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Upcoming Programs

CLE Event & CITBA Annual Meeting - May 22, 2017

Materials for the upcoming Annual Meeting and CLE conference have been posted for download prior to the event. CLE conference materials are available here.

Haven't registered? It is not too late. Please visit the CITBA website (www.citba.org) for information and to register.

Past CITBA Events

March 14, 2017: Enforce and Protect Act (EAPA) Workshop

U.S. Customs and Border Protection (CBP) offered a free workshop to provide valuable information to parties who are filing allegations or defending allegations such as: an opportunity to engage with CBP officials who enforce trade laws, specifically EAPA investigations; a walkthrough of a sample case with the team to learn CBP's procedures and the actions CBP takes to pursue an investigation; and gaining guidance on how to develop strong allegations and learn more about the role of parties in EAPA proceedings.

February 16, 2017: Trade Policy in 2017

Trade was a key issue in the 2016 election. The panel will discuss the likely priorities and objectives of the new President and Congress in the trade arena in 2017. Specific topics will include potential areas where there may be policy changes and potential areas for bipartisan cooperation on trade and its effects on American jobs and competitiveness.

Panelists included:

- Angela Ellard, Chief Trade Counsel and Trade

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Subcommittee Staff Director, Ways and Means Committee, U.S. House of Representatives
- Jason Kearns, Chief International Trade Counsel, House Ways & Means Committee - Democratic Staff
- Alan M. Dunn, Partner, Law Offices of Stewart and Stewart; former U.S. Assistant Secretary of Commerce
- David J. Ross, Counsel, Wilmer Cutler Pickering Hale and Dorr LLP; former Associate General Counsel, Office of the U.S. Trade Representative

Moderator: Jennifer M. Smith, Partner, Law Offices of Stewart and Stewart, and CITBA Young Lawyers Committee Member

February 9, 2017: Understanding and Complying With Economic Sanctions in 2017

CITBA is proud to co-sponsor a luncheon event with the D.C. Bar International Law Section:

In recent years, truly remarkable changes have been made to the ways in which the U.S. Government utilizes economic sanctions, and further changes are likely under the Trump Administration. During this "off the record" program the Acting Director of the Office of Foreign Assets Control (OFAC), the former Deputy Assistant Secretary of State for Counter Threat Finance and Sanctions, and seasoned practitioners will discuss these changes and how lawyers and their clients can understand and comply with complex constantly evolving sanctions.

CITBA's Young Lawyer Committee Membership

Interested in becoming more engaged with international trade?! Are you under 40 years old, feel young, or know someone that fits the bill? If so, please join or nominate someone to join the CITBA Young Lawyers Committee! We are especially looking to expand our membership outside of the DC/NY area. The Committee meets by phone once a month and seeks to create opportunities for young lawyers to create and participate in events and publications. If you or anyone you know is interested in contributing to the committee, please contact Alex Hess (alexandra.hess@hugheshubbard.com) or Shama Patari (spatari@barnesrichardson.com).

Announcements

NEWS FROM THE CLERK OF THE COURT OF INTERNATIONAL TRADE

By Stephen Swindell & Scott Warner*

**Administratively Administrating the Administrative Way...and Filing Fee Refunds Too!*

On April 3rd, the Court adopted multiple amendments to the Rules of the Court, including a new administrative order and a slight modification to an older one. We also put forth a policy regarding the refund of erroneous electronic filing fees. To help you become the first on your block to learn about these amendments, here's a quick rundown:

Registry Funds and You

Following the lead of the Administrative Office of the U.S. Courts, the Court has a new Administrative Order in place concerning the deposit, investment and tax administration of funds in the court's registry. This new order, Administrative Order 17-01, provides guidance to both the bar and the Court for processing such funds and comes with a bevy of amended forms, Forms 16 to 16-5 and Specific Instructions for them too! To spread the love for registry funds, Rule 67.1 was also modified to reflect the provisions of the new administrative order.

