no injury to the US industry.⁵

To understand the approach the DOC takes, below is an outline of the steps that the DOC take when considering if dumping has occurred:

1. An industry files a petition with the ITC and the DOC (domestic producers joining the petition are called "petitioners").

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2. Petitions required to contain some evidence of dumping and injury in order to initiate an investigation (evidentiary requirements are quite modest) critical circumstances.

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3. ITC has 45 days to determine whether there is reason to believe that dumped imports are causing or threatening injury to a domestic industry (affirmative preliminary findings are rendered in about 79 percent of cases).

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³ *Ibid.*

⁴ B. Lindsey and D. Ikenson, "Center for Trade Policy Studies Antidumping 101: The Devilish Details of "Unfair Trade" Law, 26 November 2002, <http://www.freetrade.org/pubs/pas/tpa-020es.html>

⁵ See note 1.

4. DOC issues questionnaires to “mandatory respondents” – the largest known foreign producers and exporters of subject merchandise from the countries in question.



5. DOC normally makes its preliminary determination (prelim) within 140 days of the investigation’s initiation. If the determination is affirmative, liquidation is suspended for all future subject imports, and a bond must be posted to cover possible antidumping duties at the rate announced in the prelim.



6. DOC conducts an on-site verification of the respondents’ questionnaire data and considers factual and legal arguments submitted by petitioners and respondents.



7. DOC makes its final determination within 75 days of prelim.



8. If affirmative (occurs 90-94% of the time) respondents must pay cash deposits on possible antidumping duties at the rate announced in the final determination.



9. Upon DOC’s final determination ITC has 45 days to make its final injury finding. If affirmative (occurs 83% of the time) an antidumping order is issued, which subjects prospective imports to antidumping duty deposits equal to the calculated rate of dumping.



10. The deposit rate is only an estimate of the dumping liability. Final liability is determined by administrative review conducted later by the DOC (calculated on Period of Review POR).⁶

The calculation of the dumping margin depends on the type of the economy in which the product originated. In the case of China the economy is classified as a Non-Market

⁶ See note 4.

Economy ('NME')⁷. There is a Safeguards Agreement currently in place for China (country specific safeguard). For the first twelve years upon China's accession into the WTO, the US may take action against Chinese imports if they are disrupting the US market. This provision does not apply to US exports to China and moreover China cannot retaliate in response to the Safeguards for at least three years.⁸

In calculating whether a product is being or is likely to be, sold in the United States at less than fair value (in other words being 'dumped'), DOC must make "a fair comparison...between the export price or constructed export price and **normal value**."⁹ DOC is directed by statute to calculate normal value "on the basis of the value of the factors of production utilized in producing the merchandise. When valuing factors of production in NME circumstances DOC is directed by antidumping law to gather surrogate prices from the "best available information"...in a market economy country...considered to be appropriate by the administering authority."¹⁰ The surrogate country for China is usually India. According to the leading case of *Yantai Oriental Juice v. United States*, 2002 Ct. Intl Trade; Slip Op. 2002-56 Justice Eaton found that "the process of constructing foreign market for a producer in a NME is difficult and necessarily imprecise. DOC enjoys wide discretion in valuing factors of production and has broad authority to interpret the antidumping statute. In *Lasko Metal Prods., Inco v. United States*, 43 F 3d 1442 Justice Restani (current Chief Justice at the CIT) held that the approach to be taken by the DOC and ITA is a 'mix and match' approach. The purpose of the antidumping statute is to calculate margins as accurately as possible therefore commerce may use evidence of prices paid by the NME country to market economy suppliers in combination with surrogate country information when valuing factors of production. The essence of the finding by Justice Restani in *Lasko* is to direct the DOC and ITC to determine factors of production as accurately as possible, this includes taking into consideration market economy prices if the NME paid market rates. Such discretion afforded to DOC and ITC by US antidumping laws gives rise to abuse. Greg Rushford editor of Rushford Report stated:

⁷ A 'NME' is defined by the antidumping statute as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." Commerce's designation of the PRC as a NME country is not disputed.

⁸ See US Government Sector Papers, Washington Council on International Trade, "*Product-Specific Safeguard*", http://www.wcit.org/topics/china/chi_sector_pages/chi_sector_prod_safe.htm.

⁹ 19 USC § 1677b (a) (1994). Normal value has been summarized as follows:

Commerce generally calculates the antidumping duty by comparing an imported product's price in the United States to its normal value..., which represents the price of comparable merchandise in the exporting country. The dumping margin is the amount by which [normal value] exceeds the US price.

