by Eric McClafferty, Esq.

The Surge In International Trade Litigation

Antidumping duty cases are powerful ways to address the problems caused by unfairly low-priced imports.

Three recent antidumping duty cases are grabbing the attention of material handling equipment producers, importers, distributors and end-users in the United States and Europe. The two U.S. cases involve hand trucks from China and forklift trucks from Japan, while the European case covers non-motorized hand pallet trucks. Importers are paying substantial antidumping duties in connection with most purchases of these products.

Many material handling companies have some familiarity with antidumping duty cases involving steel input products, which have been in effect for many years. Those familiar with antidumping duty cases know that they are international trade actions that can have a powerful impact on competition, market share and prices. These cases change buying and import sourcing decisions from the day they are filed.

Recent Cases

At the end of November 2004, the United States put an antidumping duty order in place on hand trucks from China in response to a petition filed by U.S. producers. Importers are now required to deposit duties with U.S. Customs on Chinese hand trucks (and most parts of hand trucks) ranging from 26.49% up to 386.75%—yes, 386.75%—of entered value. (Duty deposit rates depend on the identity of the Chinese producer.)

On January 28, 2005, the European Union found provisionally that hand pallet trucks from China were being sold at dumped prices in Europe. As a result, the EU has begun collecting antidumping duties ranging from 29.7% to 49.6% from European importers of Chinese hand pallet trucks.

On March 1, 2005, the United States initiated its second five-year “sunset” review of the original 1987 antidumping duty investigation of internal combustion industrial forklift trucks from Japan. Currently, U.S. importers are required to pay antidumping duties ranging from 4.48% up to 57.81% (again, depending on the identity of the Japanese exporter) in connection with imports of forklift trucks, and certain parts of those trucks (including frames) from Japan. The sunset review will determine if the order stays in place or is terminated.

These antidumping duty cases can quickly change the way an industry sector looks at global sourcing, supplier selection and target export market selection. Of course, in addition to antidumping duty cases that affect sourcing behavior, U.S. and international trade laws offer the means to counter foreign government subsidies, import surges, infringements of intellectual property rights from imports (knock-offs and grey market imports), and also offer avenues to help open foreign markets closed by government barriers to trade.

What Is Dumping?

Antidumping duty investigations in the United States are triggered by a petition from U.S. producers of the product in question to the Department of Commerce and the U.S. International Trade Commission (ITC). Antidumping duty investigations cover two principal issues: dumping and injury.

Contrary to popular belief, antidumping analysis does *not* measure whether foreign products are sold in the U.S. at prices that are lower than U.S.-made goods. Instead, the Commerce Department evaluates whether the price of a product in an export market (for example, the price of a Chinese hand truck in the U.S.) is lower than the price of the identical product sold in the home market (China) by the same Chinese manufacturer. In other words, is the producer selling his products for less in the United States than the price at which he sells that same product in his home market? This is the approved antidumping duty analysis under the World Trade Organization (WTO) treaties. In conducting this analysis, prices are adjusted so that transportation and other factors that affect international sales prices are removed from the equation and the comparison is made based on an “apples to apples” price. Without getting into specifics of the Commerce analysis, if prices of the exported product in the U.S. are below cost or below the home market price, dumping is occurring. Simplifying again somewhat, the antidumping duty applied to imports is essentially the margin of dumping. This differential duty, applied by U.S. Customs upon import, is designed to enforce pricing discipline on dumped products so they are not unfairly traded, as defined by the U.S. statute and the WTO treaties. (In China cases, the dumping analysis is complicated by China's non-market economy status, which makes it impossible to determine market values for certain input products. The Commerce Department has a special methodology to analyze non-market economy inputs using surrogate market economy prices.)

Injury

Dumping of imports from the targeted country must also be found by the ITC to be a cause (not necessarily the only cause) of injury (or threat of injury) to domestic producers. Injury is measured by looking at volume, impact and price of imports in the U.S. market and the financial health of the U.S. industry. The injury finding is absolutely critical. If injury or threat of injury is not found, even at the preliminary stage of the ITC investigation, the investigation ends immediately, subject to the right of the domestic industry to appeal.