Let's Get Physical Exhibits With One Less Form

In a follow-up to last October's rule amendment regarding physical exhibits or items, Rule 80(h) to be exact, Administrative Order 02-01 has been modified to eliminate the requirement for parties to file two forms with such submissions. Thanks to this tweak, you no longer have to file a Form 23 Certification of Filing and Service of Physical Exhibit or Item and a CM/ECF Form 10 Notice of Manual Filing with your physical exhibits or items. Now you'll only have to file the Form 23. Don't worry, CM/ECF Form 10, you're still #1 in our hearts!

Putting the Fun in Electronic Filing Fee Refunds

Not that anyone ever makes mistakes, especially mistakes involving the electronic payment of filing fees, but if they do, they should be aware that the Court now has a policy in place concerning refunds of those fees. Aptly named the Electronic Filing Fee Refund Policy and located on the Rules and Forms web page of the Court's website, this policy directs the Clerk's Office on what it can do to effectuate the return of fees erroneously paid through the Pay.gov feature on CM/ECF. If you ever suspect that you might have a made such a mistake, give us a heads up by letting our CM/ECF Help Desk know by email at: cmecf_helpdesk@cit.uscourts.gov or by phone at: 1-866-450-1859. Hope this helps and thank you for not making any mistakes!

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

News You Can Use

A Step-by-Step Guide to: Filing Administrative Protests In ACE

Nicholas Baker, Senior Associate at The Law Office of Lawrence W. Hanson, P.C., has put together a useful step-by-step guide for the filing of administrative protests in the Automated Customs Environment.

The guide walks through the entire process -- from account set-up to protest filing -- with clear instructions and screen-prints from the ACE portal. It is available at: http://globaltradeeducation.com/articles/.

New U.S. Trade Representative Sworn In

After four months of waiting, Robert Lighthizer was sworn is as President Trump's U.S. Trade Representative on May 15, 2017. Ambassador Lighthizer received his undergraduate and law degrees from Georgetown University. He previously served as chief minority counsel and chief counsel and staff director for the Senate Committee on Finance, was the Deputy Trade Representative during the Reagan Administration, and spent over three decades in private practice, most notably with the law firm of Skadden, Arps, Slate, Meagher & Flom, where his practice focused on antidumping, countervailing duty, and safeguards law.

At USTR, Ambassador Lighthizer is expected to focus on re-negotiation of trade agreements such as NAFTA, enforcing U.S. trade rights in multiple international fora, and enhancing enforcement of U.S. trade policies, all to ensure that trade benefits American workers and businesses.

Federal Circuit and CIT Case Summaries

By Claudia Burke*

** Claudia Burke 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 does it represent the official views of the Department of Justice.*

Customs

Court of International Trade Holds that Snuggies are Blankets, not Garments, for Tariff Purposes. *Allstar Marketing Group, LLC v. United States* [Barnett, J.]. On February 10, 2017, the CIT issued a decision on the classification of polyester fleece coverings with sleeves, known as the Snuggie®. Both parties had

requested summary judgment on the issue whether the Snuggie® is classifiable as a "garment" under tariff category 6114 (as claimed by the government), or as a "blanket" under category 6301, or "other made up articles" under category 6307 (as claimed by the plaintiff, Allstar Marketing Group LLC). The court granted plaintiff's motion for summary judgment and held the Snuggie® is classifiable as a blanket for tariff purposes because it is marketed and used as a blanket, and the addition of sleeves does not make it a garment, and it is not a garment because it is not ordinarily worn as apparel. The decision means that, instead of the current 14.9 percent duty rate, Snuggie® importers will pay duties at a rate of 8.5 percent.

Court of International Trade Holds Importer and Its President Jointly and Severally Liable for Unpaid Customs Duties and Penalties. *United States v. Int'l Trading Servs., LLC & Julio Lorza* [Barnett, J.]. On May 5, 2017, the CIT granted summary judgment in favor of the United States on its claim for unpaid customs duties and negligence penalties under 19 U.S.C. § 1592 regarding misclassified entries of sugar from Brazil. The court awarded $986,967.31, plus interest-the full amount sought in the case. Judgment was entered jointly and severally against the importer, International Trading Services, LLC, and its President, Mr. Lorza.

