citba.org
Customs and International Trade Bar Association

Quarterly Newsletter
Winter 2013
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CITBA & Related News

CITBA MEETING

MAY 14, 2013

CITBA will hold its annual Spring Meeting on May 14. Information regarding this event and the CLE program will be forthcoming.

Past CITBA Events

JANUARY 31, 2013

The "Nest" at the Willard Hotel, Washington DC

Injury Analysis and Decision-Making in Trade Cases
Panel including Federal Circuit Judge Hon. Jimmie Reyna, CIT Judge Hon. Timothy Stanceu, USITC Commissioners Dean Pinkert and David Johanson.

FEBRUARY 20, 2013

Offices of Baker & Hostetler LLP, Washington DC

Latest Developments in Iran/Syria Sanctions
Panel including former OFAC Chief Counsel Sean Thornton, as well as Ann Broeker and Davin Blackborow from the OFAC Chief Counsel's Office.

MARCH 21, 2013

Court of International Trade, New York, NY

Court of International Trade Best Practices Forum
Challenges at the Leading Edge: The Courts, Practitioners, and Government. The program featured a discussion on leading trade remedy issues, procedural and technical developments, and the redesign of Customs litigation, from the perspectives of the Bench, United States government, and private practitioner communities. This event was co-sponsored by CITBA and the Federal Circuit Bar Association and included presentations by Chief Judge Donald C. Pogue, Court of International Trade, and Chief Judge Randall R. Rader, Court of Appeals for the Federal Circuit.

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Links of interest:

CITBA Homepage

US CIT Homepage

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US Customs and Border Protection

Bureau of Industry and Security

Office of Foreign Assets Control

International Trade Administration

US International Trade Commission

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CITBA CO-SPONSORS WRITING COMPETITION

CITBA and Brooklyn Law School are sponsoring this Writing Competition to encourage law students who are interested in careers in Customs and international trade law. Winning papers will be considered for publication in the *Brooklyn Journal of International Law*. Two prizes will be awarded: **$1000.00 first prize**; **$500.00 second prize**. Awards will be presented at CITBA's semi-annual dinner in the fall. Entrants must be *currently enrolled* in a J.D. or L.L.M. program at any of the nation's law schools. **The final date for submission is May 24, 2013.**

The writing award honors the memory of Andrew P. Vance, past president of CITBA and distinguished public servant and practitioner. Through his work in the field of Customs and international trade law for over forty years, Andrew Vance maintained and improved the standards of practice and earned the respect and affection of countless lawyers, judges and scholars. For more information click here Andrew P. Vance Writing Competition.

UPCOMING PROGRAMS

DC Bar/CITBA
Panel Discussion – Recent Developments in CBP Enforcement
April 11, 12:00 pm to 2:00 pm, at the DC Bar Conference Center, 1101 K Street, NW, Washington DC 20005.

ABA INTERNATIONAL TRADE COMMITTEE
Spring Meeting
April 23-27, 2013 in Washington, D.C. at the Hyatt Regency on Capitol Hill, 400 New Jersey Avenue, N.W.

NYSBA INTERNATIONAL TRADE COMMITTEE
International Section Global Law Week. May 14-27, 2013. Location to be determined.

ANNOUNCEMENTS

News from the Clerk of the Court of International Trade
By: Stephen Swindell and Scott Warner*

To date, nearly 300 attorneys have successfully registered as Confidential Information Filers and may now view and file confidential documents on CM/ECF in their appropriate cases. Please remember that the electronic filing and serving of confidential documents is now mandatory. To register as a confidential filer and begin viewing and filing confidential documents in your cases, follow the requirements and procedures outlined in the Rules of the Court as amended on January 1st and mentioned in the Fall newsletter.

In addition to those regarding confidential filings, some other amendments took effect on January 1st that are worth highlighting.

The rules on precedence of action were simplified. Rule 3(g) was amended so that certain types of actions will now only be given precedence over others upon motion. But Rules 56.2(a) and 65(e) were also amended to make clear that motions seeking temporary or preliminary injunctive relief have

precedence over other matters before the Court.