¹⁰ U.S.C § 1677b(1)

“If there is evidence of China not playing by the rules of the marketplace, it would be in the official files. I’ve looked at case after case, and the evidence is simply not there... The evidence that is in the antidumping files shows that the US antidumping laws are designed to let the Commerce Department bureaucrats do pretty much anything they want, as they go about the business of sticking it to China.”¹¹

Statistics show that the discretionary nature and the increase of use of antidumping practices in the last decade appear to be evolving over time, in the last three years the moving average of the US antidumping margins have been on an upward movement. The average antidumping margin rose 2.5 % a year, from a starting point of the 15.5% in the early 1980’s to over 63% by 2000 for margins calculated by the DOC. Similarly the trend over the last three years have also been on the rise for ITC decisions where the likelihood of the ITC finding injury, rising from about 45% rate in the early 1980’s to a 60% rate by 2000. Combined, these figures indicate a rise in the average expected antidumping duty (antidumping duty time the probability of affirmative injury determination) from approximately 5% to over 30% for any foreign firm that finds itself investigated in a US antidumping action.¹² Further study shows that the upward trend in US dumping margin is primarily through evolving discretionary practices at the DOC, with little or no role for changing country composition of investigated cases or legal changes.¹³ In particular, the DOC’s use of ‘adverse facts available’, cost of production tests, and cost data to construct normal value are estimated to be driving a lot of the increasing higher dumping margins. Importantly, this effect is due not only to increasing and extensive use of these practices, but apparent changes in implementation of these practices that mean a higher increase in margin whenever discretionary practices are applied. Consequently, these results suggest that these practices are evolving rapidly into more distorted practices over time.¹⁴

It has been suggested that derived from DOC decision announcements the most systematic changes in DOC implementation of discretionary practices are those that are not required by law. The most obvious changes involved use of “facts available”, for instance in the 1980’s the DOC were more willing to work with foreign firms and assist them in getting information required for the antidumping calculations. In earlier times, the DOC was also willing to consider foreign firm information during the latter stages of an investigation.¹⁵ In contrast by

¹¹ G. Rushford, “*Tilting the Rules of Fair Trade*” November 18, 2003, The Wall Street Journal.

¹² B. Blonigen, “*Evolving Discretionary Practices of US Antidumping Activity*” April, 2003, University of Oregon and NBER. (Draft Article)

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

the late 1980's the DOC was applying 'adverse fact available' even when firms failed to respond to one portion of the questionnaire and was rejecting any information from the foreign firms after the preliminary decision as untimely. The DOC also became less lenient toward 'non-cooperation' cases for seemingly minor omissions.¹⁶

The above statistics show that there has been a shift in approach taken by the DOC and ITC. As we can see the approach by the DOC and ITC is a 'mix match' approach that is guided by antidumping legislation which provides the governmental agencies a high level of discretion. The attitude has changed over the last two decades and the DOC and ITC have toughened up the procedures for defendants in antidumping investigations. It has been stated by W. Perry that politics play a much smaller role in dumping cases than foreign producers might think, G. Rushford comments otherwise.¹⁷ G. Rushford states that since 1993 the decade encompassing the Clinton- Bush administrations – US antidumping officials has slapped punitive tariffs on China 33 times. Currently it appears that the US trade policies are looking at Chinese-made bedroom furniture, on grounds that they are priced too cheaply. Rushford argues that American commerce secretaries and presidents of both political parties keep insisting that China doesn't play by the rules of "fair trade". But whether the product is furniture or apple juice, the politician's claims just don't hold up. "The fact that they continue repeating such smears is really unfair".¹⁸

To gain an even better understanding of the shift in attitude in DOC and ITC it is appropriate to discuss the approach taken by the CIT.

Court of International Trade

Court rulings have the potential to affect DOC dumping margin calculations. Parties involved in US antidumping actions have the ability to appeal rulings with the CIT and ultimately, the US Supreme Court. Most of the cases considered by the CIT involve issues connected with the procedures used in dumping margin calculations by the DOC. The CIT in general allows the DOC broad discretions in how to administer the US antidumping law and only overturns decisions when a procedure is clearly not reasonable in its consistency with the law. This view however is only a general impression. Upon a review of several recent antidumping

¹⁶ Ibid.

¹⁷ See note 1 and note 11.