AD/CVD

Federal Circuit Sustains Commerce's Antidumping Determination Involving Oil Country Tubular Goods from China. *American Tubular Products v. United States* [Newman, Mayer, Lourie, J.J.]. On February 13, 2017, the Federal Circuit sustained Commerce's use of certain surrogate value data in a case involving the first administrative review of an antidumping duty order covering Oil Country Tubular Goods (OCTG) from China. At issue was Commerce's valuations of steel billets (a primary input for OCTG) and international freight when OCTG is shipped, as well as Commerce's treatment of a by-product that is produced when OCTG is made. The court held that Commerce's decision was supported by substantial evidence and was in accordance with law.

In a Pair of Decisions, Federal Circuit Sustains Commerce's Interpretation of Trade Remedy Orders. *Meridian Products, LLC v. United States* (Fed. Cir.) [Prost, Newman, Wallach, JJ]; *Districargo, Inc. v. United States* [Moore, Schall, Hughes, JJ]. On March 28, 2017, the Federal Circuit sustained Commerce's interpretation of trade remedy orders on aluminum extrusions from China. On April 3, 2017, the Federal Circuit again sustained Commerce's interpretation after finding that Meridian controlled the decision. Previously, the CIT overruled Commerce's determination that Meridian's trim kits, used to create an aesthetic frame around kitchen appliances, fell within the scope of antidumping and countervailing duty orders covering aluminum extrusions from China, based on a "finished goods kit" exclusion contained in the orders. The United States appealed the judgment on the basis that the trial court's interpretation of the exclusion was unreasonably narrow. The Federal Circuit agreed, and ordered the trial court to reinstate Commerce's original scope ruling. The Federal Circuit, in a non-precedential decision in Districargo, subsequently held that Meridian was controlling as to the interpretation of the "finished goods kit" exclusionary language.

Federal Circuit Vacates and Remands Commerce's Separate Rate Methodolgy.

Changzhou Hawd Flooring Co. Ltd. v. United States [Taranto, Lourie, Chen, JJ]. On February 15, 2017, the Federal Circuit held that if Commerce wishes to depart from the "expected method" of assigning a separate rate when all of the individually investigated firms have a zero or de minimis rate, it must make certain findings to justify such a departure. The "expected method" states that Commerce is to weight average the zero, de minimis, and facts available margins, unless Commerce concludes that the method is not feasible or would result in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers. In this appeal, Commerce assigned the separate rate respondents a margin, despite the fact that all the mandatory respondents received de minimis margins. The court vacated and remanded to Commerce to reconsider its departure from the "expected method."

Federal Circuit Requires Exhaustion of Administrative Remedies Before Commerce. *Boomerang Tube LLC v. United States* [Reyna, Hughes, Stoll, JJ.]. On May 8, 2017, the Federal Circuit issued a precedential decision requiring interested parties appearing before Commerce to raise their arguments before the agency, even when Commerce changes its reasoning between its preliminary and final decisions. In the decision on appeal, the CIT ruled in the government's favor on the merits of plaintiffs' arguments challenging the agency decision. The court of appeals vacated and remanded, holding the CIT should have dismissed the case without reaching the merits because plaintiffs failed to raise their arguments before the agency.

Court of International Trade Sustains in Part Commerce's Antidumping Review on Cased Pencils from China. *Shandong Rongxin Import & Export Co., Ltd. v. United States* [Katzmann, J.]. On February 3, 2017, the CIT sustained in part, and remanded in part, Commerce's final results in a 2012-13 administrative review of an antidumping duty order covering imports of cased pencils from the People's Republic of China. The importer challenged Commerce's determination that a domestic company, Dixon Ticonderoga Company (DTC), was an interested party entitled to request an administrative review of the antidumping order. The court sustained the determination that DTC was a domestic producer and interested party, but remanded the case to Commerce to revisit its determination that the importer was ineligible for a separate duty rate because it had not demonstrated that the importer selects its management autonomously of the Chinese government, which is one of four criteria that must be satisfied to show the absence of de facto government control.

