

# CLIENT ALERT

## This Month In International Trade - January 2012

Feb.08.2012

### THIS MONTH'S TOP FIVE DEVELOPMENTS

#### 1) EU High Court Annuls Footwear Anti-dumping Duties

On 2 February 2012, the Court of Justice of the European Union (CJEU) decided in a ground-breaking judgment that the European Commission was wrong not to consider claims of market economy treatment (MET) made by several Chinese footwear producers that were not among those sampled by the Commission in the context of an anti-dumping case.

In case *Brosmann Footwear (HK) and Others v. Council (C-249/10 P)*, several Chinese footwear companies obtained the reversal of the decision by the General Court of the European Union denying their action for annulment of [Council Regulation \(EC\) No 1472/2006](#). The Council Regulation had imposed an anti-dumping duty on EU imports of certain footwear with uppers of leather originating from China and Vietnam. The Chinese companies in question had requested MET but due to the large number of companies which had come forward in the investigation, the Commission had applied sampling as the method to determine the dumping margin and did not examine the MET claims of non-sampled companies.

In the appeal, the CJEU agreed with the appellants that the General Court erred in law in so far as it held that the EU institutions were not required to examine the claims for MET by producers not included in the sample. The CJEU pointed out that the MET assessment relates to the determination of the normal value and is distinct from the determination of the dumping margin for which sampling is expressly foreseen in the Basic Anti-dumping Regulation. MET can be granted to any company, sampled or not, that can demonstrate the legitimacy of its business practices and the absence of state interference and the EU institutions are obliged to examine MET claims even from non-sampled producers.

This decision is particularly noteworthy because it interprets the present EU legislation as obliging the Commission to examine all MET claims in a given investigation, claims which when granted often result in a lower level of anti-dumping duties (as was the case for the footwear duties under consideration).

#### 2) Recent Developments in EU Export Controls and Sanctions

The reform of EU export controls continues with the introduction of new EU General Export Authorizations for dual-use exports, and EU sanctions regimes regarding Iran and Syria are expanding quickly.

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### 3) Campaigning Already? President Obama Proposes Trade Agency Consolidation

On January 13, President Obama proposed a reorganization of the government's trade agencies. His proposal would consolidate the trade-related functions of six agencies - (1) the trade-related aspects of the Department of Commerce; (2) the Small Business Administration; (3) the Office of the U.S. Trade Representative ("USTR"); (4) the Export-Import Bank; (5) the Overseas Private Investment Corporation; and (6) the Trade and Development Agency - into one trade agency, saving roughly \$3 billion over 10 years in improved efficiency.

President Obama cannot undertake the reorganization without Congressional approval and he has therefore asked Congress for "consolidation" authority which had been regularly granted to Presidents until the mid-1980s. His proposals however face steep opposition on the hill, principally from those who worry that incorporating USTR into a larger bureaucracy will decrease its negotiating effectiveness. With this opposition, and considering the Administration's primary focus on securing Permanent Normalized Trade Relations with Russia, there is little reason to believe Congress will grant the authority to allow the agency consolidation.

### 4) China Raw Material Export Restrictions Defeated In WTO Appeal

U.S. importers of certain raw material inputs scored a major victory this week when the World Trade Organization (WTO) Appellate Body issued their report on China's export restrictions. The Appellate Body affirmed China violated WTO rules by imposing various restrictions on exports of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, and zinc. U.S. metals and chemicals manufacturers import the goods as raw material inputs for their products.

The case, initiated in 2009 by the United States, the European Union and Mexico, centered on China's export duties, quotas and bans in violation of the country's WTO accession commitments. China appealed a July 2011 WTO panel ruling backing the charges of the complainants; the Appellate Body found China failed to justify any restrictions. For example, it failed to establish the existence of exceptional circumstances such as critical shortages.

The WTO Dispute Settlement Body is expected to adopt the panel and Appellate Body reports at its meeting on February 22. After that, the disputing parties will endeavor to agree on a reasonable period of time for China to bring the measures at issue into compliance with its WTO obligations. There has been some speculation that the results in this dispute could lead to follow-on dispute settlement regarding China's restrictions on exports of "rare-earth materials", which are used in various high-tech electronic products.

### 5) Recent Guidance for the Protection of Intellectual Property Rights at the EU Border

In December 2011, the Court of Justice of the European Union (CJEU) provided practical guidance regarding the application of the EU legislation for customs action against goods suspected of infringing certain intellectual property rights (IPR) which are not yet cleared for free circulation in the EU.

