Client Alert | International Trade

US Customs and Border Protection Issues First Final Determination of Antidumping Duty Evasion Using New Statute and Regulations

September 2017

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Enforcement of US trade remedy laws is heating up. Less than one year after publishing August 22, 2016 regulations to implement Section 421 of the Trade Facilitation and Trade Enforcement Act of 2015, commonly known as the Enforce and Protect Act ("EAPA"), US Customs and Border Protection ("CBP") on August 14, 2017 issued its first affirmative Final Determination.

A Final Determination under EAPA establishes whether, by means of material false statements or omissions in entry documents, an importer has failed to pay owed antidumping or countervailing duties ("ADD" or "CVD," respectively) or to make required cash deposits. Specifically, in EAPA Case Number 15135/7175, the Trade Remedy and Law Enforcement Directorate ("TRLED") found "substantial evidence" that Eastern Trading NY, Inc. ("Eastern Trading") "evaded" US ADD order A-570-918, by transshipping steel wire hangers actually originating in China, to the United States through a Thai entity, Everbright Clothes Hanger (Thailand) Co., Ltd. ("Everbright"), whom Eastern Trading falsely claimed had produced the goods. Importers should note the steel wire hangers Final Determination not only because it is CBP's first under EAPA but also because it reveals some of CBP's investigative procedures in such cases. The summary below describes EAPA procedures and timelines, and then extracts some lessons from CBP's Final Determination in this first of several instigated EAPA cases.

EAPA Procedures and Timelines

After receiving an interested party's properly filed EAPA allegation or a referral from another federal agency, CBP has 15 business days to ***initiate*** an investigation. CBP must initiate if information contained in the allegation "reasonably suggests" that "evasion" occurred.

After initiation, CBP starts gathering information concerning any allegedly covered merchandise entered within one year before CBP received the allegation. For example, CBP might first send the importer a Form 28 ***Request for Information*** regarding one entry. If, as in the steel wire hangers case, the allegation concerns country-of-origin claims, the CBP Form 28 might request:

- a sample of the imported merchandise;
- a reconstructed entry package and related transactional information (consisting of a CBP Form 7501 Entry Summary, the associated CBP Form 3461 Release, Purchase Orders, Commercial Invoices, Packing Lists, Bills of Lading, Proofs of Payment, etc.);

- such corporate information as who owns the importer and how, if at all, the importer relates to its foreign supplier;
- production records from the goods' foreign manufacturer (including purchase orders, invoices, and transportation documents for the manufacturer's raw materials, screen shots from the manufacturer's Enterprise Resource Planning system showing what processing the raw materials underwent in the declared country of origin, and an explanation linking such production information directly to the US importer's particular entries of finished products);
- a factory profile, including the manufacturer's registration with the local government, any available financial statements, its number of employees, the factory's production capacity, its actual production, and the production equipment used (with photographs); and
- the manufacturer's domestic and foreign sales information, as well as export documentation, showing the various destinations for goods produced, not only those at issue that the US importer entered.

Of course, CBP recordkeeping regulations generally require an importer to maintain only some of the documents listed above. The importer almost certainly will not maintain others in the ordinary course of business and sometimes cannot easily obtain them, especially when the importer and exporter are not related.

If the importer's Response to the CBP Form 28 Request for Information is incomplete or contradicts the EAPA allegation, CBP officials stationed overseas might ***visit the factory*** of the importer's foreign supplier, to see which of the competing narratives observed facts support. Notably, however, CBP will probably not at this point tell the importer or the producer/exporter that an EAPA investigation has commenced.

No later than 90 calendar days after initiation, CBP determines whether "reasonable suspicion" of evasion exists and, if so, issues ***Interim Measures***. Interim Measures include:

- suspension of liquidation on any unliquidated entry of allegedly covered merchandise imported on or after the date of initiation;
- extension of the liquidation period for any unliquidated entry of allegedly covered merchandise imported before the date of initiation; and
- measures authorized by 19 USC. § 1623 to protect the revenue of the United States, such as, for example, requiring a single transaction bond per entry sufficient to cover the amount of the ADD or CVD allegedly owed.

Importantly, under CBP's current interpretation of the relevant statute, the ADD allegedly owed are calculated under the high "all others" or "countrywide" rate, even if the allegation involves a specific producer with its own lower "separate rate." This is because the importer's originally filed entry documents declaring a different, non-subject country of origin will never expressly tie the merchandise to the specific producer alleged by the petitioner.