Court of International Trade Denies Chinese Garlic Importer's Request for Preliminary Injunction Against CBP's Enhanced Bonding Requirement. *Harmoni Int'l Spice, Inc. v. United States* [Kelly, J.]. On February 7, 2017, the CIT denied the request of Harmoni Int'l Spice, Inc. (Harmoni) for a preliminary injunction to prevent CBP from requiring enhanced bonding on its imports of fresh garlic from China. Because Harmoni faced a potential antidumping duty liability of more than $200 million on existing imports, CBP required single transaction bonds to protect against the risk that Harmoni would be unable to pay the antidumping duties on its imports. Harmoni alleged it could not afford the cash collateral required to post the bonds, and that the bonding requirement would put it out of business. In denying Harmoni's motion, the court found that CBP reasonably assessed the risk posed by plaintiff's imports, and plaintiff should have "anticipated" the potential

antidumping duty liability and taken steps to "place itself in a better financial position."

Court of International Trade Sustains Commerce's Presumption That Chinese Exporter is Controlled by Government. *Yantai CMC Bearing Co. v. United States* [Barnett, J.]. On February 8, 2017, the CIT rejected Yantai's challenge to Commerce's rebuttable presumption that all enterprises operating within a non-market economy country are controlled by the government. In this review of tapered roller bearings from China, Commerce found that Yantai had not rebutted that presumption. Therefore, Commerce found Yantai subject to the single antidumping duty rate assigned the China-wide entity, a higher rate than it would have received had it been able to demonstrate absence of government control. The trial court sustained Commerce's determination in its entirety.

Court of International Trade Denies Catfish Exporters' Request to Suspend Assessment of Antidumping Duties. An *Giang Fisheries Import and Export Joint Stock Co. v. United States* [Kelly, J.]. On February 24, 2017, the CIT denied the request of An Giang Fisheries Import and Export Joint Stock Co. (An Giang) to enjoin the liquidation of entries subject to an antidumping duty order. Eight months after the court had entered a consent preliminary injunction suspending liquidation pending conclusion of the litigation, An Giang asked the court to amend the injunction to include additional entries that CBP had already liquidated. In denying An Giang's motion, the court found that liquidation ordinarily moots a party's claims pertaining to liquidated entries in an anti-dumping action, and that none of the exceptions applied here. The court further found that An Giang did not suffer irreparable harm because the liquidated entries could be challenged pursuant to a different statutory provision. Finally, the court found that Commerce was within its statutory authority to issue liquidation instructions, An Giang had not acted in a timely fashion, and both the balance of hardships and public interest weighed in the government's favor.

Court of International Trade Sustains Commerce's "Differential Pricing" Methodology for Combatting "Masked" Dumping. A*pex Frozen Foods Pvt., Ltd., et al. v. United States* [Kelly, J.] On March 3, 2017, the CIT sustained Commerce's "differential pricing" methodology for identifying and remedying "masked" dumping, in an administrative review of Commerce's antidumping duty order covering shrimp from India. The court held Commerce's methodology to be reasonable, stating that "a reasonable practice cannot be distortive" and that plaintiffs had simply presented alternate methodologies that led to different results.

Court of International Trade Dismisses Challenge to Review of Antidumping Duties on Wooden Bedroom Furniture from China. American *Furniture Manufacturers Committee v. United States* [Restani, S.J.]. On March 13, 2017, the CIT dismissed a challenge to the final results of Commerce's review of the antidumping duty order covering wooden bedroom furniture from China. The order established a 216 percent dumping margin for a relevant exporter. American Furniture Manufacturers Committee (AFMC), an association of domestic manufacturers of covered merchandise, challenged Commerce's determination on the basis that Commerce did not investigate allegations that certain importers improperly used the exporter to avoid paying cash deposits at the 216 percent rate. AFMC did not

previously request a review of the importers, which did not participate in Commerce's review. The court dismissed AFMC's arguments for lack of jurisdiction and found that AFMC suffered no cognizable harm from Commerce's decision.