¹⁸ See note 11. Rushford says that "Twenty-seven American furniture makers in the states like North Carolina and Virginia are asking for antidumping tariffs ranging from 158% to 441%... Interestingly, the Chinese manufactures buy significant amounts of oak, cherry, walnut and other hardwoods from US southern states like Virginia which have been actively pursuing export opportunities for their wood products at trade fairs in Shanghai and Guangzhou. When Chinese business men buy American wood, nobody says it's unfair."

cases, I have found that the CIT are fair and impartial and its decisions carry enough weight for DOC and ITC to be put on alert and kept in check. One of the most preeminent antidumping cases involving China that illustrate this attitude is that of *Yantai Oriental Juice* decided in June 2002 by Justice Richard K. Eaton.

An analysis of this case will clearly demonstrate the current role and attitude of the CIT toward antidumping investigations conducted by the DOC and ITC. In this case DOC initiated its investigation of Apple Juice Concentrate ('AJC') production from the PRC in June 1999, in response to a petition filed by several domestic manufacturers. Plaintiff's (Chinese AJC producers) challenged the following aspects of DOC's final determination:

1. DOC's selection of various surrogate factors of production including:
 - DOC's selection of India as the surrogate country for the PRC;
 - DOC's selection of Indian prices to value juice apples;
 - DOC's valuation of ocean freight expenses;
 - DOC's valuation of steam coal;
 - DOC's valuation of selling general, administrative expenses and factory overhead;
 - DOC's inclusion of Detroit freight costs in its east coast surrogate freight calculations.

Factors of production are the single most important mechanism for the DOC to determine whether or not subject merchandise is being dumped. In determining factors of production DOC has a lot of discretion however this is not limitless. DOC must avoid using any prices which has reason to believe or suspect may be subsidized and the critical question is whether the methodology used by DOC is based on the 'best available information' and establishes margins as accurately as possible. DOC's task in NME investigations is to calculate what a producer's costs or prices would be if such prices or costs were determined by market forces. The following findings were made by Justice Eaton:

- DOC used the Petitioners' Market Study to establish that an Indian Company 'HPMC' was a significant producer of comparable merchandise (AJC). Justice Eaton rejected DOC's use of the Petitioner's market Study stating that it was not in accordance with law or based on **substantial evidence**.¹⁹ Where Commerce is

¹⁹ The court's role is not to determine whether information chosen by the DOC is the best actually available to determine the value for factors of production, but whether the choice is supported by substantial evidence and is in accordance with law. See 19 U.S.C. § 151 a (b)(1)(B)(I). Substantial evidence consists of such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Consol. Edison v. United States*, 305 US 197, 229, 83 L. Ed. 126, 59s. Ct. 206 (1938)

presented with **secondary information**, to the extent practicable, it is required to **corroborate that information** in order to evaluate its probative value.

- DOC's conclusion based on Petitioners' Market Study, that India was a significant producer of AJC was not supported by substantial evidence on the record. When drawing inferences from the facts on record DOC may not rest its decisions on conclusory statement. Rather DOC must articulate a '**rational connection between the facts found and the choice made**'. For example, DOC's statement that 'we share the petitioners' conclusion is devoid of any explanation.
- In determining the value of apples plaintiffs argued that the Indian prices for apples were influenced by a 'Market Intervention Scheme' ('MIS') whereby the Indian national and provincial governments artificially raised the prices of apples in order to provide subsidy to the apple growers. DOC's argument was that they are primarily concerned with subsidy programs that lower the factors of production and this is not the case with the MIS. Justice Eaton did not accept this explanation he ordered that DOC explain (1) why the distortions caused by MIS is considered fair market value for Indian Apples; (2) fully explain why the DOC **only** takes into account subsidy programs that lower factors of production; (3) why prices derived from a company who is administered by MIS should be considered to have paid market prices for their apples.
- Plaintiffs also argued that their goods were shipped by market economy companies and charges were incurred in a market economy. Plaintiffs ultimately failed on this point because although payment was made in a market economy currency, it was made to a PRC freight forwarder rather than to the market economy carrier.
- For Selling General and Administrative Expenses calculation and overhead ratios DOC ignored the largest know Indian AJC producer data (HPMC's financial report was relied on in every aspect of calculating factors of production) and instead opted for 'general basket category' of financial data provided by the petitioners. Justice Eaton found that this was not to be supported by substantial evidence. He ordered the DOC to explain why it rejected using the financial data of the largest AJC producer - a producer who DOC concluded was of **comparable merchandise**.
- Commerce failed to take into account the volume of freight sent to each port, valuing the few shipments to Detroit equally to the many shipments to New York. Thus the east coast rate was skewed by Detroit's inclusion. Justice Eaton directed DOC to calculate a separate Detroit freight rate and explain its reasons for not doing so and

explain its policy of not weighting shipments to various destinations so as to accurately reflect the volume of merchandise actually shipped to each destination.