Moreover, when taking Interim Measures, CBP sometimes uses language treating CBP's halfway-point decision as if it were a Final Determination. According to CBP's press release announcing the imposition of Interim Measures against Malaysian imports in one of the still ongoing steel wire hangers cases, for example: "This *was* a complex and coordinated scheme, attempting to evade the antidumping duty order by transshipping wire hangers through Malaysia to the United States" (emphasis added). At the Interim Measures stage, however, CBP has found only "reasonable suspicion" of evasion.

Within five calendar days after CBP has decided to take Interim Measures and no later than 95 calendar days after CBP initiated the investigation, the importer receives ***formal Notices*** regarding those conclusions. In other words, only after such Notices does CBP's EAPA process become transparent to the importer, and only now can the importer's legal defense begin. For the first time in the process, the importer knowingly starts adding evidence, information, explanation, and argument to the EAPA administrative record.

In addition, the importer might now receive a CBP Form 29 ***Notice of Action*** implementing the Interim Measures. Possibly forestalling the importer's otherwise available opportunity to avoid civil penalties by making a Prior Disclosure, this CBP Form 29 might also formally tell the importer that CBP has initiated an investigation of ***alleged violations of 19 USC. § 1592***, which prohibits the importation of merchandise by

means of negligent (or grossly negligent or fraudulent) material false statements, acts, or omissions. If it receives such a Notice, the importer must now defend against two separate, simultaneous investigations.

If, at any point, CBP cannot determine whether allegedly covered merchandise actually falls within the scope of an ADD or CVD order, CBP may "refer the matter to" the ***US Department of Commerce*** ("Commerce") for a scope "determination." The time required for Commerce's answer does not count toward deadlines listed here.

Some 200 calendar days after initiation of the investigation is an importer's last day voluntarily to ***submit factual information***, although parties get ten calendar days to rebut new factual information placed on the record.

Parties have until 230 calendar days after the investigation's initiation to ***submit written arguments***. Here, however, parties get 15 calendar days after submission of such written arguments to answer them.

In making its Final Determination, CBP may apply an ***adverse inference*** if a party has "failed to cooperate" or not acted to the best of its ability in complying with CBP's Requests for Information. That is, CBP may use facts otherwise available, such as those alleged in the initial petition.

By statute, CBP has until 300 calendar days after initiation to make a ***Final Determination*** or to extend the investigation if it is "extraordinarily complicated." In that event, a Final Determination is due no later than 360 calendar days after initiation, with ***Notice*** as to that Determination coming five business days later.

After an affirmative Final Determination of evasion, CBP must:

- continue to suspend the liquidation of unliquidated entries of covered merchandise imported on or after the date of the investigation's initiation;
- continue to extend the liquidation period for unliquidated entries of covered merchandise entered before the date of initiation;
- ask Commerce to determine the applicable ADD or CVD assessment rate or cash deposit rate; and
- assess duties or require the posting of cash deposits consistently with Commerce's instructions.

CBP must apply the highest available ADD or CVD rate (including "all others") to any entries for which the producer or exporter is "unknown." If "appropriate," CBP must also:

- initiate civil proceedings under 19 USC. § 1592 or 19 USC. § 1595a, which authorizes CBP, among other steps, to seize unlawfully imported merchandise;
- implement "rule sets" (i.e., program CBP's computer systems to store, manipulate, and interpret import data) enabling CBP's Automated Targeting System and the Automated Commercial Environment to identify other importers, parties, and merchandise possibly associated with the evasion;
- require estimated duty deposits on any merchandise for which "the importer has repeatedly provided incomplete or erroneous entry summary information"; and
- refer the record to US Immigration and Customs Enforcement for further civil or criminal investigation.

Either the importer or the petitioner may, within 30 business days after CBP's Final Determination, request de novo ***administrative review***. CBP must complete such review within 60 business days thereafter.

Within 30 business days after CBP's administrative review decision, either party may request ***judicial review*** in the US Court of International Trade ("USCIT"). The USCIT examines: (1) whether CBP "fully complied with all procedures" set forth in the statute; and (2) "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Lessons Gleaned from CBP's Final Determination in the First Steel Wire Hangers Case

CBP initiated the first steel wire hangers EAPA investigation on October 11, 2016, after finding that information in allegations submitted by M&B Metal Products Company, Inc. ("M&B Metal") "reasonably suggested" that Eastern Trading had transshipped steel wire hangers subject to ADD cash deposits from China through Thailand.

