

CLIENT ALERT

This Month In International Trade - December 2011

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THIS MONTH'S TOP FIVE DEVELOPMENTS

1) Landmark CAFC Decision Invalidating Applicability of countervailing duty law to Non-Market Economies.

In *GPX International Tire Corporation v. United States* (Dec 19, 2011), the U.S. Court of Appeals for the Federal Circuit (CAFC) determined that the Department of Commerce (DOC) lacked statutory authority to apply countervailing duty (CVD) law, *i.e.*, anti-subsidy law, to non-market economies (NMEs), including China. Specifically, the CAFC noted that when amending and reenacting CVD in 1988 and 1994 Uruguay Round Agreements Act, Congress was aware of and legislatively ratified the DOC's then position that government payments cannot be characterized as "subsidies" in a non-market economy context and that CVD law accordingly did not apply to NME countries. While GPX will have a considerable impact on trade remedies in the U.S., any immediate changes to pending investigations or current orders seem unlikely. Additionally, the parties may appeal the decision to the U.S. Supreme Court or could also pursue legislation to expressly grant DOC authority to apply CVD law to NMEs.

2) CBP Proposes to Revise its Treatment of Post-Importation Adjustments in Related Party Transactions

On December 28, 2011, US Customs & Border Protection issued a notice requesting comments to its proposal to revoke a 2001 valuation ruling letter relating to the acceptability of post-importation adjustments made pursuant to a transfer pricing policy. The notice follows an advanced notice published on CBP's website on September 23, 2011 in which CBP proposed to allow importers to use the transaction value appraisal in transactions between related parties when the post-importation transfer price is determined pursuant to a pre-existing transfer pricing policy also used by the importer in its corporate tax return filings with the I.R.S.. CBP's proposal also indicates acceptability of certain downward adjustments, which can result in refunds of duties paid to the importer. However, the CBP notice is proposing that importers must enter into the CBP Reconciliation program to utilize transaction value for these post-importation adjustments. Comments should be received by January 27, 2012.

3) A 2012 Preview? U.S. Congress Further Expands Extra-Territorial Sanctions on Iran

In what may be a preview of events to come throughout 2012, the U.S. Congress passed new Iran sanctions in late December, dramatically expanding the extra-territorial effect of U.S. sanctions on Iran. The new sanctions were included as an amendment to the National Defense Authorization Act of 2012 (H.R. 1540), signed by President Obama on December 31, 2011, despite the Administration's public opposition to the Iran provisions.

The new legislation targets foreign financial institutions, prohibiting all such institutions which have "knowingly conducted any significant financial transaction with the Central Bank of Iran or another Iranian financial institution designated by the Secretary of the Treasury" from opening or maintaining a correspondent account or payable-through account in the United States. In effect, the provision forces foreign financial institutions to choose between (a) doing business with Iran's financial sector or (b) maintaining designated accounts in the United States. This restriction will take effect on February 29, 2012.

These prohibitions also apply, though in a more limited fashion, to foreign central banks. Foreign central banks that engage in transactions for the "sale or purchase of petroleum or petroleum products to or from Iran" will also be restricted from maintaining correspondent or payable-through accounts in the U.S. This restriction will take effect on June 29, 2011.

The legislation does afford the President a limited waiver authority in two ways. First, if the President determines that (a) the "price and supply" of petroleum produced by countries other than Iran does not enable the country (in which the financial institution is located) to completely reduce imports and (b) the country has "significantly reduced its volume of crude oil purchases from Iran" in the last 180 days, then the President may waive sanctions for 180 days.

Second, the President may waive the sanctions if the waiver is "vital to the national security of the United States" and the President submits a report to Congress justifying the waiver. The Administration has not publicly discussed these provisions, but media reports have indicated that Japan, South Korea and Turkey – all countries heavily reliant on Iranian crude – are considering requesting a waiver on these grounds.

As the U.S. enters an election year and Iran maintains its belligerent posture – it has just threatened military action against a U.S. aircraft carrier if the vessel returns to the Gulf after the conclusion of Iran's military exercises – these new sanctions may be the first of many in 2012.