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## THIS MONTH IN TRADE – OTHER NEWS

### Russia + 2 Customs Union; Jackson-Vanik Closer to the End?

Russia, Belarus, and Kazakhstan launch the Eurasian Economic Commission (EEC): a new governing body for their trilateral customs union, another step towards common economic space. The EEC will have certain specified supranational powers and is currently based in Moscow. While the three countries have applied a common import tariff since January, 2010, the EEC objectives are aimed at regulating economic integration and coordinating trade policies among the three member states.

Russia is increasing its global trade profile following the December 16, 2011 Ministerial Conference of the World Trade Organization wherein [Trade Ministers adopted the terms and conditions of Russia's accession agreement](#) and invited Russia to join the World Trade Organization. Under WTO rules, unless the United States grants permanent normal trade relations (PNTR) to Russia, U.S. companies will not be able to benefit from the preferential terms in the accession agreement. In order for the President to be able to grant PNTR status to Russia, Congress must pass legislation lifting Section 402 of Title IV of the Trade Act of 1974. Section 402, also known as the Jackson-Vanik Amendment, requires an annual review of Russia and other former Soviet states to confirm compliance with freedom-of-emigration policies before enjoying normal trade relations status with the United States for that year. While the Executive Agency, through the [U.S. Trade Representative](#), and other agencies have been working on this agenda, ultimately the Senate Finance and House Ways and Means committees will debate the issue as the committees of jurisdiction for amendments to the 1974 Trade Act. While U.S. companies are not yet impacted, there is a deadline - Russia has until June 15, 2012 to ratify its accession package and then thirty days following ratification, full membership becomes effective.

### More on GPX

On January 24, 2012, the Court of Appeals for the Federal Circuit (CAFC) granted a one-month extension to the U.S. government for filing a rehearing petition in the controversial *GPX International Tire Corporation v. United States* decision. In its December, 19, 2011 opinion, the CAFC held that the Department of Commerce lacked statutory authority to apply countervailing duty (CVD) law, *i.e.*, anti-subsidy law, to non-market economies (NMEs), [including China](#). While such extensions of time are routinely granted, interested parties are closely watching this case as legislative options could be pursued if or when all judicial remedies expire. The government now has until March 5 to file for a rehearing or may also file an appeal directly to the U.S. Supreme Court by March 19, 2012 (90 days from the date of the decision or if a rehearing is requested, within 90 days after the CAFC denies the motion or issues a decision on the rehearing).

### "Dolphin-Safe"? - US Appeals, Mexico Counter-Appeals In WTO Tuna-Labeling Dispute

The United States and Mexico continue their dispute in the WTO over the application of a 1990 U.S. law establishing certain labeling standards for tuna offered for sale in the United States. On January 20, the United States appealed from the September 2011 report of the [WTO dispute settlement panel](#). The U.S. appeal challenges the panel's conclusion that the labeling standards breach U.S. obligations under the Agreement on Technical Barriers to Trade by requiring "mandatory compliance." (The United States claims the standards are voluntary.) Mexico appealed from other aspects of the panel report. In particular, Mexico challenges the panel's findings that the U.S. law does not discriminate based on nationality and is not inconsistent with international standards.

## CROWELL AND MORING SPEAKS

**Lorry Halloway** moderated a panel on recent sanctions developments in Canada, the European Union and the United States affecting the aviation industry at the 2012 International Air Transport Association Legal Symposium on February 7, 2012, in Shanghai.

**Dan Cannistra** will host a [webinar with Sanchez Devanny](#), "NAFTA -- Managing the 2012 Audit Environment," on February 9.

**Jeff Snyder** will speak at the February 29 - March 3 - IPBA Spring Training, held in New Delhi from February 29 through March 3.

**Chris Monahan** will give a presentation on "Recent Developments in U.S. Export Controls" at the [Society of Research Administrators annual meeting](#) on March 18-21, 2012.

**Lindsay Denault** will speak on a panel about "Facilitating Access to International Markets" at the [AICPA International Business Conference](#), June 11-12, 2012.

## CROWELL AND MORING WELCOMES

We are pleased to announce that **Cari Stinebower** joins our international group, bringing expertise in OFAC, financial sanctions, AML, FCPA, and trade compliance. Cari previously served as counsel for the U.S. Department of the Treasury's OFAC and as a programs officer for OFAC. She can be reached at (202) 624-2757 or [cstinebower@crowell.com](mailto:cstinebower@crowell.com).

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