The Rules were also amended to remind you, through a practice comment added to Rule 75, to file the appropriate documents in each of your cases and to notify the Clerk's Office separately whenever there is a change in your contact information. Without accurate information, you may not receive important information about your bar status or be notified of activity in your cases.

Lastly, the judges amended the standard chambers procedures by removing separate procedures for individual judges and making changes to the practice. Most notably, page counts for briefs have been replaced with word counts as follows: Movant and respondent briefs are now limited to 14,000 words while reply briefs are limited to 7,000 words. Also standardized forms are now available for Pretrial Orders, Scheduling Orders, Orders Governing Preparation for Trial and Certifications of Settlement Efforts.

**Stephen Swindell is the Supervisor and Scott Warner is the Operations Manager for Case Management at the Court of International Trade.*

FEDERAL CIRCUIT AND CIT CASE SUMMARIES

By: Stephen Tosini*

Court of International Trade Remands Selection of Surrogate Country in Antidumping Duty Review of PET Film from China.
DuPont Teijin Films v. United States (Ct. Int'l Trade) [Restani, J.]. On February 7, 2013, the Court of International Trade granted in part the motion for judgment on the administrative record filed by DuPont Teijin Films and other domestic polyethylene terephthalate (PET) film producers. As part of the antidumping analysis for non-market economy countries, such as China, the Department of Commerce (Commerce) must select a market-economy country that is at a comparable level of economic development and is also a significant producer of comparable merchandise, as the primary surrogate country for obtaining market prices to value inputs to the production process. The court remanded Commerce's decision to select India as the primary surrogate country, ordering Commerce to explain its choice to use 2008 per capita gross national income (GNI) data, rather than the more current 2009 data, in determining economic comparability. The court noted that the disparity between the per-capita GNIs of India and China increased between 2008 and 2009, and that Commerce failed to explain why the change was not relevant.

Court of International Trade Sustains Commerce's Explanation on Remand for Its Continuing Use of "Zeroing" in Challenge Brought by Thai Producers of Plastic Bags.
Thai Plastic Bags Indus. Co., Ltd. v. United States (Ct. Int'l Trade) [Pogue, C.J.]. On February 11, 2013, the Court of International Trade sustained Commerce's reasoning for continuing to employ "zeroing" – by which it excludes non-dumped sales from its calculation of antidumping duty margins – in administrative reviews after ceasing the practice in investigations. The court rejected a challenge by Thai producers and exporters of plastic bags to Commerce's decision to employ zeroing when comparing the weighted average of normal values to the export prices of individual transactions — the "average-to-transaction" comparison method relied upon in this review. The court also sustained Commerce's application of the "transactions disregarded rule" as consistent with past agency practice.

Court of International Trade Dismisses Russian Chemical Producer's Challenge to Department of Commerce's Denial of Its Request for Changed Circumstances Review Related to U.S.-Russia Agreement.
JSC Acron v. United States (Ct. Int'l Trade) [Stanceu, J.]. On January 25, 2013, the Court of International Trade dismissed a challenge to Commerce's decision not to conduct a changed circumstances review. A Russian producer of ammonium nitrate requested a changed circumstances review to obtain a reduction in the cash deposit rate applicable to its imports. The existing rate was established more than 12 years before but, before it could be implemented, the United States and Russia entered into a "suspension agreement" under which the Russian government agreed to restrict export volumes and insure that exports were sold above agreed prices. When the Russian government withdrew from the suspension agreement in 2011, the Russian producer asked Commerce to conduct a changed circumstances review, which Commerce declined to do. The court held that it did not possess jurisdiction to entertain the case under the court's residual jurisdiction because the Russian producer could obtain a new cash deposit rate through an administrative review and then challenge that review in court.

Court of International Trade Authorizes Commerce to Re-Open Proceedings to Consider Fraud Allegations.
Ad Hoc Shrimp Trade Action Committee v. United States, (Ct. Int'l Trade) [Pogue, C.J.]. On January 9, 2013, in a decision concerning an emerging area of trade law, the Court of International Trade granted the Government's request that it authorize Commerce to re-open the administrative record in an administrative review of the antidumping duty order on warmwater shrimp from China, to consider new allegations, stemming from Commerce's findings in a subsequent proceeding, that a Chinese exporter involved in the review had provided false information to Commerce regarding its affiliates. The court rejected the exporter's contention that Commerce was required to offer clear and convincing evidence sufficient to make a *prima facie* showing of fraud, emphasizing that Commerce has inherent authority to cleanse its proceedings from fraud, analogizing Commerce's findings in the subsequent review to intervening legal authority, and explaining that Commerce had offered compelling justification for its request.

