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PRESS RELEASE

Wiley Rein's International Trade and Appellate Practices File Petition for Certiorari with U.S. Supreme Court in Important International Trade Case

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On May 24, 2011, Wiley Rein filed a petition for certiorari in the United States Supreme Court on behalf of Nucor Corporation in a case of national importance involving the proper calculation of antidumping duties under the Tariff Act of 1930 (the Act).

The Act requires the imposition of an antidumping duty on foreign merchandise that is being sold in the United States at less than its fair value and is materially injuring an American industry. 19 U.S.C. § 1673. The Act defines "dumping" as "the sale or likely sale of goods at less than fair value," "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," and "weighted average dumping margin" as the "percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(34), (35).

The petition presents a straightforward question of statutory interpretation: does the Act exclude above-fair-value sales (*i.e.*, those sales that do not constitute "dumping") from the statutory formula for "weighted average dumping margin"? For decades, the Department of Commerce believed it did, even arguing that this practice (sometimes referred to as "zeroing") was unambiguously required by the Tariff Act. But after the WTO determined that zeroing did not comply with the WTO Antidumping Agreement, Commerce did an about-face and abandoned its interpretation of the Act, deciding that

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the Act is ambiguous and permits Commerce to consider sales that do not constitute dumping when computing dumping margins. On appeal, the Federal Circuit sustained this new interpretation. *See United States Steel Corp. v. United States*, 621 F.3d 1351 (Fed. Cir. 2010).

Proper resolution of this question is critical to protecting American industry from foreign manufacturers that engage in the unfair trade practice of "dumping" their goods in the United States for less than fair value. When above-fair-value sales are allowed to offset dumped sales in calculating "weighted average dumping margin," the resulting antidumping duty to be imposed under the Tariff Act can change dramatically. In some cases, above-fair-value sales may offset dumping entirely, leaving American businesses without the statutory protection that Congress intended to give them.

Indeed, that is what happened in this case. After Commerce began considering non-dumped sales in computing dumping margins, it recalculated the "weighted average dumping margin" applicable here and reduced that margin from 2.59% to *zero*. By allowing non-dumped sales to offset dumped sales, Commerce enabled a foreign steel producer to entirely avoid an antidumping duty—notwithstanding the undisputed fact that that company dumped steel products in the United States and, in doing so, materially injured the American steel industry. Nucor seeks a petition for certiorari because Commerce's interpretation is incompatible with the plain meaning and purpose of the Tariff Act.

Attorneys from Wiley Rein's nationally recognized International Trade Practice (Alan H. Price, Timothy C. Brightbill and Maureen E. Thorson) and Appellate Practice (Helgi C. Walker, Thomas R. McCarthy, and Michael Connolly) combined forces to draft the petition in this major litigation. The Supreme Court will review the petition later this year.