U.S. COURT OF INTERNATIONAL TRADE 19TH JUDICIAL CONFERENCE

GETTING DOWN TO THE FACTS: DEVELOPING THE RECORD AND USING AFA

I. Developing the Administrative Record

A. Petitioner's Perspective

1. The Petition

The administrative record generally starts with the petition. For petitioners, it is crucial to file a strong and well-supported petition. The agencies' regulations set forth the petition requirements.[1] The petition must include all required information, "to the extent reasonably available to the petitioner."[2]

In CVD cases, the petition must allege each of the elements necessary to establish the existence of each countervailable subsidy — *i.e.*, financial contribution, specificity, and benefit — based on the reasonably available information and documentary evidence.[3] Information about the value of the subsidy to exporters or producers of the subject merchandise must be included if reasonably available,[4] and it is helpful to include estimated subsidy margins, if possible. Often, however, information about the value of subsidies that particular exporters or producers may have received is not reasonably available at the petition stage.

In AD cases, the petition must include all factual information relevant to the calculation of the export price, constructed export price, and normal value.[5] The petition should include estimated dumping margins. Preparation of an AD petition may require working closely with the client to identify and analyze the various factors of production, production costs, and U.S. and foreign sales prices. U.S. clients may have limited information about foreign production operations, costs, and factors of production.

Counsel should also work closely with the client in preparing the ITC-related aspects of the petition, including identification of pricing products, lost sales and lost revenue allegations,[6] and pricing and industry performance indicators.

Beyond satisfying the formal regulatory requirements, the petition serves as the first opportunity to frame the story about the unfair trade practices in the country or countries at issue and why those practices are injuring or threatening to injure the U.S. industry and workers.

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[1] *See* 19 C.F.R. §§ 207.11, 351.202.

[2] *Id.* §§ 207.11(b)(2), 351.202(b).

[3] *See* 19 U.S.C. § 1677(5)(A)-(B), (5)(D)-(E), (5A); 19 C.F.R. § 351.202(b)(7)(ii)(B).

[4] 19 C.F.R. § 351.202(b)(7)(ii)(B).

[5] *Id.* § 351.202(b)(7)(i)(B).

[6] *See id.* § 207.11(b)(2)(iv)-(v).

2. Commerce Proceedings

During the course of Commerce proceedings, petitioners should carefully review respondents' submissions. Often, such submissions have missing, incomplete, and/or incorrect information. Petitioners should submit deficiency comments to draw Commerce's attention to such issues, including suggested questions for supplemental questionnaires. Petitioners should also submit rebuttal, clarifying, and correcting factual information within the appropriate deadlines.

Other best practices include submitting pre-preliminary comments that highlight the significant issues in advance of the preliminary determination or results and pre-verification comments that highlight significant items for Commerce to examine at verification. Comments should be submitted sufficiently far in advance of preliminary determination or results or verification, as the case may be, that Commerce has time to consider the comments.

Petitioners should submit case briefs and rebuttal briefs and participate in the hearing. Pursuant to Commerce's regulations, "{t}he case brief must present all arguments that continue in the submitter's view to be relevant to {Commerce's} final determination or final results, including any arguments presented before the date of publication of the preliminary determination or preliminary results."[7] The rebuttal brief may respond only to the arguments raised in other parties' case briefs.[8] A party should present an issue in its case brief to exhaust administrative remedies with respect to that issue and preserve it for appeal.[9]

3. ITC Proceedings

Counsel should work with the client as soon as possible to ensure that the client submits a complete and accurate ITC questionnaire response. Small businesses may have difficulty in preparing questionnaire responses. In ITC proceedings, as in Commerce proceedings, it is important to bring apparent issues in questionnaire responses to the agency's attention. Both counsel and witnesses must thoroughly prepare for the staff conference and/or hearing. Parties should include all relevant issues and arguments in their briefs and answers to Commissioners' and staff questions.

B. Respondent's Perspective

1. What Goes Into the Record?

All the information, data, and evidence you want or may later need to persuade the agency or a future appellate reviewer. Keep in mind that the record before the agency is the record on appeal.

