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CLIENT ALERT

This Month In International Trade - June 2011

July 1, 2011

EU Takes Steps to Implement WTO Panel Report in ITA Case

In June 2010, a World Trade Organization ("WTO") panel ruled that the European Union ("EU") improperly denied duty-free treatment to certain flat panel displays, multifunction devices and set top boxes in violation of the Information Technology Agreement ("ITA"). In October 2010, the EU confirmed that it intended to implement the rulings of the WTO panel report, and agreed to achieve compliance by June 30, 2011, at the latest. To implement the WTO panel report, the EU published a regulation (the "Regulation") on June 25, 2011 providing for duty-free treatment. Simultaneously, the EU published a withdrawal of a previous explanatory note that had denied duty-free treatment to set top boxes with a recording function. The limited scale of the EU's implementation of the WTO's panel report will likely result in continued litigation. Firstly, the European institutions tried to minimize the actual impact of the Regulation by stating that it shall neither have retroactive effect nor provide interpretative guidance on a retroactive basis. Secondly, the implementation does not extend to other information and communications technology products that are likewise covered by the ITA but were not subject to the WTO proceedings.

EU Launches Debate On The Future of Its Export Control System For Dual Use Goods

On June 30, 2011, the Commission launched a debate on the EU's system of exports controls for dual use items which are goods that have both civilian and military uses. The Commission is inviting submissions from business and other stakeholders on how export controls in Europe could be improved through a Green Paper that was adopted today.

Under the current export control system, implementation is almost entirely left to the EU Member States. The Green Paper addresses the possible extension of the scope of EU General Export Authorizations, a common approach to catch-all controls, additional controls imposed by Member states, the criteria used to decide on an export authorization, information exchanges among Member States' agencies as well as the rules on transit and brokering.

Submissions can be made until October 31, 2011. The Commission is expected to present its report to the European Parliament and Council on the review in 2012 and will subsequently propose amendments to the EU's Dual Use Regulation.

Commerce Proposes Tightening Dumping Rules For Chinese Exporters

The U.S. Department of Commerce has recently solicited comments on a new proposal that would make it more difficult for exporters of Chinese merchandise subject to antidumping duty orders to claim low "company-specific" margins. Commerce's notice suggests that there is a "loophole" in its current duty assessment methodology under which certain exporters are able to use these company-specific margins even where they have not demonstrated that they are entitled to do so -- the recent proposal would eliminate the loophole by requiring that the "PRC-wide" rate be assessed on such entries.

In dumping cases involving China, importers enter subject merchandise at a company-specific cash-deposit rate (which is often relatively low), a separate rate, or the NME-wide rate (which typically is quite high). Entries of subject merchandise are subject to cash-deposit requirements and are suspended from liquidation until the Department instructs CBP to liquidate the entries. If no administrative review of the entries is conducted, all of the entries are liquidated at the rate declared at entry. But if a review is requested of one or more exporters, all of the entries of merchandise declared (by the importers) to have been manufactured by those exporters are suspended pending Commerce's calculation of a final assessment rate.

Commerce has determined that in some cases in which importers have declared entries as being subject to a particular company-specific rate, the exporters did not actually report those sales during the administrative review process. This apparent disconnect raises a question as to whether those entries were actually entitled to the company-specific rate. As a result, under Commerce's proposal, such entries would be liquidated at the high "PRC-wide rate."

The proposal raises a number of questions: first, it is unclear whether and how Commerce and Customs can "match" the entries declared at the company-specific rate to the sales reported in the administrative review. Second, importers who see themselves as legitimately purchasing from PRC exporters will be adversely affected if the exporter is reviewed and fails to include those sales in its database -- those importers are likely to find the proposal troubling, as they generally have little control over what the exporters report to Commerce.

Comments on the proposal are due by Monday, July 11th.

Commerce to Suspend Liquidation of Ball Bearings Entries

On June 10, the Department of Commerce released a notice of its intention to issue instructions to Customs and Border Protection regarding imports of ball bearings and parts thereof from Japan and the United Kingdom. Commerce would instruct CBP to suspend liquidation of entries, made on or after July 11, 2005, that include ball bearings from Japan and the UK and that have not liquidated, or have not been deemed liquidated, as of April 30, 2011. Commerce's action is a result of a recent Court of International Trade decision, *NSK Corp. v. United States*, Slip Op 11-43, 2011 WL 1491346 (CIT Apr. 20, 2011), that reversed the antidumping duty order on ball bearings from Japan and the UK. The CIT decision is currently on appeal in the Court of Appeals for the Federal Circuit. Read More [PDF]

Airbus-Boeing Dispute Highlights

The World Trade Organization's ("WTO's") Dispute Settlement Body ("DSB") adopted the *Panel and Appellate Body ("AB") Reports in the European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft ("Airbus")* brought by the United States. The AB found the European Union ("EU) and its member states had provided subsidies to Airbus that had caused serious prejudice to the US. The AB refused to quantify the alleged subsidies at issue; the U.S. has alleged they amount to more than $18 billion while the EU has argued most of those subsidies have expired. In either case, the EU now has 6 months from the adoption of the AB report to withdraw the subsidies or to remove their adverse effects.

