citba.org
Customs and International Trade Bar Association

Quarterly Newsletter
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CITBA & Related News

UPCOMING PROGRAMS

MAY, 2014
New York, NY – location TBA
CITBA Annual Meeting
Please check the CITBA website for updated details of this event: http://www.citba.org/events.php

MAY 14, 2014
US Court of Appeals for the Federal Circuit, Washington DC
Federal Practice Summit 8:30am to 4:00 pm
Sponsored by the CAFC and the Federal Circuit Bar Association, the Federal Practice Summit will feature topics including: "The Sovereign as Litigant", "Hot Button Issues in Litigation", "Government Intervention, and Amicus Participation." Opening remarks will be given by Chief Judge Rader. The program will also feature a judge's round table. Register at the FCBA website here.

PAST CITBA Events

FEBRUARY 7, 2014
The "Nest" at the Willard Hotel, Washington DC
CITBA Winter Luncheon
From Uruguay to Bali and Beyond: International Trade Enforcement and Other Challenges
Speakers and panel included CIT Judge Hon. Claire R. Kelly; Sandra Bell, Executive Director, Regulations and Rulings, CBP; Scott Kieff, Commissioner, UITC; Chris Marsh, Deputy Asst. Secretary, AD/CVD Operations, Int'l Trade Admin., DOC; Brad Ward, Director, Interagency Trade Enforcement Center.

APRIL 3, 2014
Waldorf Astoria, New York, NY
ABA Section of International Law
CITBA members joined in a reception for the Judges of the U.S. Court of International Trade.

In this issue:

Links of interest:

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US CIT Homepage

US Court of Appeals for the Federal Circuit Homepage

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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ANNOUNCEMENTS

NEWS FROM THE CLERK OF THE COURT OF INTERNATIONAL TRADE
*By: Scott Warner and Stephen Swindell**

Attorney Renewal Registration

Yes, it's been five years already! If it's not marked on your calendar or if you need a friendly reminder, USCIT Rule 74(e) requires all attorneys who were admitted to the Court before 2013 to renew their registration with the Court. Non-government attorneys are also required to pay a $50 fee. It's the same rule and fee as last time, but we have made a couple of improvements in getting the word out and making the renewal process easier for you.

In 2009, we mailed hard copies of the Notice of Attorney Renewal Registration to all eligible attorneys. This time around, we made it more convenient for everyone by emailing the notice to all eligible attorneys with an email address on record with the Court. A hard copy of the notice was sent the old-fashioned way to those attorneys without an email address on record.

The other changes we have made concern how you submit the Attorney Renewal Registration form and pay the fee. In the past, we required you to fill out the form manually and mail or deliver it to us with your check or money order. Now, you can complete the form on the Court's website and pay the fee online using your credit card! If you go this route, your receipt will be emailed to you by the Court's merchant account vendor, CDG Commerce. If you still wish to send in a check or money order, just mail it to us with a hard copy of the completed form. If you would like to receive a receipt for your check or money order, be sure to send us a self-addressed postage-paid envelope too. For those that like to renew in person and pay their fees with cold hard cash, you can still do that too. Whichever way you choose to pay, you can combine multiple attorney renewal fees into one payment.

You can find the Notice of Attorney Renewal Registration on the Court's website at www.cit.uscourts.gov and a link to the notice has been placed on the CM/ECF login page. For the Attorney Renewal Registration form itself and FAQs on the process, check out our Attorney Information page of the Court's website. If you have any questions about the process, the form or anything about attorney renewal registration, give our Admissions Office a call at: (212) 264-2812.

Other Changes in Store - Appeal Fees and Citation Errors

We would also like to highlight a couple of other changes coming your way April 1st. First, the cost of filing an appeal with the U.S. Court of Appeals for the Federal Circuit will increase from $455 to $505.

Lastly, Section 2 (C) (3) of the Standard Chambers Procedure regarding citation errors is being eliminated. Instead of notifying the Court of such errors in your documents by an Errata Memorandum, you will have to file a Motion for Errata as directed in Section 4 (d)(i) of Administrative Order 02-01.

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

OTHER ANNOUNCEMENTS FROM THE COURT OF INTERNATIONAL TRADE

The following additional announcement was recently posted on the Court's website:

Notice of Proposed Amendments

Pursuant to 28 U.S.C. § 2071(b), notice is given of certain proposed amendments to the Rules of the United States Court of International Trade. The proposed amendments were recommended by the Court's Advisory Committee on Rules, which was appointed pursuant to 28 U.S.C. § 2077(b). The proposals pertain to USCIT Rule 26.1. *{Per the Advisory Committee Note: "Rule 26.1, which has no counterpart under the Federal Rules of Civil Procedure, has been deleted to eliminate any potential inconsistencies between that rule and Rules 26 and 30, and to ensure consistency of practice before the Court with general federal practice under the Federal Rules of Civil Procedure"}.*

This notice is given to provide the public, the bar and others interested in the work of the United States Court of International Trade with an opportunity to comment on the proposed amendments. All comments received will be forwarded to the Court for consideration.