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[7] *Id.* § 351.309(c)(2).

[8] *Id.* § 351.309(d)(2).

[9] *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 882 F. Supp. 2d 1366, 1373 (Ct. Int'l Trade 2012).

a. Commerce Proceedings

19 C.F.R. § 351.102(b)(21) defines "factual information" and sets specific filing deadlines by category—read the regulation and DOC's notice of final rule (78 FR 21246, 4/10/13).

Confidential/BPI information is due early and should be submitted in questionnaire/suppl. questionnaire responses. Later deadlines are generally limited to publicly available information and data (e.g., factor valuation in NME cases, LTAR/MTAR (in CVD cases)), including information and data to "rebut, clarify, or correct."

Commerce's record tends to focus narrowly on the facts and data pertaining to the mandatory respondents (typically only two companies), especially in dumping cases. But certain issues require or invite broader analysis and information. Particular Market Situation allegations (§§ 1677(15)(C) and 1677b(e)) require evidence of market distortion that, in the end, may look much like the distortion allegations offered in arguing for or against specific CVD benchmarks. This is a major issue in the pending review in *OCTG from Korea*. Watch for final results in early 2017. See also Commerce's distortion analysis in the DS 437 implementation proceeding for an extended discussion of distortion analysis and the types of evidence the Department will consider and rely on.[10]

b. ITC Proceedings

Questionnaire oriented, but very open to the later introduction of evidence including in briefs (post-conference and pre-hearing) and through live testimony. ITC's preliminary conference and final hearing are evidentiary (Commerce's hearings definitively are not).

Unlike the DOC (narrow respondent focus), the ITC record encompasses the actions of the domestic petitioner(s), foreign producers (all not just 2), importers, domestic purchasers, and non-subject imports. Counsel need to think expansively about the conditions of competition in the market for the subject merchandise and domestic like product, including substitute products, new entrants, and public statements by domestic or foreign producers (e.g., SEC filings, annual reports, press comments, statements & presentations at industry shows, representations made to lenders, admissions made in unrelated litigation that might reflect on the companies' actions or plans).

Expert economic testimony is common at the ITC and usually focuses on the data presented in the questionnaires and staff report. Counsel should consider whether other expert testimony might be relevant to issues such as substitutability and, where they can be persuaded to appear, customer or consumer testimony.

[10] Available on ACCESS, Memorandum to Paul Piquado, "Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437)" (March 7, 2016), in matters C-570-931, 936, 944, and 980.

2. Working with Clients and Agencies in Getting the Necessary Information Before the Agency

Review client information for accuracy and completeness *BEFORE* presenting it to the agencies. Budgets are tight, but you have an obligation to present accurate information. That is best done by working on-site with the client's systems, records, documents, and personnel who have knowledge. Remind your client that 18 U.S.C. § 1001 applies to written representations.

Use 19 U.S.C. § 1677m(c) (difficulty providing information) sparingly but in appropriate situations use it. Especially for smaller, less sophisticated companies, make a record of difficulties/burdens. This applies to both Commerce and ITC. AFA and adverse inferences depend on a lack of cooperation and a failure to act to the best of the company's ability. It is your responsibility to make a record of what that ability is and of the effort expended in relation to it.

II. Factual Gaps

A. Statute

The text of the relevant statute, 19 U.S.C. § 1677e, as amended by the Trade Preferences Extension Act of 2015 ("TPEA"), is set forth below. The TPEA amendments (effective June 29, 2015) are highlighted.

(a) IN GENERAL If—

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

(A) withholds information that has been requested by the administering authority or the Commission under this subtitle,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,

the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

(b) ADVERSE INFERENCES

(1) IN GENERAL If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle—

(A) may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available; and

(B) is not required to determine, or make any adjustments to, a countervailable subsidy rate or weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.

(2) POTENTIAL SOURCES OF INFORMATION FOR ADVERSE INFERENCES An adverse inference under paragraph (1)(A) may include reliance on information derived from—

(A) the petition,

(B) a final determination in the investigation under this subtitle,

(C) any previous review under section 1675 of this title or determination under section 1675b of this title, or

(D) any other information placed on the record.