Court of International Trade Rejects Constitutional Challenge to Newly-Enacted Trade Legislation Relating to Countervailing Duties.
GPX International Tire Corp., et al. v. United States (Ct. Int'l Trade) [Restani, J.]. On January 7, 2013, in a decision issued on a remand from the Court of Appeals for the Federal Circuit, the Court of International Trade dismissed a constitutional challenge to a statute (Pub. L. No. 112-99, 126 Stat. 265 (March 13, 2012)) that was hastily enacted by Congress to counteract a Federal Circuit decision, which had held that Commerce lacked the authority to apply countervailing duties against imports from non-market economy countries, including China. Chinese tire producers and a domestic importer challenged the new statute on constitutional grounds, contending that the statute's retroactive effective date violated the *Ex Post Facto* clause, and the due process and equal protection guarantees of the Fifth Amendment. The court rejected these arguments, holding that, even if the new law were a retroactive change in the law, it had a rational basis and thus was permissible.

Court of International Trade Sustains Department of Labor's Denial of Trade Adjustment Assistance.
Former Employees of Western Digital Technologies, Inc. v. Secretary of Labor (Ct. Int'l Trade) (Pogue, CJ.). On December 21, 2012, the Court of International Trade sustained the Department of Labor's determination that plaintiffs, former employees of Western Digital Technologies who were engaged in engineering functions related to the development of hard disk drives, were ineligible to apply for Trade Adjustment Assistance (TAA) benefits under the Trade Act of 1974. Plaintiffs contended that they were eligible for TAA benefits because Western Digital Technologies had shifted plaintiffs' work to its facilities in Asia. The court held, however, that substantial evidence

supported agency findings that the work performed by plaintiffs had not been shifted overseas because their work is primarily related to new-product design whereas the work performed in Asia is confined to the mass manufacturing of these products.

Court of International Trade Denies Attorney Fees under Equal Access to Justice Act, Holding the Government Substantially Justified in Pursuing Customs Broker Penalties.
United States v. Robert E. Landweer & Co. (Ct. Int'l Trade) [Gordon, J.]. On December 19, 2012, the Court of International Trade rejected a petition for attorney fees after it had dismissed a complaint seeking penalties against a customs broker for misrepresentations to U.S. Customs and Border Protection (CBP) on entry documents for Chinese crawfish, resulting in the loss of antidumping duties. After intervening precedent by the Court of Appeals for the Federal Circuit precluded the Government from bringing an action under the principal regulation on which CBP relied during the administrative proceeding, the court dismissed the Government's remaining claims for lack of exhaustion. In denying the fee petition, the court reasoned that, although CBP had failed to exhaust statutory administrative remedies because it did not notify the broker of the specific regulations allegedly violated, the Government's actions were substantially justified because there existed conflicting trial court precedent supporting both the Government's and the broker's views.

Court of International Trade Sustains Commerce's Respondent Selection and Remands Surrogate Country Selection in Review Concerning Shrimp from China.
Ad Hoc Shrimp Trade Action Committee v. United States (Ct. Int'l Trade) [Pogue, C.J.]. On November 30, 2012, the Court of International Trade sustained Commerce's reliance upon CBP data to select the mandatory respondent for Commerce's fifth administrative review of its antidumping duty order covering frozen, warmwater shrimp from China. The court held that the domestic industry had failed to proffer evidence calling the data's reliability into question. The court also held, however, that Commerce's selection of India as the primary surrogate country (used to calculate "surrogate values" for the costs of producing shrimp in a market economy country comparable to China) was not supported by substantial evidence because Commerce lacked justification for its treatment of countries with similar but varying gross national incomes as equally economically comparable to China, rather than analyzing the differences along with other relevant factors such as data quality.