Court of International Trade Sustains in Part Commerce's Antidumping Investigation of Taiwanese Steel Nails. *Mid Continent Steel & Wire, Inc. v. United States*, [Kelly, J.]. On March 23, 2017, the CIT sustained, in part, Commerce's antidumping duty investigation of imports of certain steel nails from Taiwan. The domestic industry challenged Commerce's determinations regarding a Taiwanese nails producer's alleged affiliations. The Taiwanese nails producer, in turn, challenged several aspects of Commerce's application of its differential pricing analysis, and it also challenged Commerce's treatment of its production costs for steam and transfer prices paid for wire drawing and nail making as not supported by substantial evidence. The court rejected most of these challenges, remanding for further explanation and consideration a single issue regarding Commerce's allocation of expenses associated with the Taiwanese nails producer's separate steam line of business.

Court of International Trade Sustains Commerce's Remand Results in Antidumping Investigation of Fresh Crawfish Tail Meat Imported from China. *Xiping Opeck Food Co., Ltd. v. United States* [Eaton, J.]. On April 5, 2017, the CIT sustained in its entirety the Commerce's remand results in its 2009-10 administrative review of an antidumping duty order on fresh crawfish tail meat from China, a review initiated based on U.S. industry allegations that Xiping engaged in middleman dumping and had structured its sales to mask the dumping. Xiping challenged Commerce's application of its middleman dumping methodology to calculate Xiping's liability, claiming its first sale was to its U.S. importer. The court sustained Commerce's findings that: (a) Xiping's sales to its U.S. importer - a single-purpose shell corporation - were not commercially reasonable and, thus, should not be considered; and (b) Xiping's dumping liability should be based on the Chinese reseller's costs and sales prices to the U.S. because Xiping had knowledge that its product was being dumped.

Court of International Trade Sustains-in-Part Commerce's Final Results in Antidumping Review of Activated Carbon Imported from China. *Jacobi Carbons AB, et al. v. United States* [Barnett, J.]. On April 7, 2017, the CIT sustained in part Commerce's final results in the seventh administrative review of the antidumping duty order on certain activated carbon from China, and denied plaintiffs' motion to supplement the administrative record. Plaintiffs, who are producers, exporters, or importers of Chinese activated carbon, challenged among other things Commerce's selection of Thailand as the primary surrogate country, and its application of the Chinese value-added tax (VAT) in calculating plaintiffs' dumping liability. The court rejected plaintiffs' argument that Commerce erroneously applied the legal standard for selecting the primary surrogate country and denied plaintiffs' motion to supplement the administrative record as to this issue, but ultimately concluded that Commerce's selection of Thailand was not supported by substantial evidence. Furthermore, although rejecting plaintiffs' argument that Commerce unlawfully relied on the Chinese VAT in calculating plaintiffs' dumping liability, the court concluded that Commerce's calculations were not supported by substantial evidence.

Court of International Trade Sustains-in-Part Commerce's Remand Redetermination in Antidumping Investigation of Glycine Imported from China. *Baoding Mantong Fine Chemistry Co. v. United States* [Stanceu, CJ.]. On April 19, 2017, the CIT sustained in part Commerce's remand redetermination in an administrative review of the antidumping duty order on glycine from China. The parties challenged Commerce's determinations related to surrogate values for liquid chlorine, ammonia, formaldehyde, steam coal, and general expenses and profit. The court sustained Commerce's surrogate values for liquid chlorine and for general expenses and profit. The court remanded for Commerce to reconsider its surrogate values for the remaining three factors of production.