(c) CORROBORATION OF SECONDARY INFORMATION

(1) IN GENERAL

Except as provided in paragraph (2), when the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.

(2) EXCEPTION

The administrative authority and the Commission shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding.

(d) SUBSIDY RATES AND DUMPING MARGINS IN ADVERSE INFERENCE DETERMINATIONS

(1) IN GENERAL If the administering authority uses an inference that is adverse to the interests of a party under subsection (b)(1)(A) in selecting among the facts otherwise available, the administering authority may—

(A) in the case of a countervailing duty proceeding—

(i) use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or

(ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use; and

(B) in the case of an antidumping duty proceeding, use any dumping margin from any segment of the proceeding under the applicable antidumping order.

(2) DISCRETION TO APPLY HIGHEST RATE

In carrying out paragraph (1), the administering authority may apply any of the countervailable subsidy rates or dumping margins specified under that paragraph, including the highest such rate or margin, based on the evaluation by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available.

(3) NO OBLIGATION TO MAKE CERTAIN ESTIMATES OR ADDRESS CERTAIN CLAIMS If the administering authority uses an adverse inference under subsection (b)(1)(A) in selecting among the facts otherwise available, the administering authority is not required, for purposes of subsection (c) or for any other purpose—

(A) to estimate what the countervailable subsidy rate or dumping margin would have been if the interested party found to have failed to cooperate under subsection (b)(1) had cooperated; or

(B) to demonstrate that the countervailable subsidy rate or dumping margin used by the administering authority reflects an alleged commercial reality of the interested party.[11]

B. Facts Available ("FA") vs. Adverse Facts Available ("AFA")

The Federal Circuit has recognized that:

> When Commerce is missing necessary data, the statute provides two options to secure data that can be used as a substitute for the missing information. *See* 19 U.S.C. § 1677e. The first is "facts otherwise available." . . . The second is the "adverse facts available" approach. . . .
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> These two subsections have different purposes. Subsection 1677e(a) . . . may be used whether or not any party has failed to cooperate fully with the agency in its inquiry. *See Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011) ("'[T]he mere failure of a respondent to furnish requested information—for *any reason*—requires Commerce to resort to other sources of information to complete the factual record . . . .'" (emphasis added) (quoting *Nippon Steel v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003))). In contrast, subsection 1677e(b) . . . authorizes an inference adverse to an interested party when "Commerce makes the separate determination that [the party] has failed to cooperate by not acting to the best of its ability." *Id.* (quoting *Nippon Steel*, 337 F.3d at 1381) (internal quotation marks omitted).[12]

Further, "the statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do."[13]

C. Statement of Administrative Action ("SAA")

The SAA states:

> Where a party has not cooperated, Commerce and the Commission may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing adverse inferences, one factor the agencies will consider is the extent to which a party may benefit from its own lack of cooperation.[14]

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[11] 19 U.S.C. § 1677e.

[12] *Mueller Comercial de Mexico v. United States*, 753 F.3d 1227, 1231-32 (Fed. Cir. 2014).

[13] *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

[14] URAA Statement of Administrative Action ("SAA"), H.R. Doc. No. 103-316, vol. 1, at 870, *reprinted in* 1994 U.S.C.C.A.N. 4040. The SAA "shall be regarded as an authoritative expression by the

D. Application of Adverse Inferences

AFA is an important tool for the agencies to incentivize cooperation and compliance with agency proceedings.[15] But as a tool of investigation, AFA is not to be used punitively.[16]

When Commerce applies AFA, Commerce typically provides a detailed explanation of the facts to which AFA is applied and the basis for application of AFA and addresses the parties' arguments regarding application of AFA in the Preliminary Decision Memorandum (for preliminary determinations/results) or Issues and Decision Memorandum (for final determinations/results).