Court of International Trade Sustains Department of Commerce's Use of Adverse Facts in Antidumping Proceedings against Chinese Imports.
Jiangsu Changbao Steel Tube Co., Ltd. v. United States (Ct. Int'l Trade) [Pogue, C.J.]. On November 14, 2012, the Court of International Trade sustained the Department of Commerce's use of adverse facts available against a Chinese manufacturer of oil country tubular goods. The court held that Commerce reasonably determined that the manufacturer had withheld information, submitted information that could not be verified, and impeded Commerce's investigation. These findings were based on the manufacturer's belated admission that it had lied to Commerce during the investigation and failed to disclose the existence of a dual record-keeping system.

After Trial of Novel Cause of Action, Court Of International Trade Assesses Lost Duties and Interest against Carrier after the Government Proved that Chinese Wearing Apparel Transported through the United States to Mexico Was Not Properly Exported.
United States v. C.H. Robinson Co. (Ct. Int'l Trade) [Gordon, J.]. On November 7, 2012, the Court of International Trade found that a carrier who purportedly transported wearing apparel from China, entered through the United States, to Mexico, was liable for duties, taxes, and fees pursuant to 19 U.S.C. § 1553, and 19 C.F.R. § 18.8(c), because the merchandise went missing. At trial, the United States demonstrated, by a preponderance of the evidence, that the merchandise was not exported to Mexico. The court further awarded prejudgment interest to the United States, based on equity and fairness.

Court of International Trade Sustains Department of Commerce Imposition of Antidumping Duty Order on Chinese Exporter's Shrimp.
Shantou Red Garden Foodstuff Co. LTD v. United States (Ct. Int'l trade) [Stanceu, J]. On October 23, 2012, the Court of International Trade sustained the Department of Commerce's remand redetermination issued in response to an earlier court decision. On remand, Commerce recalculated the Chinese exporter plaintiff's rate of dumping to come into compliance with an intervening appellate decision, among other things. Nevertheless, the new rate remained above the *de minimis* amount necessary to impose an antidumping duty order on the exporter.

Stephen Tosini is an attorney with the Department of Justice, Civil Division, National Courts Section.* ***These summaries are not a document of the U.S. Department of Justice, nor do they represent the official views of the Department of Justice.*

Feature Articles

Protecting the Industry or Violating the Rights of the Surety? Default Judgments Against Ocean Transportation Intermediaries Without Notice to the Surety

By Aykut Ozger*

A relatively uneventful day at the Lifoumore Law Firm; around 2:30pm. Suddenly the phone rings:

Attorney:	Good afternoon, Lisa speaking.
Client:	Hi Lisa, we got another one of these OTI claims; looks like another default judgment. I am e-mailing you the details as we speak. This is the first time we became aware of this claim since the claimant did not contact us before. Please have a look at it and let us know what our options are. This has become quite a nuisance.
Attorney:	Ok, hold on; I am receiving something. Yeah, got it. I will look at it and let you know.
Client:	Ok, thanks. Let me know if you need any other information.
Attorney:	Will do. Talk to you later. Bye.
Client:	Bye.

Lisa opens her e-mail and the attachments. It is another Federal Maritime Commission case, where a carrier made a claim against the Ocean Transportation Intermediary ("OTI") bond issued by Lisa's surety client for the benefit of a Non-Vessel Operating Common Carrier ("NVOCC"), Queenrantsoa, Inc. The claim letter is heavy, full of threats and deadlines. It says "You are the surety that provided the NVOCC bond for Principal Queenrantsoa, Inc. My client Yapendai Co. Ltd. obtained a default judgment against Queenrantsoa in the Superior Court of Kannesota for various breaches, which is a transportation related activity; no doubt. As such, you are obligated to pay the claim under 46 C.F.R. § 515.23. Have the check, in the amount of $46,000.00, made payable to Yapendai Co. Ltd., sent to my office no later than 5 days within the date of this letter."