Each proposal is accompanied by commentary describing the recommended change. When viewed on the USCIT Website, recommendations for language to be deleted from each rule will appear with strikeovers, and proposed new language will appear in red.

Comments are to be submitted in writing by the close of business on May 8, 2014 to:

Tina Potuto Kimble
Clerk of the Court
United States Court of International Trade
One Federal Plaza - Room 597
New York, NY 10278-0001

FEDERAL CIRCUIT AND CIT CASE SUMMARIES

*By: Claudia Burke & Stephen Tosini**

Federal Circuit Rejects Constitutional Challenge to Countervailing Duty Amendment to the Tariff Act of 1930. *Guangdong Wireking Housewares & Hardware Co., Ltd. et al. v. United States* [*Dyk*, Chen, and O'Malley, JJ.]. On March 18, 2014, the Federal Circuit affirmed the constitutionality of the 2012 amendment to the Tariff Act of 1930; the amendment provides that, as of 2006, imports from non-market economy countries, including China, are subject to countervailing duties. The statutory amendment superseded a prior Federal Circuit holding (*GPX Intern. Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011)) that countervailing duties could not be imposed on Chinese imports. Plaintiff Chinese producers alleged that the amendment violates the Ex Post Facto clause. The Federal Circuit held that the amendment was a retroactive change but also held that the amendment was not punitive and does not violate the Constitution.

Federal Circuit Affirms Commerce Rescission of Review for New Chinese Shipper. *Marvin Furniture (Shanghai) Co., Ltd. v. United States* [Rader, CJ, Prost, *Reyna*, JJ]. On March 11, 2014, the Federal Circuit affirmed the Court of International Trade's decision sustaining the Department of Commerce's (Commerce) decision to rescind a new shipper review. Commerce initiates new shipper reviews for producers or exporters that were not part of an original antidumping duty investigation but recently shipped merchandise and are eligible for their own rate, not simply the rate that has already been established under the order. The appellant, a Chinese furniture producer, requested such a review but failed to provide all of the necessary information. Giving appellant the benefit of the doubt, Commerce initiated the review anyway, but upon realizing that the facts did not justify initiation, rescinded the review in the middle of the review period. The Federal Circuit affirmed the determination, holding that the appellant was not eligible for the review.

Federal Circuit Grants Government's Petition for Rehearing *En Banc* and Vacates Panel Decision Holding that Only "Importers Of Record" May Be Held Liable for Grossly Negligent Violations of 19 U.S.C. § 1592. *United States v. Trek Leather, Inc.* [*per curiam*]. On March 5, 2014, the Federal Circuit granted the Government's request for rehearing *en banc* and vacated a precedential panel decision (*United States v. Trek Leather, Inc.*, 724 F.3d 1330 (Fed. Cir. 2013)) that had reversed a judgment issued by the Court of International Trade holding Harish Shadadpuri – the president of Trek Leather – personally liable for civil penalties for grossly negligent violations of 19 U.S.C. § 1592 in connection with Trek's importations of men's suits. Mr. Shadadpuri had personally submitted the false entry documents to Customs and Border Protection, but a divided panel held that only "importers of record" (and agents authorized in writing to act on their behalf) could be found liable for civil penalties based on *negligence* or *gross negligence* because the only "duties" involved in making customs entries were those imposed on importers of record. The petition for rehearing en banc contended that the decision is in direct conflict with the plain language of section 1592 and would likely encourage widespread evasion of the customs laws. The en banc court reinstated the appeal and ordered further briefing, which is scheduled to be completed in early June.

Federal Circuit Affirms Commerce Application of a Total Adverse Inference for Chinese Magnesium Producer in Antidumping Proceeding. *Tianjin Magnesium Int'l Co. Ltd. v. United States* [per curiam]. On February 5, 2014, the Federal Circuit affirmed the decision of the Court of International Trade sustaining Commerce's antidumping determination. For the third administrative review in a row, plaintiff, a Chinese magnesium exporter, submitted falsified documents to Commerce as a justification for a particular offset to the exporter's dumping margin. Commerce decided that the plaintiff had failed to cooperate in the proceeding and that the nature of failure called into question all of the information provided by the plaintiff. Commerce thus chose to apply a total adverse inference to the plaintiff, meaning that it chose as plaintiff's dumping margin a high rate assigned to another respondent from a prior proceeding. The Court of International Trade and the Federal Circuit both affirmed the determination.