Commerce has used AFA appropriately in numerous cases in which respondents have failed to cooperate to the best of their ability, including cases were respondents have submitted false information (see Section III below) and deliberately withheld requested information until late in the investigation.[17] The Federal Circuit has also concluded that Commerce may apply adverse inferences against a non-cooperating party that have collateral consequences for a cooperating party in certain instances, such as where the cooperating party could have used an existing commercial relationship with the non-cooperating party to induce compliance and where a cooperating company respondent could encourage foreign government cooperation in a CVD case.[18] Commerce should apply AFA in other instances in which respondents try to game the system.

That said, the statute does not require perfection; mistakes can be accepted as such and need not always be deemed a failure of cooperation. In *Stanley Works (Langfang) Fastening Systems Co. Ltd. v. U.S.*[19] the court upheld Commerce's decision *not* to apply AFA because the respondent had cooperated with Commerce by responding to the best of its ability even though it had missing factors of production. Where it seeks to apply AFA, Commerce must demonstrate that the omitted data is necessary and relevant; not simply that it was requested. In *Borusan*

United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

[15] *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012); *see also Mukand, Ltd. v. United States*, 767 F.3d 1300, 1307 (Fed. Cir. 2014).

[16] *See, e.g., Yantai Xinke Steel Structure Co., Ltd. v. United States*, 2015 WL 5333508 (2015).

[17] *See Mukand*, 767 F.3d at 1302, 1304-07 (upholding application of total AFA where the respondent did not provide requested data despite five separate requests and only "offered to submit the same information it previously declared was not reasonably available" after the preliminary results and noting that "{a}bsent the threat of an adverse inference, respondents could sit out the preliminary phase of the investigation and submit requested data only when the resulting preliminary antidumping rates are higher than the rate that would have been established with the withheld data").

[18] *See Mueller*, 753 F.3d at 1233-36; *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed Cir. 2014); *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010).

[19] 964 F.Supp.2d 1311 (2014).

Mannesman v. U.S.,[20] Commerce requested information which the respondent determined be legally irrelevant to the calculation of a subsidy for subject merchandise; nevertheless, because the respondent did not provide such information, Commerce applied AFA. In finding that Commerce abused its discretion, the CIT directed Commerce to explain on remand why the information on whose absence AFA was based, was "necessary".[21]

Recently, the Federal Circuit clarified two terms frequently used by the courts in AFA cases – "commercial reality" and "accurate." The appellate court held that "{t}hose terms must be considered against what the antidumping statutory scheme demands."[22] Having determined that "commercial reality" is nowhere found in the statute and that the term "accurate" appears only one time, the Court held that:

> a Commerce determination (1) is "accurate" if it is correct as a mathematical and factual matter, thus supported by substantial evidence; and (2) reflects "commercial reality" if it is consistent with the method provided in the statute, thus in accordance with law.[23]

In light of the TPEA amendments and *Nan Ya*, there may be significantly fewer cases in which respondents challenge the "corroboration" of rates based on AFA.

The ITC generally does not apply adverse inferences, despite the explicit statutory authority to do so.[24] As a result of the ITC's practice, foreign producers or importers could choose not to participate in ITC proceedings if they believe that the ITC might make more favorable findings or even a negative determination in the absence of their information.

The new Enforce and Protect Act of 2015 ("EAPA") authorizes U.S. Customs and Border Protection ("Customs") to use an adverse inference where a party or person "has failed to cooperate by not acting to the best of the party or person's ability to comply with a request for information" in a proceeding for investigating claims of evasion of antidumping and countervailing duty orders.[25] We will see how Customs applies adverse inferences in such investigations.

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[20] 61 F. 3d 1306 (2015).

[21] *Id*. at 1347 ("Assuming the truth of Borusan's claims regarding subject merchandise and non-subject merchandise production survived verification, Commerce's 'attribution' would wind up at exactly at the point that Borusan had been making all along to Commerce: that the hot-rolled steel purchase information for the non-subject-merchandise-producing Halkali and Izmit mills is not relevant to the *attributable* HRS for LTAR in the countervailing duty investigation of oil country tubular goods from Turkey"). *Nippon Steel Corp.* 337 F.3d at 1383 (holding that while there is no requirement to find motivation or intent in order to draw an adverse inference, "[a]n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made").

