



Highlights in International Trade and Commerce

02.07.2008

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The International Law Section of Williams Mullen prepared the following brief descriptions of selected issues in international trade and commerce for general information purposes and use by clients and friends of Williams Mullen.

HIGHLIGHTS:

1. "The Last Shall Be First" and the Importer Charged More.
2. Ten Plus Two Plus Two More Weeks.
3. Upward Trend in Volume of AD/CVD Cases against China Continues.
4. Executive Order and New Regulations Implement Changes to CFIUS.

1. "The Last Shall Be First" and the Importer Charged More:

On January 24, U.S. Customs and Border Protection ("CBP") invited comments on its proposal to assess substantially higher duties by reinterpreting the statute for appraising imported merchandise. CBP primarily appraises the value of imported merchandise on the basis of "transaction value," defined as "the price actually paid or payable for merchandise when sold for exportation to the United States," plus specified additions. In the past, CBP's interpretation has based transaction value on the price from a first sale for export to the United States--for example, between the manufacturer and an intermediary, both of which may be foreign (the "first-sale" principle). The Court of Appeals has upheld the first-sale approach in cases where the sale has been at arm's length and the parties knew that the merchandise was destined for a U.S. customer. CBP now proposes to substitute the price paid in the last sale before the goods enter the United States, normally a much higher price than the "first-sale" price. According to CBP, the last-sale principle will be easier to apply. At the same time, use of a higher price as the basis for calculating duties will raise the amount of duties paid by importers. Opponents to this change abound and will likely submit comments. Those comments are expected to express outrage that: (1) CBP proposes effectively to overrule well-established judicial precedent; (2) CBP's justification cites a non-binding commentary from the World Customs Organization's Technical Committee on Customs Valuation; (3) appraisements will be much higher if the new interpretation takes effect, because they will include intermediaries' mark-ups; (4) the change thus constitutes a new tax, undercutting

simultaneous efforts to stimulate the economy; and (5) CBP gave Congress and the private sector little advance notice. Perhaps for the last reason, two weeks after the notice first appeared CBP extended the comment deadline by an extra month, until April 23.

2. Ten Plus Two Plus Two More Weeks:

CBP has extended by 15 days the period during which it will accept public comments regarding the January 2, 2008 Notice of Proposed Rulemaking ("NPRM") commonly referred to as "10 + 2" or "Additional Data Elements." If CBP were to implement the NPRM as currently drafted, regulatory amendments would require importers and carriers electronically to submit additional information pertaining to cargo before it is brought into the United States. Specifically, the NPRM proposes to require: (1) importers, and sometimes carriers, to submit through the Automated Manifest System or Automated Broker Interface an Importer Security Filing containing certain additional Data Elements (the "10" of "10 + 2"); and (2) carriers electronically to submit two kinds of added information: (a) a Vessel Stow Plan; and (b) Container Status Messages. Through these means, CBP intends to meet requirements of section 203 of the Security and Accountability for Every ("SAFE") Port Act of 2006 (6 U.S.C. ? 943) and section 343(a) of the Trade Act of 2002, as amended by the Maritime Transportation Security Act of 2002 (19 U.S.C. ? 2071 note). Comments on 10 + 2 will be due March 18, 2008.

3. Upward Trend in Volume of AD/CVD Cases against China Continues:

In our HIGHLIGHTS last July ("Summer Months Heat Up U.S. Trade Remedy Litigation"), we predicted that 2007 would prove to be a bumper year for petitions requesting the imposition of antidumping and countervailing duties on imports from foreign producers. That prediction appears to have come true. During 2007, U.S. producers filed 30 antidumping duty petitions ("AD"), covering 16 products from 11 countries. Countervailing duty petitions ("CVD"), all affecting China, accompanied seven of the 30. The year 2006, by contrast, saw only seven AD petitions, covering five products from three countries, with only one of the seven accompanied by a CVD petition. The latter, concerning Coated Free Sheet Paper, was the first CVD case addressing imports from China but ended in December 2007 when the International Trade Commission determined that an industry in the United States was not injured by reason of Chinese imports. All other CVD cases against China, however, are still alive. As reported in our December 2006 HIGHLIGHTS ("Commerce Initiates Countervailing Duty Case against China"), Commerce has changed the policy that it held from 1984 to 2006. Although the Department is proceeding carefully, recent determinations have begun identifying subsidies in the context of a "non-market" economy. Meanwhile, during January 2008, two more AD petitions were filed, and a CVD petition against China accompanied one of them.

4. Executive Order and New Regulations Implement Changes to CFIUS:

Anticipating new regulations slated for late February, the Executive Branch in a January 23 Executive Order ("EO") set forth criteria and procedures for reviews by the Committee on Foreign Investment in the United States ("CFIUS" or "the Committee"). As reported in these HIGHLIGHTS last July ("New Statute Envisions a More Serious CFIUS"), the Foreign Investment and National

Security Act of 2007 ("FINSA") amended the existing CFIUS statute to make foreign-government control alone generally sufficient to trigger a CFIUS investigation. Last October and December, Treasury invited public comments to help the Department draft implementing regulations. Observers at the time wondered how new regulations would balance the concerns of business and national security, especially when Treasury and the "lead agency," sometimes the Department of Homeland Security, disagreed.

Issued before the new regulations, the new EO aspires to create an added role for CFIUS by: (1) authorizing the Treasury Secretary, after consultation with CFIUS, to act on the Committee's behalf "exclusive of the heads of departments or agencies"; (2) expressly requiring the "lead agency" to obtain CFIUS's approval before the "lead agency" takes any "material" action on the Committee's behalf; (3) requiring an investigation if any CFIUS member believes that a reviewed transaction threatens to impair U.S. national security and that the threat has not been mitigated; (4) providing rules for the use of mitigation agreements; and (5) explaining that the President may act even when CFIUS cannot reach a recommendation.

An important test case for the new process will be an investment by Bain Capital in 3Com. Bain is partnering with China's Huawei Technologies, which has ties to China's army and would obtain a 16.5 percent stake in 3Com--but no operational control or decision-making power. Last October, 33 members of Congress demanded a CFIUS review of that transaction, because 3Com supplies anti-hacking technology to the U.S. Department of Defense. In December, after a November 30 Washington Times article caused an uproar, Barney Frank (D-Mass.), Chair of the Committee on Financial Services, and Carolyn Maloney (D-N.Y.), Chair of the Subcommittee on Financial Institutions and Consumer Credit, expressed concern over leaks of confidential and classified information relating to the acquisition. This month, Chairman John Dingell (D-Mich.) and other members of the House Committee on Energy and Commerce have asked Treasury to provide a closed briefing on the deal no later than February 28. In a related development, a prepared statement issued by Treasury Under Secretary David McCormick on February 5 suggested that the February 9 meeting of the G-7 Finance Ministers and Central Bank Governors would discuss CFIUS reviews in the context of U.S. openness to investment. Look for the new regulations to emerge later this month.

If you have any questions concerning the subject matter addressed above, please feel free to contact one of our International Attorneys.

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