Administrative Review of Antidumping Duty Order Covering Honey from China Sustained. *Dongtai Peak Honey Indus. v. United States* [Tsoucalas, S.J.] On March 21, 2014, the Court of International Trade sustained Commerce's administrative review of its antidumping duty order covering honey from China. The court sustained: (1) Commerce's denial of plaintiff's extension requests, and removal of the requests and the untimely documents from the record; (2) Commerce's denial of a separate antidumping duty rate and consequent assignment to plaintiff the substantially higher dumping rate assigned to merchandise produced or exported by companies considered part of the Chinese government; and (3) Commerce's use of adverse facts from the record to calculate that dumping rate.

Plaintiff Dismisses Challenges to the Effective Dates for Trade Remedy Orders. *Wind Tower Trade Coalition v. United States* [Gordon, J.]. On February 6, 2014, the Court of International Trade

granted voluntary dismissal of three related lawsuits challenging determinations by Commerce regarding the effective dates of its trade remedy orders covering Wind Towers from China and Vietnam. The dismissals follow a decision by the Court Appeals for the Federal Circuit affirming the Court of International Trade's denial of preliminary injunctions in the three matters. Both courts held that the plaintiff, a coalition representing domestic industry, had failed to show a fair likelihood of success on the merits of its claim that Commerce erred in determining the effective dates of the orders. The effective dates for Commerce's orders, and the resulting treatment of duties collected provisionally during the Commerce and International Trade Commission (ITC) investigations in trade matters, depend on whether the ITC finds present injury or merely threat of injury to the domestic industry. In these cases, the ITC made a mixed determination, with three commissioners finding no injury or threat, two commissioners finding present material injury, and one commissioner finding a threat of injury. An evenly divided commission is treated as having found of injury. In denying injunctive relief, both the CIT and Federal Circuit held that Commerce had interpreted the statutes reasonably in light of the ITC's mixed determination and that the "balance of the hardships" and "public interest" factors did not favor granting preliminary relief.

Court of International Trade Affirms Commerce's Ruling that Curtain Walls Are Within the Scope of Antidumping and Countervailing Duty Orders on Aluminum Extrusions from China. *Shenyang Yuanda v. United States* [Eaton, C.J.]. On January 30, 2014, the Court of International Trade affirmed Commerce's ruling that certain curtain wall units fell within the scope of trade remedy orders on aluminum extrusions from China. In denying a motion filed by importers of curtain wall units, the court agreed with Commerce that, because curtain wall units are "parts for" a finished curtain wall, the curtain wall units did not fall within the orders' express exception for "finished merchandise." This is the first decision by the court on approximately ten pending challenges to the scope of the aluminum extrusion orders.

Court of International Trade Denies Domestic Producers' Challenge Commerce's Antidumping and Countervailing Duty Orders on Aluminum Extrusions. *Aluminum Extrusions Fair Trade Committee v. United States* [Pogue, C.J.]. On January 23, 2014, the Court of International Trade denied a challenge brought by a coalition of domestic aluminum extrusions producers. The domestic producers challenged Commerce's decision, in identifying finished heat sinks as a product not subject to the orders, to omit the descriptor language "sold to electronic manufacturers." The ITC used this language to describe the finished heat sinks in the Commission's negative finding of material injury to the domestic industry. Commerce generally does not include the domestic purchaser in a description of subject merchandise because, when products are entered into the country, Customs and Border Protection is often unable to identify the ultimate domestic purchaser. The court concluded that the elimination of the clause "sold to electronics manufacturers" from the description of heat sinks would not result in any material difference in how imported aluminum extrusions would be classified. The court also found that the domestic producers' concern that certain heat sinks might be improperly classified in the future was not ripe for review.

Claudia Burke and Stephen Tosini are attorneys with the Department of Justice, Civil Division, National Courts Section.* ***These summaries are not a document of the U.S. Department of Justice, nor does it represent the official views of the Department of Justice.*

FEATURE ARTICLE

Will an Importer's Prior Disclosure of Customs Law Violations Insulate it from Liability under the False Claims Act?

By: Josh Levy, Esq.

Importers who fail to use reasonable care when entering merchandise into the U.S. know all too well that Customs can collect monetary penalties for even the slightest of errors. False information on entry documentation about classification, valuation, country of origin, or any other information, can result in large penalties under 19 U.S.C. § 1592. Customs can impose penalties regardless of whether the importer commits fraud or negligence.