Two main clusters of information in the allegations apparently supported CBP's decision to initiate. First, a combination of import data and a Foreign Market Researcher's Report allegedly revealed insufficient production capacity to manufacture Eastern Trading's imports during the EAPA review period. The Foreign Market Researcher's Report allegedly summarized three visits to Everbright's Thai factory, a conversation with Everbright's accounting firm, and a review of Everbright's financial statements. Second, corporate links between Eastern Trading, Everbright, and Everbright's Chinese supplier, who sometimes shipped steel wire hangers directly to the United States, implied coordination. CBP's Notice specifically cited the following data points: an observed absence of warehouse space, office space, trucks, or a passable street at Everbright's factory; the accounting firm's assertion that the factory was still under construction; a contradiction between the one machine that Everbright's financial statements accounted for and the three machines that import data suggested were required; the relationship between Everbright and Chinese producers that supplied the US market without any alleged production in Thailand; and a further tie between Eastern Trading and Everbright's Chinese supplier, combined with Everbright's establishment in Thailand soon after an ADD order started affecting the Chinese supplier.

Not until December 13, 2016, however, did CBP issue to Eastern Trading a combined Notice of Initiation and Notice of Interim Measures, the latter being based on "reasonable suspicion" of evasion.

According to the Notice of Interim Measures, CBP based its finding of "reasonable suspicion" primarily on: (1) Eastern Trading's October 31, 2016 Response to an October 6, 2016 CBP Form 28 Request for Information; and (2) a Report by CBP representatives about their own November 25, 2016 visit to Everbright's Thai factory. The Notice specifically cited: CBP's having seen no Everbright production activity during the business hours that Eastern Trading's CBP Form 28 Response listed for this supplier; fewer employees and machines than Eastern Trading's CBP Form 28 Response had reported (and fewer than needed to comprise sufficient production capacity for Eastern Trading's imports); the inability of Everbright's manager to answer such production-related questions as who supplied Everbright's raw materials; contradictions between this manager's answers to CBP's questions about production capacity and answers provided by Everbright's alleged accountant; the fact that both sets of estimates were still too low to accommodate Eastern Trading's imports; the fact that equipment in Eastern Trading's photographs of Everbright did not match equipment that CBP's representatives photographed onsite; suggestions in Everbright's financial statements that it did not obtain production equipment or begin functioning as a manufacturer until after Eastern Trading had already imported goods from it; and reported depreciation on equipment that also supported a later start date than Eastern Trading's imports required.

Between CBP's December 13, 2016 Notices and CBP's August 14, 2017 Final Determination, CBP on December 22, 2016 served another Form 28 Request for Information on Eastern Trading and a Claimed Manufacturer Request for Information on Everbright. Neither entity responded by April 29, 2017 (200 days after the investigation's October 11, 2016 initiation), although Eastern Trading unsuccessfully tried to do so on June 7, 2017. M&B Metal alone then filed, and CBP apparently accepted, written arguments on June 28, 2017. This is inexplicably one month later than May 29, 2017 (230 days after the investigation's October 11, 2016 initiation). Eastern Trading subsequently responded on July 24, 2017—a date 26 rather than 15 days later than the M&B Metal submission rebutted. CBP's description of Eastern Trading's response as "amended" might explain the latter discrepancy.

In addition, CBP separately obtained from Chinese or Thai governmental authorities official data on Everbright's imports into Thailand of finished products originating in China on or about the period of EAPA review, as well as shipments by Everbright's Chinese supplier directly to the United States.

Without expressly drawing adverse inferences from the importer's or foreign manufacturer's partial failure to answer CBP's second round of Requests for Information, CBP based its Final Determination on six main kinds of evidence, which CBP characterized as "substantial." First, estimates of production capacity by Everbright's manager and accountant differed, the alleged Everbright accountant later claimed to be only a translator, and

in any event both estimates were too low to account for Eastern Trading's imports. Second, information in Eastern Trading's CBP Form 28 Response about Everbright's hours of operation, numbers of machine, and numbers of employee contradicted what CBP saw during its site visit, these and observed raw materials were again insufficient, and statements that people at the factory provided orally about sources for raw materials were incomplete and contradictory. Third, Everbright's registration with local authorities and its financial statements showed that it lacked production equipment during the early part of the EAPA review period, and reported depreciation did not support an inference that the equipment had been used earlier. Fourth, the volume of Everbright's imports into Thailand of finished products originating in China reportedly matched the volume of Everbright's shipments to Eastern Trading around the same time in "80 percent" of instances. Fifth, information from Commerce's New Shipper Review in the relevant ADD case suggested that at least one shareholder of Chinese producer Yingqing and Chinese exporter Qingqing also held shares of Everbright, and one of Eastern Trading's CBP Form 28 Responses listed the primary contact for both Chinese companies as one of Everbright's shareholders. Finally, a Chinese exporter with the same physical address, phone, and fax number as Yingqing and Qingqing had reportedly shipped directly from China to Eastern Trading certain finished products marked "Everbright."