Both the dumping and injury inquiries are driven by empirical evidence of import volumes, prices, cost of production and a good deal of other data gathered by the agencies under a highly confidential process governed by administrative protective orders, coupled with argument from all interested parties about what the facts demonstrate.

In addition to U.S. and EU cases, China, India, Mexico and many other countries have actively investigated a number of antidumping duty actions that could affect companies that export to those destinations.

What Companies Should Do

The action your company takes in response to an antidumping duty case, or proposed case, depends on your company's role. Does your company import, produce for export, or does the company produce domestically in the United States?

Importers face difficult decisions in the face of an antidumping duty investigation. This is true even though the Commerce Department's questions are generally directed to foreign exporters. Ultimately, importers are financially responsible for the payment of duties to U.S. Customs. The mere filing of an antidumping duty case can lead to a great deal of uncertainty about eventual duty liability. This often causes importers to abandon imports and purchase from U.S. producers in an effort to avoid uncertain levels of antidumping duty liability. Importers are justifiably concerned that final duty liability may not be calculated and assessed until a year or more after the investigation is started, particularly when importers are dependent on exporters' responses to Commerce's questionnaires. Moreover, antidumping duties can be a significant percentage (or multiple) of the value of the entered product (many China case margins are in the high double digits, and some have even topped 200%).

If your company is an importer of a product subject to an antidumping duty case, you should evaluate the company's exposure to future duty liability by reviewing the company's volume and value of imports and the prices at which you are (and have been) purchasing product compared to prices in the home market. If your company believes that the products are not purchased at dumped prices (under Commerce's methodology), or that domestic producers in the United States are not injured (at least in part) by imports, you may wish to contest the case, most likely at the International Trade Commission. Other importers may stop importing from the targeted country and turn to alternative foreign sources, although this option can involve significant investments of time to conduct due diligence on suppliers, the formation of agreements on intellectual property protection overseas, and other complex issues necessary to establish a relationship with a reliable producer that can satisfy quality requirements. Anyone pursuing this strategy must also be careful to guard against circumvention of the antidumping duty order, which is prohibited by law. (Circumvention of antidumping duty orders has particularly been an issue with regard to agricultural commodity cases, but efforts are underway to prevent circumvention.)

In this regard, U.S. importers of non-motorized pallet trucks from China who exported these products to the EU are likely to find that the EU considers those items as a subject Chinese product that are liable to antidumping duties. A somewhat more complex issue arises as to key Chinese-origin parts of pallet trucks imported into the U.S. One question is whether those parts would be substantially transformed into a U.S. product when incorporated into a completed U.S. pallet truck, or whether the parts would be considered by the EU as Chinese products subject to the order.

Read Up On Globalization

The World Is Flat by Thomas L. Friedman, 2005. What *New York Times* correspondent Friedman means by "flat" is "connected," the lowering of trade and political barriers and the ability to do business instantaneously with billions of others around the world. Friedman explains how this flat world really accelerated when we stopped looking at it—when the dot-com bust turned interest away and the Iraq War turned eyes toward the Middle East.

Why Globalization Works by Martin Wolf, 2004. Associate editor and chief economics commentator at London's *Financial Times*, Wolf explains how globalization works as a concept and how it operates in reality. He confronts the charges against globalization and offers a realistic scenario for economic internationalism.

In Defense of Globalization by Jagdish Bhagwati, 2004. Drawing on his knowledge of international economics, Bhagwati explains why the "gotcha" examples of critics are often not as they seem, and that, in fact, globalization often alleviates many of the problems for which it has been blamed.

Globalization and Its Discontents by Joseph E. Stiglitz, 2003. This book explains the functions and powers of the main institutions that govern globalization—the International Monetary Fund, the World Bank and the World Trade Organization. Stiglitz, the 2001 winner of the Nobel Prize in Economics, believes that globalization can be a positive force around the world, particularly for the poor. While this book includes no simple formula on how to make globalization work, Stiglitz offers a reform agenda that will provoke debate.