Lisa looks at the date of the letter, and sees that it is dated three days ago. That leaves two days to pay the claim before her client is faced with a lawsuit. She thinks "not again; not another default judgment; why do we know about these claims only at the point of a default judgment? Why not before? Are these claimants up to something? Why are they not putting the surety on notice at the time of the original claim? Are they trying to take the easy way out? What is going on? "

Quite frustrated, Lisa takes the copy of the regulations from her bookcase, and opens the relevant part one more time; the infamous 46 C.F.R. § 515.23. It reads, once again:

> (b) *Payment pursuant to a claim*. (1) If a party does not file a complaint with the Commission pursuant to section 11 of the Act (46 U.S.C. 41301-41302, 41305-41307(a)), but otherwise seeks to pursue a claim against an ocean transportation intermediary bond, insurance or other surety for damages arising from its transportation-related activities, it shall attempt to resolve its claim with the financial responsibility provider prior to seeking payment on any judgment for damages obtained. When a claimant seeks payment under this section, it simultaneously shall notify both the financial responsibility provider and the ocean transportation intermediary of the claim by certified mail, return receipt requested. The bond, insurance, or other surety may be available to pay such claim if:
>
> (i) The ocean transportation intermediary consents to payment, **subject to review by the financial responsibility provider**; or
>
> (ii) The ocean transportation intermediary fails to respond within forty-five (45) days from the date of the notice of the claim to address the validity of the claim, and **the financial responsibility provider deems the claim valid**.
>
> (2) If the parties fail to reach an agreement in accordance with paragraph (b)(1) of this section within ninety (90) days of the date of the initial notification of the claim, the bond, insurance, or other surety shall be available to pay any final judgment for damages obtained from an appropriate court. The financial responsibility provider shall pay such judgment for damages **only to the extent they arise from the transportation-related activities of the ocean transportation intermediary** ordinarily within 30 days, without requiring further evidence related to the validity of the claim; **it may, however, inquire into the extent to which the judgment for damages arises from the ocean transportation intermediary's transportation-related activities**. Emphases added.

Lisa is not alone in her frustration. The existence and effects of 46 C.F.R. § 515.23 have become quite a headache for surety companies and their attorneys. As portrayed above, the typical scenario is when a claimant, usually an ocean carrier, has a problem with a NVOCC, and sues the NVOCC and obtains a default judgment. At the time the claimant files a suit against the NVOCC, either intentionally or unintentionally, it fails to inform the surety of the suit, who, if informed, could have intervened in the suit as a defendant. However, the claimants usually decide to keep the surety in the dark, and hope to get a default judgment against the principal so that later on they can execute the default judgment and get paid by the sureties under the NVOCC bond.

Although a plaintiff's attorney will argue that this kind of action is consistent with the legislative history and the goal behind 46 C.F.R. § 515.23, intending to protect the industry from the unfair practices of NVOCCs, the effect of this section creates an unfair situation for the surety companies. Furthermore, such a reading of the regulations, forcing the surety to pay on the judgment without questioning the validity of the claim, is inaccurate.

<u>The OTI bond is not a blank check for Claimants</u>

Neither the NVOCC bond nor the Freight Forwarder ("FF") bond is a blank check for the claimants from which to collect. Just because there is a "judgment" against a principal does not expose the bonds to automatic collection. This is exactly why 46 C.F.R. § 515.23(b)(2) explicitly states that "[t]he financial responsibility provider shall pay such judgment for damages *only to the extent they arise from the transportation-related activities of the ocean transportation intermediary …*; *it may*, however, *inquire into the extent to which the judgment for damages arises from the ocean transportation intermediary's transportation-related activities*."

This means a couple of things. First, for there to be a valid claim, the party must have acted as an

OTI; second, the alleged damages must have arisen out of the transportation related activity of this OTI; and third, the surety has the legal right to investigate the true nature of the claim. As such, regardless of the fact that there is a judgment, the law gives the surety the ability to inquire into the nature of the claim to see whether the requirements of the law are met. This is further corroborated by the fact that 46 C.F.R. § 515.23 repeatedly uses language to the effect that the claim is subject to review by the financial responsibility provider. Avoiding these requirements and forcing the surety to automatically pay on a judgment runs afoul of the clear language of the regulations.

According to the definition provided in 46 C.F.R. § 515.2(o) an OTI is an ocean freight forwarder or a non-vessel-operating common carrier. Therefore, for a claim to be covered by the bond, the claimant must provide evidence establishing that it has incurred damages arising from the transportation related activities of the OTI. Thus, the liability of a surety is limited to instances where the asserted damages arise from the transportation-related activities of the OTI. Once again, the surety has to have the ability to review the claim to see whether its principal acted as an OTI. If the surety is obligated to pay on a judgment without any review, this obviates the language of the regulations.