Feature Articles

Commerce's Irrecoverable VAT Deduction Policy Is Unlawful And Unreasonable

By Dharmendra N. Choudhary*

** Dharmendra N. Choudhary is a Washington D.C. based International Trade Attorney with GDLSK LLP, the largest US law firm focused on Customs and International Trade issues. He has been a longstanding Counsel to several Chinese and Vietnamese exporters in US Anti-dumping proceedings.*

By a Federal Register notice issued on June 19, 2012, the US Department of Commerce ("DOC" or "Commerce") inaugurated a new policy in Anti-dumping ("AD") proceedings against Non-market economy ("NME") countries to deduct from US export sale price an amount equivalent to irrecoverable Value added tax ("VAT") that is paid on purchased inputs that are utilized in producing the export goods. Pursuant to this policy, in all Chinese AD proceedings, the DOC has been offsetting the US sale price by the allegedly irrecoverable VAT amount. This article demonstrates that the DOC's policy is not only ultra vires of the applicable statute, but is also inconsistent with the underlying facts.

Legal Framework

Pursuant to 19 U.S.C. §1677a(c)(2)(B), Commerce is authorized to make an adjustment to reported U.S. price by "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States." Thus, according to the plain language of the provision, the tax, duty or charge that is sought to be offset from US sale price must be ***imposed on the exportation of the subject merchandise***. In other words, such a tax must satisfy the following three prongs:

(a) The taxable event is exportation, i.e. liability to pay such tax arises solely on account of exportation of goods.
(b) Such export tax is imposed upon the subject merchandise.
(c) Such export tax is included in the US sale price.

"Exportation" is an action taken in the course of international commerce that has

a well-defined meaning. According to U.S.C.B.P. regulations, "exportation" is defined as "a severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country." 19 C.F.R. § 101.1, *see also, Swan & Finch Co. v. United States*, 190 U.S. 143, 145 (1903) (noting that "the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country"). Thus, exportation is that point in the chain of commerce at which the merchandise is physically transported from one sovereign country to another.

Commerce's VAT Deduction is Not Authorized by the Plain Language of the Statute

Under Chinese law, no VAT is imposed on goods at the point of (or due to the fact of) exportation. The *Interim Regulations of the People's Republic of China on Value-Added Tax* (2008) states at Article 2.3 that "[f]or taxpayers that export goods, the tax rate shall be zero." In other words, the export sale is exempt from the VAT scheme. Conversely, under the Chinese law, the only tax-related event triggered by exportation is that a company is potentially entitled to a refund of certain VAT amounts previously paid on input purchases.

Consequently, Chinese exporters do not pay VAT on subject merchandise in the course of exportation. Since there is no additional VAT liability for an export sale (because the export VAT rate is *zero*), there is no need to credit VAT paid on input purchases against VAT owed on the export sale.

Nonetheless, pursuant to its *Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings*, 77 Fed. Reg. 36481, 36482 (June 19, 2012), Commerce has sought to unlawfully expand the ambit of "export tax, duty, or **other charge**" to include input VAT that is allegedly not fully refunded upon exportation. To that end, Commerce has reasoned that under Chinese laws, export sales are not VAT neutral because some portion of the input VAT that an exporter pays on inputs used in the production of export goods is not refunded. While acknowledging that no tax or VAT is levied on export sales itself, Commerce nonetheless reasons that an "irrecoverable" portion of input VAT is embodied on the constituent inputs at the time of exportation of subject merchandise. Commerce also reasons that there is no practical difference between a new charge imposed at the time of exportation versus a refund that is withheld at the time of exportation (but which is provided for domestic sales). Carrying this creative argument further, Commerce has reasoned that the unrefunded input VAT is covered under the rubric of "other charge" that is "imposed" on exportation of subject merchandise since the unrefunded input VAT is "perfected" upon export of goods.

Having allegedly grounded the unrefunded input VAT in the "other charge" prong of the controlling statute, Commerce deducts from US sale price an amount equivalent to the free-on-board ("FOB") value of goods multiplied by the difference between the VAT rate levied on subject merchandise (17%) and export refund VAT rate (say, 9% - the refund rate varies from one commodity to other), i.e. Irrecoverable VAT = FOB * 8%.

DOC's methodology is unlawful for several reasons.