In its lengthy 1200 page report, the AB reached a number of conclusions with potentially important consequences on both the ongoing Boeing dispute and more generally on the future analysis of government subsidies. In particular the AB broke new ground in finding: (1) that the correct test for analyzing the export-contingency of government subsidies is 'objective', requiring

an analysis of the design and structure of the subsidy and not the government's motivation for implementing it; (2) that partial privatizations may be sufficient to 'extinguish' subsidies despite established precedent which had only permitted extinction under a 100 percent privatization; and (3) that R&D programs that are not directly targeted at specific products need to be carefully analyzed as they may not be causally related to any prejudice the petitioner experienced.

It will be interesting to see how these findings carry over into the AB's review of the EU's symmetrical WTO suit against alleged U.S. subsidies provided to Boeing. Both the U.S. and the EU are currently appealing the *Boeing* Panel's report from the end of March in which it found various U.S. subsidies to Boeing to be prohibited. Click here for a summary of the Boeing dispute.

Senate Bill Proposes Reforms to Duty Suspension Process

A new Senate bill would give the U.S. International Trade Commission the power to consider and vet duty suspension requests formerly handled by congressional offices. Under the bill, after review the ITC would send draft legislation including duty suspensions to Congress for ratification into law. The goal of the bill is to remove the "earmark" tag for duty suspensions, or miscellaneous tariff legislation. This will allow duty suspension laws to be implemented under the current "pay-go" rules that restrict legislation deemed to be "earmarks" by requiring that the legislation include revenue generating programs to offset the revenue loss created by the duty suspension bills. Read More [Library of Congress website]

Customs Issues New Guidelines On Air Penalty Mitigation

The U.S. Customs and Border Protection released a general notice amending its guidelines regarding the assessment and mitigation of penalties related to arriving air carriers. Arriving air carriers which fail to provide accurate and valid advance electronic cargo information to CBP within a certain time period are subject to penalties. If CBP determines that a violation of this requirement does not compromise its law enforcement goals, CBP may mitigate the penalty to an amount between $1,000 and $3,500. CBP may provide up to an additional 50% of the mitigation amount to validated C-TPAT program members in good standing. Other mitigating factors include the carrier's experience in using electronic cargo information, performance and error rates, and demonstrated remedial action.

Export Control Reform: BIS Finalizes Strategic Trade Authorization License Exception

On June 16, 2011, as part of the President's Export Control Reform Initiative, the Department of Commerce's Bureau of Industry and Security (BIS) issued a final rule (76 Fed. Reg. 35276) amending the Export Administration Regulations (EAR) to include a new license exception. In what BIS is characterizing as "an initial step in a broad export control reform effort," the Strategic Trade Authorization (STA) license exception will authorize the export, reexport, and in-country transfer of specific items to destinations where the administration has determined there is a relatively low risk of diversion.

In the final rule, BIS addressed the 41 comments it received in response to the December 9, 2010 proposed rule, and made several substantive changes, including to what items and destinations are eligible for the exception. Under the final rule, items controlled for reasons of encryption items (EI), short supply (SS), surreptitious licensing (SL), missile technology (MT), or chemical weapons (CW) are ineligible for STA treatment, and STA is not available for exports to prohibited end-users or end-uses, or to embargoed destinations. Finally, a number of items classified under particular ECCNs have either been removed from STA eligibility or are subject to additional requirements or limitations under STA. [READ MORE]

Exporters invoking License Exception STA will have to meet certain conditions, including: furnishing the consignee with the ECCN for the exported item(s); obtaining written certifications from the consignee in advance of the export; and providing notification to the consignee that the export is being made pursuant to STA. Alternative requirements may apply for releases of software source code or technology within a single country. Finally, some exports made pursuant to STA will need to comply with the Wassenaar reporting requirements set forth in section 743.1 of the EAR.

Time will tell if STA truly lightens licensing burdens for exporters. The public comments BIS received after releasing the proposed rule were split between those that felt the STA would decrease licensing and those that believed STA was either inapplicable to their business models or too onerous to effectively ease their licensing burdens. Regardless of STA's eventual effectiveness (or lack thereof), this final rule reflects BIS's recognition that some license requirements simply are not justified by U.S. national security and foreign policy. Such recognition and rulemaking, even if only a small first step, demonstrates progress towards actual, broad export control reform.

OFAC Continues Focus on the Reinsurance Industry: General Re and Iran

True to its word, OFAC has continued to announce settlements of what is reported to be a pipeline of dozens of cases in the insurance/reinsurance industry with a $59,130 settlement with General Reinsurance for reinsurance claim payments to Steamship Mutual Underwriting Association Limited for losses arising from National Iranian Tanker Company operations. [Read More...]

Crowell and Moring Speaks

On June 13, Laurent Ruessmann delivered a presentation on Mutual Recognition of Global Security Programs at the ICPA 2011 EU Compliance Strategy Conference in Brussels. Crowell and Moring was a sponsor of the ICPA event and hosted a reception for all attendees.

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