Jihad vs. McWorld: How Globalism and Tribalism Are Reshaping the World by Benjamin Barber, 2001. Too often, how we think is the product of a transnational corporation with headquarters elsewhere. Barber contends that global capitalism works against the very concept of citizenship, of people thinking for themselves and with their neighbors. And while self-determination is one of the most fundamental of democratic principles, unchecked it has led to a tribalism in which virtually no one besides the local power elite gets a fair shake.

Exporters

If you produce overseas for export to the U.S. and your product is the subject of an antidumping duty action, your company may decide to stop exporting to the United States to avoid the assessment of duties on your product. If your company continues to export because the U.S. is an important market, it is generally wise to obtain qualified U.S. counsel to advise the company during the investigative process. While the process of responding to questionnaires, and the briefing and hearings at both agencies are complex, many exporters both participate in the Commerce investigation in an effort to keep their antidumping duty rate low and appear at the ITC in an effort to show that U.S. producers are not injured as a result of imports. Winning the antidumping duty battle at Commerce by showing that products are not dumped (and obtaining a zero antidumping duty rate), or convincing the ITC that the domestic industry is not injured by imports are each critical victories for exporters, although a “no injury” finding is preferred, because that typically ends the case entirely.

Responses to Unfair Import Competition

Many U.S. companies are moving out of market sectors that are no longer profitable because of unfair import competition. These companies often aim to produce higher value-added products, or focus on branding, in an effort to escape unfair pricing. This strategy sometimes has been effective in the past, but increasingly it fails because foreign producers, particularly Chinese producers, gobble up low margin sectors quickly and are capable of climbing the value chain more quickly now than in the past. Other U.S. producers become importers or move their own production offshore. (Some importing does not preclude a company from being involved in a trade case, but too much can align a U.S. company's interests with trade case opponents and push the company into the foreign respondents' camp from the ITC's perspective.) Importing and overseas production are also often short-term solutions, as foreign producers may quickly learn how to produce the company's products and no longer need the vestigial U.S. entity, which is then discarded. There are an increasing number of unemployed executives and surprised company owners who thought the best way to survive in a market filled with unfairly priced products was to move production to China, only to find that they and headquarters units in the United States were soon redundant.

Antidumping actions are a well-recognized and effective way to defend significant investments in U.S. production and loyal U.S. employees from unfair trade practices. Academic studies have shown that antidumping duty cases can lead to significantly decreased import volumes, gains in market share, price increases, and the ability to invest and innovate. It is surprising that more U.S. companies are not seriously evaluating trade actions, rather than pulling up stakes and abandoning investments in the U.S. without a fight.

In summary, an antidumping duty case is a powerful way to address the problems caused by unfairly low-priced imports. The submission of a well-researched antidumping duty petition to the government, followed about three months later by affirmative injury and dumping decisions on the petition, can change importers back into customers for domestic manufacturers, and force dumped products to drop out of the market or sell at fair prices.

Facts About China

China's rapidly growing economy of the last decade or so has been spurred partly by home building and automobile manufacturing. This growth has caused China to compete with the rest of the world for global oil reserves, contributing to rising prices. A few musings on China's effect on the world economy:

2nd: China's rank in world petroleum consumption, just surpassing Japan. The U.S. consumes the most.

20 million: Estimated number of vehicles on China's roads currently.

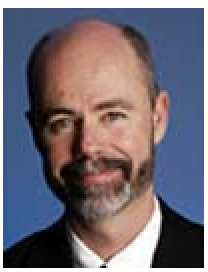
100 million: Number of vehicles expected on China's roadways within the next decade, which is about half the number of vehicles in the U.S.

1.3 billion: China's total population as of January 2005. The current U.S. population is around 290 million.

778 million: Estimated number of workers in China's labor force, more than five times that of the United States.

17.1 percent: China's estimated overall industrial production growth rate in 2004.

2nd: World rank of China's economy on a purchasing power parity basis, after only the United States.



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