First, input VAT is an *internal tax*, which is levied and paid on inputs purchased from the domestic market within China.

Second, input VAT is not a tax that is "imposed on exportation of the subject merchandise" and Commerce's rationale, while creative, is simply disingenuous.

Third, because no VAT is paid on export of goods, the US sale price cannot contain any amount of VAT. Even so, Commerce simply presumes that this illusory VAT amount is not only imposed on export goods but also included in the US sale price.

The Court has previously considered this very issue and concluded that Chinese VAT is a domestic tax related to production costs rather than a "tax imposed on exportation." *See, e.g., Globe Metallurgical Inc. v. United States*, 781 F. Supp. 2d 1340, 1346-1347 (Ct. Int'l Trade 2011) (noting that "VAT is paid in RMB on an aggregated basis by Respondents to the Chinese authorities ... contrary to Globe's claim, the record indicates that Chinese law does not require the VAT to be charged to customers on export sales"). Moreover, in *Bridgestone Ams., Inc. v. United States*, 33 CIT 1040, 1048-50 (2009), the Court of International Trade ("CIT") rejected the argument that "unrefunded VAT" should be included in the respondents' normal value calculation as a production cost pursuant to 19 U.S.C. § 1677b, noting that "[a]lthough Xugong paid VAT to acquire inputs in producing the subject goods, the Chinese VAT system is part of the 'cost or pricing structure' of China," which is disregarded under the non-market economy methodology. This precedent directly contradicts the Department's position that Chinese VAT can be considered a tax "imposed on exportation." Rather, the precedent confirms that Chinese VAT is an internal tax related to the cost of production within China.

The Department's theory of an unrefunded VAT arising solely from and on account of exports is based on an incorrect permise that in relative terms, there is a loss of input VAT credit while exporting goods relative to when those goods are sold in the domestic market (when full credit of input VAT is available to be utilized against output VAT). Based on this premise, Commerce proceeds to determine the amount of based on the following formula:

> Irrecoverable VAT credit = FOB price * (Standard VAT rate of 17% for finished goods sold in domestic market - VAT refund rate 9% for finished goods that are exported).

There are several problems with Commerce's underlying theory.

First, there is a disconnect between the origin of an irrecoverable VAT and the formula used to determine the amount. It is notable that Commerce's sole raison d'etre for an irrecoverable VAT is based on a portion of VAT paid on inputs. However, when computing the amount of irrecoverable VAT, Commerce erects a strawman - "finished goods sold in the domestic market" - and determines the amount of irrecoverable input VAT based on the difference between the rate of VAT credited on domestic sales of finished goods and rate of VAT refund on exports of finished goods. Inexplicably, in determining the amount of irrecoverable input VAT, there is no discussion whatsoever about the rate or

amount of VAT original paid on purchase of inputs themselves.

Second, Commerce draws erroneous conclusions with regard to VAT when comparing a Chinese producer's domestic sale with his export sales. A Chinese producer-exporter pays VAT in connection with its domestic purchases of material inputs, and it is at the time of input purchase that it incurs this cost. If the producer makes a domestic sale, it can credit the "input VAT" paid on these material purchases against additional VAT owed on the sale of finished goods, but it does not receive a refund of VAT paid for material inputs. As such, there is no reason to believe that an exporter incurs an input VAT credit detriment while exporting goods relative to when he sells those goods domestically.

Third, it is also incorrect to tie input VAT credit losses solely to the export of goods. There are other situations in which a Chinese exporter would receive no offset or credit for input VAT that it pays. For example, if a Chinese exporter buys inputs and they are lost or damaged before it can use them in production, it will always incur the full cost of VAT paid for these inputs without any refund. Likewise, if a Chinese exporter uses inputs to produce products that it cannot sell, or that are lost in inventory, it will also incur the full cost of VAT paid for those inputs without any potential refund. Under these scenarios, the company bears the full cost of VAT paid on inputs regardless of whether there is an export sale involved. Thus, any cost associated with VAT is attributable to the initial purchase of the inputs; it does not "arise solely from" and is not "specific to" export transactions. To the contrary, it is only through exportation that a potential refund of some VAT amounts previously paid on inputs would be triggered in the first place. As such, there is no support in the controlling statute for tying unrefunded input VAT with an export tax on finished goods that is included in export sale price.