However, importers are not without relief from the prospect of penalties under Section 1592. As part of its "shared responsibility" policy with the importing community to enforce U.S. Customs laws, the agency encourages importers to self-police errors made during the entry process by taking advantage of a "prior disclosure" process. 19 U.S.C. § 1592(c)(4) and 19 C.F.R. § 162.74 permit the importer to submit a prior disclosure of violations, giving them opportunity to reduce or even eliminate penalties. As long as Customs has yet to initiate an investigation of the alleged violations before the disclosure, or the importer has no knowledge of that investigation, then disclosure affords the importer the opportunity to mitigate potential penalties.

Although the U.S. has traditionally relied on Section 1592 as its primary enforcement tool to deter Customs law violations, the Government has recently utilized lawsuits by private citizens against importers brought under the federal False Claims Act. So-called "qui tam" actions have long permitted private citizens, known formally as "relators", to sue and recover damages on the Government's behalf for false claims. America's First Continental Congress passed laws that empowered informers to expose customs fraud, rewarding them with a portion of the penalties recovered. In 1863, Congress enacted the False Claims Act to combat fraud by war profiteers that sold defective boots and lame horses to the Union Army.

The current version of the False Claims Act is codified at 31 U.S.C. §§ 3729 - 3733. The FCA allows the Government, or a relator on behalf of the Government, to sue any person that knowingly submits a false claim for payment to the Government. The statute also permits suits against any person who delivers less than the proper amount of money owed to the Government. Defendants can be liable for up to $10,000 and three times the damages suffered by the Government.

Importer violations that result in lost customs revenue are fertile ground for qui tam actions by informers or the Government. Since 2012, the U.S. and relators have settled multiple FCA actions against importers. In one case, the U.S. recovered $6.3 million from an importer who misclassified auto parts. In another, the U.S. recovered $45 million based on the importer's false declaration of country of origin to avoid antidumping duties. A third case, *U.S. ex rel. Jiménez v. Otter Products, LLC d/b/a OtterBox*, Case No. 1:11-cv-02937 (D. Colo.), settled earlier this year for $4.3 million. On March 25, 2014, Bizlink Technology agreed to pay $1.2 million to settle allegations that the company violated the FCA by using a double invoicing scheme resulting in

underpayment of duties owed on imports from China.

The Government's increasing reliance on the FCA in penalty cases gives rise to an interesting question. Does an importer's prior disclosure act as a safe harbor from the FCA? The FCA contains a jurisdictional exclusion known as the "government action" bar. This provision bars an FCA action "based upon allegations or transactions which are the subject of an administrative civil money penalty proceeding". If the importer makes a prior disclosure of its violations to mitigate penalties before the FCA action commences, the importer could assert that the disclosure process equates to the kind of administrative penalty proceeding that warrants dismissal under the government action bar.

U.S. courts have yet to decide this novel issue. But the scenario was squarely before the court in *Jiménez v. Otter Products*. In 2009, the customs compliance manager at Otter Products discovered that the company had failed to declare assists on imported cases for electronic devices, undervaluing them, and underpaying duties for the previous four years. Shortly after the discrepancy was revealed, the company made its prior disclosure to Customs. One year later, the compliance manager brought an FCA action on behalf of the U.S. alleging that the company knowingly undervalued its imports in the same transactions previously disclosed. The company moved to dismiss the FCA action for lack of subject matter jurisdiction based on the government action bar.

There were sound arguments on both sides of the issue. Otter Products argued that it was insulated from FCA liability by virtue of its prior disclosure. According to the company, the disclosure self-initiated a type of "administrative civil money penalty proceeding" that precluded the FCA action. Some courts have held that a pre-penalty investigation of the same transactions qualified as a "penalty proceeding", where the investigation would result in "compromise relief". Otter Products asserted that the prior disclosure process was analogous to a pre-penalty investigation that could result in compromise relief in the form of lower penalties.

On the other side, the U.S. contended that prior disclosure and the investigation of the disclosed violations was at most a pre-penalty process that did not rise to the level of an administrative "penalty proceeding". According to the Government, an importer's prior disclosure might initiate an investigation, but the process is not necessarily designed to impose a monetary penalty. Various courts have held that government audits and investigations are not the kind of formal penalty proceedings that trigger the government action bar to FCA jurisdiction.

Unfortunately the court did not decide the issue because the parties reached a settlement. The issue is likely to appear again in the near future. Importers continue to rely on the prior disclosure process as an incentive to correct errors in exchange for reduced, or no penalties. The Government's recent decisions to rely on relators' FCA actions as an alternative to seeking Section 1592 penalties indicates that the actions for Customs law violations are here to stay. In cases where there is a prior disclosure, the question remains whether the disclosure would insulate the importer from liability under the FCA action. The recent uptick in FCA suits based on Customs law violations means we may have our answer very soon.

** Josh Levy is an LLM candidate in International Trade and Customs Law at the John Marshall Law School in Chicago, Illinois.*

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