4) Export Control Reform Continues Apace

The Obama Administration continues aggressively to pursue parallel restructuring of the U.S. Munitions List (USML) and the Commerce Control List (CCL) as part of its export control reform initiative. On December 7, 2011, the Department of State's Directorate of Defense Trade Controls (DDTC) published a proposed new USML Category XIX addressing gas turbine engines, and a second proposed rewrite of Category VII, concerning military vehicles. On December 27, DDTC published proposed revisions to Categories VI (naval vessels) and XX (submersible vessels). The Department of Commerce's Bureau of Industry and Security (BIS) issued parallel proposed rules to create the "600" series categories that will govern gas turbine engines, military vehicles, naval vessels, and submersible vessels shifted from the USML to the CCL. How the 600 series ultimately functions will be determined by a subsequent proposed rule on the definition of "specially designed" that would be applicable to both the USML and the CCL – both DDTC and BIS issued separate proposed definitions, in December 2010 and July 2011, respectively, and are currently reviewing comments.

These proposals follow similar rulemakings regarding military aircraft, published November 7, 2011, which marked a retreat from the Administration's overly ambitious initial approach of tiering and aligning the USML and CCL on a category-by-category basis. Instead, the Administration has opted first to build positive lists, leaving structural changes for a later date -- a move which necessitated DDTC's second proposed rewrite of USML Category VII. Comments on the December 7 proposed rules are due by January 20, 2012, and comments on the December 27 proposals must be submitted by February 6.

5) Farewell to Bersin; Aguilar Acting CBP Commissioner

On December 30, Alan D. Bersin stepped down as chief of the U.S. Customs and Border Protection (CBP). Bersin managed to promote balance between trade facilitation and border security while serving as a recess appointment since March 2010. The Senate did not consider his renomination in January 2011 and failed to confirm him; the recess appointment expired on December 31. On the same day Bersin stepped down as CBP Commissioner, Department of Homeland Security (DHS) Secretary Janet Napolitano announced President Obama appointed Bersin to take over as assistant secretary of international affairs at DHS. Former Deputy Commissioner David V. Aguilar now serves as acting commissioner until the President appoints a new commissioner.

THIS MONTH IN TRADE – OTHER NEWS

Imported Washing Machines Under Antidumping Scrutiny

In response to a petition filed on December 30th by Whirlpool Corporation, the U.S. Department of Commerce and International Trade Commission are initiating an investigation into whether imports of "large residential washers" or "LRWs" from Korea and Mexico are injuring the U.S. washer industry. The petition alleges that LRWs from Korea and Mexico have been sold at less-than-fair-value or "dumped" in the U.S. market, and it further alleges that the Korean LRW industry has benefited from unlawful government subsidies.

The petition closely resembles that filed by Whirlpool in March of 2011 seeking similar relief with respect to imported bottom-mount combination refrigerator-freezers from Korea and Mexico. As was the case with that petition, the LRW petition's allegations focus primarily on Korean manufacturers Samsung and LG, though other producers including Mabe and Electrolux are mentioned. The scope of the petition defines LRWs as "all automatic clothes washing machines, regardless of the orientation of the rotational axis, with a cabinet width (measured at its widest point) of at least 24.5 inches (62.23 cm) and no more than 32.0 inches (81.28 cm)." The scope also covers certain subassemblies used in LRWs, including (1) cabinets that incorporate at least three cabinet surfaces and a bracket; (2) assembled tubs that incorporate at least a tub and a seal; (3) assembled baskets that incorporate at least a side wrapper, a base, and a drive hub; and (4) any combination of the foregoing assemblies. The petition goes on to exclude stacked washer-dryers (build on a unitary frame) and commercial washers (defined at length in the petition, with the defining trait being the incorporation of payment system electronics).

A copy of the petition is available on ITC's EDIS website.

CBSA Memorandum A Major Victory For U.S. Bedding Exporters and Crowell Clients

The Canada Border Services Agency (CBSA) created a new tariff for textile shells, signaling the end of a year-long dispute over classification of the subject exports to Canada and NAFTA treatment. The new classification will allow U.S. manufactured bedding products (such as comforters and pillows), using imported fabric shells, to be imported into Canada duty-free under NAFTA. The change represents a dramatic victory for U.S. producers of the subject goods, including Crowell client Pacific Coast Feather, which would have been subject to significant tariff increases for exports into Canada.

DDTC Issues Long-Awaited Proposed Brokering Rule Amendment

On December 19, 2011, the U.S. Department of State, Directorate of Defense Trade Controls issued a proposed rule that would amend the International Traffic in Arms Regulations (ITAR) to clarify registration requirements, approval requirements, procedures, and other provisions relating to "brokering activities" governed by Part 129 of the ITAR. The long-awaited proposed rule follows a draft proposal released in 2009 but never published in the Federal Register. The draft language is open for public comment until February 17, 2012.

Russia Invited to Join the WTO; the End of Jackson-Vanik?