In reaching its Final Determination, CBP expressly rejected Eastern Trading's argument that it was an innocent victim. CBP rejected the argument because EAPA (unlike 19 USC. § 1592) does not require a culpable mental state (negligence, gross negligence, or fraud). CBP also rejected Eastern Trading's argument that Yingqing's and Qingqing's lower separate ADD rate of 40.99% should apply, rather than the higher 187.25% "all others" or "countrywide" rate. Here, CBP observed that Eastern Trading itself had "failed to provide amended entry documents to CBP and responses to the RFI that would establish [this particular Chinese producer and exporter as] the source of its imports."

The Final Determination described above implies the following lessons:

- During the course of an EAPA investigation, not only before but also after an importer has received a Notice of Initiation and a Notice of Interim Measures, CBP may gather information through ***Requests for Information***, addressed to both the importer itself and its foreign suppliers. If both entities' Responses can fully and consistently link the manufacturer's purchase of raw materials, specific processing that those raw materials underwent in the declared country of origin, and the importer's particular entries during the EAPA review period, CBP may be less inclined to find "substantial evidence" of ADD/CVD evasion.

- CBP may also, before or after an importer has received Notice, ***visit the claimed foreign producer's factory***, during which CBP will seek evidence of both production capacity and actual production. CBP will base its evaluation of the visit largely on the internal consistency of answers provided by various spokespersons, consistency with the importer's Responses to CBP Form 28 Requests for Information, and consistency with the volume of known US imports during the EAPA review period.

- In addition, CBP may seek ***data from foreign customs authorities*** on any imports by the claimed foreign manufacturer from the country subject to the ADD or CVD order. CBP will then try to match those imports and the claimed foreign producer's exports to the US importer. If the US importer and its foreign manufacturer work together, they can anticipate this analysis and rebut it by documenting non-US destinations for any goods originating in subject countries and purchased by the US importer's supplier of non-subject goods.

- In reviewing the claimed foreign producer's ***financial statements***, CBP will look for when the company purchased production equipment and registered with local authorities, and whether reported depreciation on production equipment is consistent with initial use before relevant dates of export to the United States. The foreign producer can help the US importer defend itself by providing any additional evidence of when the manufacturer purchased, installed, and began using its physical plant.

- CBP may collaborate with ***Commerce*** to obtain evidence that the same person or entity owns both a producer in the country subject to the ADD or CVD order and the claimed foreign producer, and CBP may see such ***common ownership*** as evidence of evasion. The attorney for an importer under EAPA investigation might counter that moving production to a third country demonstrates only that production moved, not that it stayed behind.

- Finally, by forcing an importer to choose between conceding and contesting allegations, a Notice of Initiation creates for the importer ***a dilemma***. By conceding and, if possible, amending entry documents before liquidation to reflect the specific manufacturer whom allegations and evidence against the importer

have identified, the importer will incur liability for the alleged ADD and CVD (and probably a 19 USC. § 1592 penalty) but might at least obtain the lower "separate" ADD or CVD rate associated with that manufacturer. If, on the other hand, the importer contests the allegations, and if CBP ultimately issues an affirmative Final Determination, the importer's very efforts to prove that it was not liable for the alleged ADD and CVD will have undermined any hope to obtain the lower "separate" ADD or CVD rate. Thus, whether the importer chooses to concede or to contest the allegations, the importer loses something. CBP's interpretation of EAPA has created this dilemma, by letting a Final Determination effectively treat the alleged manufacturer of subject merchandise as both supported by "substantial evidence" and "unknown."

A resurgent, claimed effort to "protect American jobs" has lit a fire under CBP's units charged with enforcing ADD and CVD law. These units have recently stepped up their collaboration with other US agencies and foreign customs authorities. According to CBP, it has initiated 14 EAPA investigations since the statute took effect in August 2016. Notably, during the same week that CBP issued its first Final Determination in the steel wire hangers case involving Thailand, the agency published a consolidated Notice of Interim Measures finding that "reasonable suspicion" supported eight additional allegations targeting hangers imported from Malaysia. M&B Metal first filed the Malaysia allegations around the time of the Interim Measures Notice in the Thailand investigation, and CBP's Final Determination in the Malaysia investigations, if not extended, is due March 15, 2018. Meanwhile, on the day it issued the Thailand hangers Final Determination, CBP applied EAPA Interim Measures against an importer of wooden bedroom furniture. If CBP does not extend that investigation, the wooden bedroom furniture Final Determination will be due March 12, 2018. Stay tuned.

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