The findings made by Justice Eaton in *Yantai Oriental Juice* touches on significant aspects of the considerations and attitude the DOC takes on when investigating NME (in particular Chinese) antidumping cases. As we can see the DOC has the discretion to 'pick and choose' the information it wants to use determine the factors of production. It is clear from many of the CIT decisions, the DOC do not always use the best available information. That being the case the CIT is an important avenue for appeal when defendants are ordered to pay unfairly large dumping margins.

In light of the above the following section shall discuss the lessons we have learnt from past.

Lessons from the Past

Good practice before you are faced with an antidumping investigation

In an attempt to give a 'heads up' to Chinese exporters considering exporting to the US below is a list of the preventative measures that will increase the likelihood of winning an antidumping investigation in the event petitioners' in the US file suit against a Chinese industry with the DOC and ITC:

- If your company received subsidies from the government it is almost certain that if are investigated by the DOC and ITC there will be an affirmative dumping finding.
- Avoid using subsidized materials in the production of your product merchandise i.e. subsidized raw materials for example coal.
- If possible use products that have been bought from market economies, or at least part of the components from market economies. The DOC will use NME data, if it is the best available information.²⁰
- If you receive no government incentives ensure you keep up-to-date financial records e.g. sale records, prices you have paid for materials to show that this is the case.
- In any event up to date financial records must be kept. Keep records of all expenses including:
 - sales expenses i.e. advertising costs;
 - administration expenses;
 - transportation expenses;

²⁰ According to *Luyong Bearing Factory v US*, April 14, 2003, the CIT stated that PRC trading company data will be accepted so long as it is the 'best available information'

- ocean freight (if possible use a freight forwarder from a market economy);
and
- other overheads.

What to do when you are faced with an antidumping investigation

A recent article written by William E. Perry “U.S Antidumping Case against China – Lessons Learned” gives an excellent guideline as to what Chinese exporters when faced with antidumping charges. He lists the following valuable lessons that should be taken note of:

- Participate – do not ignore the charges (the garlic industry has been shut out of the US because of its lack of participation which resulted in a 374 percent dumping margin.
- Win the initial investigation – this means providing accurate information to the ITC or DOC, you can either win by persuading ITC that there is no injury or enter into a suspension agreement (a suspension agreement is a negotiated agreement between the US and Chinese governments in which the DOC stops the antidumping case and issues a quota with a price floor) for low margins to be entered.
- Work with the US importers; they may be able to persuade end users to testify on your case with the DOC and ITC. In a case where Chinese exporters were accused of dumping silicon carbide on the US, domestic importers persuaded General Motors, one of the biggest users of Chinese silicon carbide, to intervene and testify in favor of the Chinese companies. This was one of the major reasons the ITC reached a negative determination of injury in the case.
- Be prepared and take the investigations seriously.
- With respect to raw materials, electricity or labor used in the factory. Report only on raw materials, electricity, coal, or labor used directly on the production line to make the product subject to investigation. Be sure not to over report on these factors of production, but as accurately as possible.
- Keep in mind that DOC investigators are the judge – they are being paid to verify the accuracy of the response and, are paid to be skeptical. The investigators, therefore, are searching for mistakes, but so long as the mistakes are minor and the company is being cooperative, the DOC will usually give the company the benefit of the doubt.
- Testify at the ITC hearing against the threat of material injury. Be sure to be at the hearing.

- Fully cooperate and take advantage of every opportunity to win the case. Fully cooperate and answer questionnaires carefully.
- Be willing to pay the appropriate legal fees. It is better to sacrifice a little now than to lose a whole lot later and be pushed out of the US market.

Conclusion

In conclusion this article has attempted to show the attitudes of the DOC, ITC and CIT. The DOC is the governmental agency who determines whether dumping has occurred, the ITC determines if injury has occurred and the CIT is an avenue for appeal if the DOC and ITC make a finding that you believe is unfair. The DOC and ITC attitude appears to have toughened up on its stance toward antidumping cases involving China in the last decade. This may be contributed to both political influences as an attempt to level the playing field and due to the fact that discretionary practices are simply evolving over time because of increase usage. The CIT are however aware of the DOC and ITC practices, Justice Eaton's 35 page judgment in *Yantai Oriental Juice* is a brilliant documentation of DOC's discretionary power and its abuse. Words of wisdom to Chinese manufacturers looking to export to the US would be to learn from the past lessons in order to navigate the intricate US antidumping law and move forward into the future.