On December 16, 2011, Russia's 18-year journey toward joining the World Trade Organization (WTO) draws closer to the end with the country's formal invitation to join the trade system. The Russian parliament must ratify the accession package by June 15, 2012; Russia will finally attain full membership thirty days after ratification.

As part of its accession package, Russia must conform to WTO trade rules, lower tariffs on various products, and allow access to its service markets. The United States, as one of the largest suppliers of goods to the Russian market (Russia's imports from the U.S. topping \$10 billion in 2010), will benefit immensely from the increase market access and the enforcement of WTO rules. U.S. exporters can expect lower tariffs, with average rates under 10 percent on many goods including agricultural equipment, electrical equipment high-tech instruments, metals and ores, and forest products.

Russia's entry into the WTO highlights the need for the United States to eliminate the restrictions currently applied to Russia under Title IV of the Trade Act of 1974 including the Jackson-Vanik amendment "freedom-of-emigration" requirements. Congress must repeal the Jackson-Vanik amendment as applied to Russia in order to establish permanent normal trade relations (PNTR) status with Russia. Although the U.S. has recently waived the provision for Russia, only elimination of the amendment will allow the U.S. to normalize trade with Russia within the WTO framework and realize the benefits of Russia's membership. Without the repeal, the United States granting of "most favored nation" (MFN) treatment to Russia will not be "unconditional" as required by WTO rules.

Mercosur Plans to Raise Import Duties up to 35%

The Mercosur nations (Brazil, Argentina, Uruguay and Paraguay) agreed in December to permit each member state to raise its tariffs by up to 35% to protect their economies from "predatory exports." Up to 100 products will be impacted by the higher tariffs targeted to the capital goods, textiles and chemical industries. The new tariffs will likely be imposed until December, 2014. Additional details are expected shortly.

New CITA Additions to CAFTA-DR Annex; Extension of Commercial Availability Request for Circular Knit Fleece Fabric

The Committee for the Implementation of Textile Agreements (CITA), an interagency group chaired by the Department of Commerce, determined certain cotton/nylon/spandex raschel knit, open work crepe (piece dyed and printed) fabrics are not available in commercial quantities in a timely manner in the territory of any of the CAFTA-DR (Dominican Republic-Central America-United States Free Trade Agreement) countries. CITA modified the list of fabrics, yarns and fibers in Annex 3.25 of the CAFTA-DR Agreement to include the subject piece dyed and printed fabrics.

On December 21, CITA released notice of a 14 business day extension for consideration of the commercial availability request for certain 100% polyester circular knit three end fleece fabrics (solid color).

District Court Vacates Penalty Cases Against Railroad

On December 19, the U.S. District Court for the District of Nebraska vacated over 30 penalty cases and seizures including more than \$37 million in fines assessed by Customs and Border Protection (CBP) against Union Pacific (UP) Corp. The fines stemmed from the discovery by CBP agents of narcotics on UP trains crossing the border from Mexico and included the seizure of UP railcars. In *Union Pacific Railroad Company v. U.S.*, the court held CBP "acted outside its authority in assessing penalties" under [Sections 1584](#) and [1594](#) based primarily on the agency's failure to promulgate regulations regarding the statute's "highest degree of care and diligence" standard, along with its acknowledgement of the carrier's lower degree of culpability. In addition, the court found penalizing UP for "mere negligence" would amount to arbitrary and capricious action by CBP in violation of the Administrative Procedures Act. The decision opens the door to similar challenges by carriers against CBP for Section 1584 and 1594 penalties and seizures.

South Korea Legislation to Harmonize Customs Valuation & Transfer Pricing

Pending customs legislation with the [Korean Parliament would implement a formal system](#) to coordinate adjustments to product price arising from transfer pricing rules under income tax law and customs valuation rules under customs law. Once passed, the changes are expected to apply in 2012 and include introduction of a Tax Base Adjustment Review Committee to review, at the taxpayer's request, differing tax bases under income tax and customs law. The Committee's decision will be a recommendation to the tax and customs authorities.

CROWELL AND MORING SPEAKS

On January 10, **John Brew** will be conducting training on "Customs Valuation: Best Practices for Identifying and Declaring Assists" for a C&M global manufacturing client.

Jeff Snyder will speak at the [U.S. Export and Re-Export Compliance for Canadian Operations](#) conference, held by the American Conference Institute (ACI) in Toronto, Ontario on Tuesday, January 31 through Wednesday, February 1.

Lorry Halloway will moderate a panel discussing US, Canadian and EU sanctions at the [2012 IATA Legal Symposium](#) to be held in Shanghai, China from February 5-7, 2012.

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