[22] *See Nan Ya Plastics Corp. v. United States*, Slip Op. 2015-1054 at 15 (Fed. Cir. 2016)

[23] *Id*. at 16.

[24] *See* 19 U.S.C. § 1677e(b)(1).

[25] *Id.* § 1517(c)(3)(A).

E. "Other Forms of Assistance" in CVD Cases

Commerce's standard initial CVD questionnaire includes "other forms of assistance" questions along the following lines:

- For the foreign government: Did the government or entities owned, in whole or in part, by the government or any provincial or local government provide, directly or indirectly, any other forms of assistance to producers or exporters of subject merchandise? Please coordinate with the respondent companies to determine if they are reporting usage of any subsidy program(s). For each such program, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the Standard Questions Appendix and any other applicable appendices attached to this questionnaire.

- For respondent companies: Did the government or entities owned, in whole or in part, by the government or any provincial or local government provide, directly or indirectly, any other forms of assistance to your company? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the appropriate appendices.

The statute (19 U.S.C. § 1677d) and regulations (19 C.F.R. § 351.311) contemplate the discovery of potential subsidies by Commerce. The statute states:

> If, in the course of a proceeding under this subtitle, {Commerce} discovers a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in a countervailing duty petition, . . . then {Commerce} . . . shall include the practice, subsidy, or subsidy program in the proceeding if the practice, subsidy, or subsidy program appears to be a countervailable subsidy with respect to the merchandise which is the subject of the proceeding . . . .[26]

The related regulation states:

> (a) *Introduction.* During the course of a countervailing duty investigation or review, {Commerce} officials may discover or receive notice of a practice that appears to provide a countervailable subsidy. This section explains when the Secretary will examine such a practice.
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> (b) *Inclusion in proceeding.* If during a countervailing duty investigation or a countervailing duty administrative review {Commerce} discovers a practice that appears to provide a countervailable subsidy with respect to the subject merchandise and the practice was not alleged or examined in the proceeding, . . . {Commerce} will examine the practice, subsidy, or subsidy program if {Commerce} concludes that sufficient time remains before the scheduled date for the final determination or final results of review.

[26] *Id.* § 1677d(1).

(c) *Deferral of examination.* If {Commerce} concludes that insufficient time remains before the scheduled date for the final determination or final results of review to examine the practice, subsidy, or subsidy program described in paragraph (b) of this section, {Commerce} will:

(1) During an investigation, allow the petitioner to withdraw the petition without prejudice and resubmit it with an allegation with regard to the newly discovered practice, subsidy, or subsidy program; or

(2) During an investigation or review, defer consideration of the newly discovered practice, subsidy, or subsidy program until a subsequent administrative review, if any.[27]

1. Petitioner's Perspective

The "Other Subsidies" question is appropriate under the statute and Commerce's regulations regarding discovered subsidies. Typically, the only parties that have the information necessary for Commerce to determine whether such subsidies are countervailable are the foreign government and the respondent companies.

2. Respondent's Perspective

In 2012 Commerce started enforcing its standard CVD questionnaire's direction to companies and governments to report "any other forms of assistance." Discoveries made at verification have now triggered several AFA final determinations and results under a rationale that potential subsidies discovered at verification are confirmation that a respondent did not act to the best of its ability when responding to the questionnaire.

The propriety of this question is under appeal now at the CIT, before a NAFTA Chapter 19 panel, and at the WTO. This is a very big issue when considering how to make a record. "Assistance" is not a statutory term and Commerce has stated that even general infrastructure should be reported so that the agency can confirm it to be non-specific. As noted above, the statute (§ 1677d) and regulations (§ 351.311) contemplate the discovery of potential subsidies by Commerce, and they instruct what the agency is to do. Default to AFA is not among the options, but that is the emerging practice.

Decisions will start to emerge in early 2017 and developments around this issue warrant close watching.

III. False Information

A number of different actions may be taken in response to a party's providing false information to an agency in a trade remedy proceeding, including the following.

[27] 19 C.F.R. § 351.311(a)-(c).