The language in 46 C.F.R. § 545.3 also corroborates the fact that the OTI bonds issued by the surety are not subject to automatic payment in the face of a default judgment. 46 C.F.R. § 545.3, in interpreting 46 C.F.R. § 515.23(b) states as follows: "A claimant seeking to settle a claim … should promptly provide to the financial responsibility provider *all documents and information relating to and supporting its claim* for the purpose of evaluating the validity and subject matter of the claim." Emphasis added. Why would the same regulations call for the need for the providing of the necessary documents in support of a claim, if the regulations demanded the automatic payment of these judgments? It is, thus, clear from the language of the regulations that the payment on the judgment under the bonds is not automatic, and is still subject to a surety's review and approval. The claim still has to be valid.

Axess International v. Intercargo Insurance – Misread, Misunderstood, Misapplied, and Perhaps Misheld?

Plaintiffs' attorneys often make reference to *Axess Int'l, Ltd. v. Intercargo Ins. Co.*, 183 F.3d 935 (9th Cir. 1999) in their claims against sureties. This is because the *Axess* court gives the impression that the NVOCC bond issued by a surety is a "judgment" bond. The court actually uses the word "judgment bond" for this type of bond, giving the mis-impression that the bond is automatically available to pay any kind of damages.

In *Axess*, the plaintiff wanted to collect on an NVOCC bond against a surety, as a result of a default judgment it won in a Hong Kong court. Eventually the plaintiff won against the surety on the merits of the case. However, a careful reading of the *Axess* decision reveals that the court did not do a very good job in referring the NVOCC bond as a "judgment" bond. The problem with the *Axess* decision is that while, on the one hand, the court is treating the NVOCC bond as a judgment bond, it still looks at the issue of whether the principal's activities were transportation related activities. What is more stunning is that the court even says that the surety "would not be liable on the bond if the judgment did not arise from 'transportation-related activities' because the bond only covers these activities …" Id. at 940.

In essence, the court in *Axess* contradicts itself because first, it says that it will not disturb the findings of the Hong Kong court and that the default judgment is valid. However, the court then goes into the merits of the case to see whether the activity of the principal was transportation related activity. So, if the *Axess* court looks into the merits of the case, then it cannot conclude at the same time that the NVOCC bond is a judgment bond. This is because if the NVOCC bond in fact had been a true judgment bond, the *Axess* court would not have gone into the detailed analysis of

whether misdelivery of goods is a transportation related activity as it would not have mattered since the bond would have been automatically available to pay the default judgment. The mere fact that the *Axess* court analyzed the merits of the case shows that the NVOCC bond is in fact not a judgment bond. This is in line with the purpose of 46 C.F.R. § 515.23, which makes numerous references to the fact that in any event the entity bearing the financial responsibility has the right to review the claim. This means that even a default judgment is not sacrosanct when it comes to a claim against an OTI bond. The plaintiff must still prove the merits of the case.

Any other interpretation would also be contrary to sureties' due process rights under the law. According to Black's Law Dictionary, due process means that "no person shall be deprived of life, liberty, property, or of any right granted him by statute, unless the matter involved shall first have been adjudicated against him upon trial conducted according to established rules regulating judicial proceedings. It forbids condemnation without a hearing." In case of a default judgment against a principal, where the surety did not even have knowledge of the original case, let alone the chance to defend itself, holding the NVOCC bond to be a judgment bond, available for automatic payment, would be a violation of the surety's due process rights, and would be fundamentally unfair to the surety.

Having similar views and concerns, Lisa grabs her phone and calls the claimant's attorney, who is known in the community simply as Attorney DJ.

DJ: DJ Speaking…

Lisa: Hi DJ, this is Lisa at the Lifoumore Law Firm. I am calling to discuss your claim on behalf of your client Yapendai Co. Ltd. against my client Innorety regarding a default judgment you obtained against Queenrantsoa.

DJ: Ah, yes; I remember. Yes, we have a default judgment. When are you sending my payment? I think you are calling to let me know that it is already in the mail; very nice of you, thanks for letting me know.