A. Adverse Inferences

As explained above, if a party provides false information to Commerce, the ITC, or Customs (in EAPA investigations), the agency can apply adverse inferences. The courts have also recognized that Commerce should consider evidence of fraud and may even reopen a review if there is evidence of fraud.[28]

B. Section 592 Penalties

The agency — or a private party — might be able to refer the matter to Customs for potential penalties for fraud, gross negligence, or negligence under 19 U.S.C. § 1592. The statute states:

> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—
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> > (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
> >
> > > (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
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> > > (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).[29]

If a violation is found, then there are varying degrees of maximum civil penalties based on the degree of culpability, *i.e.*:

- 19 U.S.C. § 1592(c)(1) – *Fraud* - the domestic value of the merchandise;

- 19 U.S.C. § 1592(c)(2) – *Gross Negligence* - the lesser of the domestic value of the merchandise or four times the lawful duties, taxes, and fees of which the United States is or may be deprived, or if the violation did not affect the assessment of duties, 40 percent of the dutiable value of the merchandise; or

- 19 U.S.C. § 1592(c)(3) – *Negligence* - the lesser of the domestic value of the merchandise or two times the lawful duties, taxes, and fees of which the United States is or may be deprived, or if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise.

Additionally, where a person who violates Section 592 is "beyond the jurisdiction of the United States," the associated imported merchandise "may be seized and, upon assessment of a

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[28] *See Fresh Garlic Producers Ass'n v. United States*, 121 F. Supp. 3d 1313, 1322 (Ct. Int'l Trade 2015) (citing cases); *see also Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352 (Fed. Cir. 2008) (agency "possesses inherent authority to protect the integrity of its ....decisions ...after learning of information indicating that the decision may have been tainted by fraud.").

[29] 19 U.S.C. § 1592(a)(1).

monetary penalty, forfeited unless the monetary penalty is paid within the time specified by law."[30]

Private parties can submit evasion allegations to Customs via the new EAPA procedure or via Customs' preexisting e-allegations procedure.

C. 18 U.S.C. § 1001 Penalties

Section 1001 states:

> Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title{ or} imprisoned not more than 5 years . . . .[31]

False statements in trade remedy proceedings are subject to this provision, which is referenced in the company and counsel/representative certifications required under Commerce's regulations.[32] As Commerce explained when it amended the certification language a few years ago, "certification violations {will} continue to be referred to the appropriate offices...such as the Department's Office of the Inspector General."[33] The IG works with Justice to investigate and prosecute such actions.

D. *Qui Tam* Actions under the False Claims Act ("FCA")

Under the "reverse false claims" provision of the FCA, liability extends to any "person" who

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[30] *Id.* § 1592(c)(14).

[31] 18 U.S.C. § 1001(a).

[32] *See* 19 C.F.R. § 351.303(g)(1)(i), (g)(2). False statements made to Commerce and CBP — such as in *Honey from the PRC* (which included among other issues, false country of origin declarations) — resulted in numerous individuals receiving multi-year jail terms.

[33] *Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings; Interim Final Rule*, 76 Fed. Reg. 7491, 7493 (Feb. 10, 2011).

> knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.[34]

Such obligations including payment of customs duties. The FCA provides for treble damages and statutory penalties.[35] Actions under the FCA can be brought either by the U.S. Government or by private parties as *qui tam* relators.[36] A relator receives 15-30% of the proceeds of any action or settlement of the claim, plus reasonable expenses and attorneys' fees and costs.[37]

In recent years, the United States has intervened in a number of *qui tam* actions spanning a variety of products subject to Commerce's orders. Recent recoveries by the Government against individuals and companies have totaled in excess of $70 million. Indeed, in September a jury trial was held in Atlanta involving the *Lined Paper* order and allegations that stickers fraudulently were changed to reflect an incorrect country of origin.

1. Plaintiff's Perspective

Difficulties in customs FCA cases include identifying and naming as a defendant the importer of record, alleging and proving that the defendant(s) acted with scienter, and alleging facts have not been publicly disclosed.