Lisa: Not that fast; we first have to see if you have a valid claim. So, I will please ask that you send us the bills of lading and all other relevant information in support of your claim.

DJ: WHAT? WHAT FOR? We have a default judgment. I won't give you any documents; I don't have the time for this nonsense. That default is valid, and we don't need to provide you with any information. The law is clear; the claim needs to be paid. You better send the check to my attention within the next two days; or else….

Lisa: DJ, I don't think you understand. We will deny your claim if you don't send us any information. You are making a claim against the NVOCC bond and we won't pay until you show that Queenrantsoa acted as the shipper, and its activities were transportation related activities. I don't even know if these shipments were international shipments. By the way, why didn't you let us know about the initial claim when you first filed the case against Queenrantsoa?

DJ: DENY MY CLAIM? HOW DARE YOU? You do that and I will come back with everything, including a claim for bad faith. You have two days until you send me that check. Otherwise I am going to court to execute that default against you. And I have *Axess* with me, so that you know.

Lisa: How does *Axess* help you DJ? Does it say defaults are untouchable? By the way, you still have not answered my question: before getting the default, why did you not contact us about the claim?

DJ: I have to go now; I am very busy and I will let the judge decide on this; how about that? Still waiting for that check.

Lisa: DJ, you are not getting anything until you give us the documentation. Instead of a check, you will be getting our denial letter. You are on notice.

DJ: Very well then. See you in court.

Lisa: Ok, see you in court. Don't forget *[click! – DJ hangs up]* to bring *Axess* with you because it is time to pay another visit to it. Hello? Helloo?

**Aykut Ozger is an attorney with Justus Law Firm, PLLC.*

Increase of Fraud Allegations at the U.S. Department of Commerce

By Henry Smith*

In 2012, the U.S. Department of Commerce dealt with more allegations of fraud in antidumping and countervailing duty investigations and reviews than usual. This increase was likely sparked by the Federal Circuit's February 7, 2011 decision in *Home Products International, Inc. v. United States*. This case holds that if a petitioner brings to light clear and convincing evidence of fraud in any one proceeding (or segment of a proceeding), then Commerce may be required to reexamine related proceedings (or segments) that are pending at the Court of International Trade ("CIT") or the Federal Circuit. This holding seems to have sparked a recent increase in fraud allegations because it not only addressed the issue of what might constitute clear and convincing evidence of fraud, but also opened the door to reexamination of proceedings under judicial review.

In *Home Products International, Inc. v. United States*, after an antidumping order on floor-standing, metal-top ironing tables from China had been issued, Commerce calculated de minimis dumping margins for Chinese exporter, Since Hardware (Gouangzhou) Co., Ltd ("Since Hardware"), in the first and second administrative reviews. Petitioner, Home Products International, Inc. ("Home Products"), initiated an action at the CIT challenging the results of Commerce's second review. While Home Products' challenge to the second review was pending, Commerce began conducting its third administrative review. During the third review, Home Products alleged that Since Hardware had submitted falsified certificates of origin to Commerce that inaccurately reported that it had purchased portions of certain steel inputs from market economy suppliers. These certificates of origin were material because they made it appear that Since Hardware had purchased more than the key thirty-three percent threshold of the inputs in question from market economy suppliers, thereby qualifying the entirety of those inputs to be valued based on the weighted-average price of Since Hardware's (purported) market economy purchases. This likely allowed Since Hardware to obtain a lower dumping margin.

Commerce concluded that the documents in question were unreliable and inaccurate, and, in light of these results, Home Products moved before the CIT for leave to amend Home Products' complaint in its challenge to the second administrative review to include the same fraud allegation. The government opposed, arguing that "Home Products' contention that 'newly discovered evidence' exists is not relevant" because "judicial review of antidumping duty administrative reviews is limited to 'review *upon the basis of the record made before the agency* which issued the decision." The CIT agreed with the government, declining "Home Products' invitation to go beyond the administrative record under review."