2. Defendant's Perspective

Practitioners should read the recent 3rd Circuit decision in *United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Company*.[38] Relator based its complaint on a survey of secondary market advertisements (e-Bay) in which photographs of the imported product revealed no visible country of origin markings. Alleging that the absence of origin markings implied the goods were not marked after importation (and with the payment of associated marking duties under 19 U.S.C. § 1304(i)), Relator asserted a reverse FCA claim (withholding or retention of monies that should have been paid to the government) based on the implied failure to pay marking duties. A divided appeal panel reversed the trial court's dismissal, holding that relator's statistical analysis and survey of secondary market ads was sufficient to meet the FRCP's pleading standards under Rules 8(a) and (b). The Panel was unanimous in ruling that marking duties could form the basis of a reverse FCA claim.

E. Racketeer Influenced and Corrupt Organizations Act ("RICO")

The elements of a civil RICO claim are: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as predicate acts) (5) causing injury to plaintiff's

[34] 31 U.S.C. § 3729(a)(1)(G).

[35] *Id.* § 3729(a)(1).

[36] *See id.* § 3730.

[37] *See id.* § 3730(d)(1)-(2).

[38] 2016 WL 5799660 (October 2016).

business or property."[39] The Supreme Court recently held that RICO may apply extraterritorially, "but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially," and a civil RICO plaintiff "must allege and prove a *domestic* injury to its business or property."[40]

In March, a federal district court in California concluded that the plaintiffs, a Chinese garlic exporter that received a zero AD rate and its affiliated importer, had adequately alleged a civil RICO claim against another Chinese garlic importer and its owner and a CIT-admitted attorney and a California consulting company that allegedly provided professional services relating to AD matters to producers, exporters, and U.S. importers of Chinese garlic.[41] Specifically, the court concluded that the plaintiffs sufficiently pleaded:

- the existence of an "enterprise" with respect to those defendants based on detailed connections among them and "their common purpose—to cause economic harm to Plaintiffs by instigating a DOC review and damaging Plaintiffs' reputation by alleging purportedly false and defamatory facts in the DOC filings"[42];

- a "pattern of racketeering activity" by alleging that those defendants "conspired to send multiple allegedly fraudulent emails and letters via first-class mail to the DOC in an attempt to harm Plaintiffs" (mail and wire fraud) and providing "the dates the emails and letters were sent, who sent them, a general description of the contents of the allegedly fraudulent letters, and an explanation as to why they are allegedly fraudulent," which satisfied the heightened pleading requirement under Federal Rule of Civil Procedure 9(b)[43]; and

- injury caused by the alleged RICO violation because the allegedly false statements sent to Commerce allegedly harmed plaintiffs' "business reputation, leading to lost profits; and because Plaintiffs will incur significant monetary costs in responding to the review and potentially lose their zero duty rate."[44]

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[39] *Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (quotation marks and citation omitted).

[40] *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2102, 2106 (2016).

[41] *See* Order re Defendants' Motions to Dismiss Plaintiffs' First Amended Complaint, Defendants' Motions to Strike Plaintiffs' Second Through Sixth Claims, and Plaintiffs' Motion for Preliminary Injunction, *Harmoni Int'l Spice, Inc. v. Bai*, No. 2:16-cv-00614-BRO (ASx), ECF No. 90, at 1-4 (C.D. Cal. May 24, 2016)

[42] *Id.* at 45.

[43] *Id.* at 47.

[44] *Id.* at 48. The court also concluded that the plaintiffs adequately alleged the sham exception to the *Noerr-Pennington* doctrine because they alleged that two other individual defendants, through the attorney's law firm, "filed 'baseless review requests containing false and misleading allegations against Zhengzhou Harmoni,'"which were "'part of an ongoing effort to force upon Zhengzhou Harmoni the significant expense and burden associated with administrative review, strip it of its favorable rate, and increase the market share of'" competing Chinese exporters and that those two defendants lacked standing

to file the requests. *Id.* at 50. Unless an applicable exception applies, the *Noerr-Pennington* doctrine shields persons from liability from actions petitioning governmental agencies, including "DOC petitions and supplemental filings." *Id.* at 49.