Reversing the CIT, the Federal Circuit held that "where a party brings to light clear and convincing new evidence sufficient to make a *prima facie* case that the agency proceedings under review were tainted by material fraud, the Trade Court abuses its discretion when it declines to order a remand to require the agency to reconsider its decision in light of the new evidence." The Federal Circuit reasoned that "[i]t is true that, generally, for a court reviewing an agency decision, 'the focal point for judicial review should be the administrative record already in existence.' However, the so-called 'record rule' is not without exceptions. … Where there is new evidence indicating that the original record was tainted by fraud, reopening may be appropriate."

Presumably as a result of the Federal Circuit's holding, which allows the agency and the CIT some

latitude when confronted with facts tending to demonstrate fraud, petitioners have recently alleged fraud in the following antidumping and countervailing investigations and reviews:

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from the People's Republic of China. On September 7, 2012, less than a month before the final determination, petitioner, SolarWorld Industries America, Inc. ("SolarWorld"), alleged that Chinese exporter, Wuxi Suntech Power Co., Ltd. ("Wuxi Suntech"), submitted fraudulent financial statements to Commerce. SolarWorld argued that publicly available information demonstrated that Wuxi Suntech fraudulently inflated the value of its sales to a European affiliate majority-owned by Wuxi Suntech and that the same affiliate fraudulently used worthless or non-existent bonds to obtain loans from the Government of China. SolarWorld argued that these fraud allegations called into question Wuxi Suntech's sales figures used as the denominator in calculating countervailable subsidy rates, Wuxi Suntech's creditworthiness, and the overall integrity of its financial statements. Nevertheless, in its final determination, Commerce noted that the information submitted by SolarWorld involved preliminary proceedings underway in civil court among private parties, as well as an ongoing investigation by a European authority, and that Wuxi Suntech officials had publicly denied these allegations, stating that they were instead the "victims" of fraud. Thus, Commerce determined that the aforementioned court cases and investigations had not yet resulted in conclusions that would warrant invalidating its findings. Commerce suggested, however, that, if its investigation resulted in an order, SolarWorld may request an administrative review or a changed circumstances review in which Commerce may further examine any alleged fraud.

Diamond Sawblades and Parts Thereof from the Republic of Korea and the People's Republic of China. On April 5, 2012, prior to the final results of the first administrative review, petitioner, Diamond Sawblades Manufacturers' Coalition ("DSMC"), alleged that that Chinese and Korean producers of diamond sawblades sold subject merchandise in the United States bearing false country of origin designations. In response, Commerce deferred the final results of its review to address DSMC's allegations, and, issued a post-preliminary memorandum finding that the information submitted by the Chinese and Korean producers was reliable for the final results of the review. In its final results, Commerce stated that its extensive investigation of the fraud allegations uncovered no evidence that impugns the reliability and accuracy of the Korean and Chinese producers' sales and cost data. On March 29, 2012, DSMC also alleged the same fraud in the second administrative review. DSMC's allegations had no impact on Commerce's preliminary results in that review, however, Commerce stated that it would continue to examine this allegation.

Large Residential Washers from the Republic of Korea. On July 25, 2012, two days before the preliminary determination, petitioner, Whirlpool Corporation ("Whirlpool"), alleged that Korean producer, Samsung Electronics Co., Ltd. ("Samsung"), had engaged in fraudulent conduct by submitting falsified cost and home market sales data to Commerce. The crux of Whirlpool's allegation was that documentation generated in a previous investigation of bottom mount combination refrigerator-freezers from Korea showed home market washer prices that were substantially higher than those reported in Samsung's home market sales listing. Whirlpool also pointed to a number of "circumstantial evidence" items, which it alleged demonstrated a systematic understating of Samsung's reported home market prices and costs. Because of the timing of Whirlpool's allegation, Commerce did not address it in the preliminary determination. Subsequent to the preliminary determination, however, Commerce met with Whirlpool's counsel and an accounting systems consultant with expertise in SAP retained by Whirlpool to aid in preparation for Samsung's home market sales verification. Furthermore, Commerce staffed Samsung's home market sales verification with two sales analysts and two accountants, rather than its usual two sales analysts, and tailored its verification procedures to specifically address Whirlpool's allegation. Despite this exhaustive verification, in its final determination, Commerce found "no evidence of falsified data or fraudulent conduct" on behalf of Samsung.

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