It is well-settled that Commerce's interpretation of the antidumping law cannot be contrary to the plain language of the statute or conflict with plain Congressional intent. *See, e.g., Dorbest Ltd. v. United States*, 604 F.3d 1363, 1371-72 (Fed. Cir. 2010), see also, *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837, 842-45 (1984). By its plain language, 19 U.S.C. §1677a(c)(2)(B) only authorizes Commerce to make a deduction from U.S. price to account for taxes or duties (1) that are "imposed on the exportation" of the subject merchandise and (2) that are included in the reported U.S. price of the subject merchandise. Deduction of a portion of VAT paid on the purchase of material inputs from export sale price is an impermissibly broad interpretation of this language in contravention of the plain language and clear intent of the statute. *Id.*

Commerce's Adjustment for Irrecoverable VAT is based on a Presumptive Formula instead of the actual "Amount" of the Tax

As discussed above, correct interpretation of 19 U.S.C. §1677a(c)(2)(B) suggests that Commerce's VAT deduction is not authorized by the statute. As noted above, Commerce deducts from US sale price an amount equivalent to free-on-board ("FOB") value of goods multiplied with the difference between the VAT rate levied on subject merchandise (17%) and export refund VAT rate (say, 9%), i.e. FOB * 8%.

In a recent decision, *China Mfrs. Alliance v. United States*, 2017 Ct. Intl. Trade LEXIS 10, 52-54, Slip Op. 17-12 (Feb. 7, 2017) (emphasis added), the Court held the Department's deduction of irrecoverable input VAT from U.S. price to be based on a mere presumption, and therefore, unlawful:

> [T]he **deduction** from the EP or CEP starting price **must be in the actual "amount" of the tax, duty, or other charge that was "imposed"** by the government of the country of export. ... If Commerce finds that a tax, duty, or other charge was so imposed in relation to the subject merchandise, it then would make a finding as to whether the tax, duty, or other charge was "included in such price," i.e., the starting price. **If a charge was not found to have been so imposed, then under the statute, and as a matter of logic, it cannot be found to have been "included" in that price.** Commerce never made either of these two specific findings. Under step one of the Chevron analysis, the court must give effect to the unambiguous language of the statute. ... **Instead of finding as a fact that the PRC imposed a tax, duty, or charge - of whatever character - in an amount equivalent to 8% of the FOB value of GTC's subject merchandise, Commerce applied a presumption that goods exported from China are subject to "irrecoverable VAT" in the amount of 8% of the FOB value of the exported good.** Final I&D Mem. 30 ("Irrecoverable VAT is (1) the free-on-board value of the exported good, applied to the difference between (2) the standard VAT levy rate and (3) the VAT rebate rate applicable to exported goods."). **A presumption is**, of course, **different than a finding of fact**. ....., it stated in the Final Issues and Decisions Memorandum a general finding that "under the PRC's VAT regime, . . . some portion of the input VAT that a company pays on purchases of inputs used in the production of exports is not refunded." ..... Later in the memorandum, Commerce further found that ..... according to the Chinese VAT schedule, the standard VAT levy is 17 percent and the rebate rate for subject merchandise is nine percent." .... Under the plain language of 19 U.S.C. § 1677a(c)(2)(B), these findings do not suffice. They are not findings of an "amount" of a tax, duty, or other charge that was imposed by the exporting government in relation to GTC's exported merchandise. Commerce next stated that "{f}or purposes of these final results, therefore, we removed from U.S. price the difference between the rates (i.e., eight percent), which is the irrecoverable VAT as defined under PRC tax law and regulations." .... This also was insufficient as it is not a finding of any specific amount of a tax, duty, or other charge imposed in relation to GTC's subject exports. **Having failed to reach a finding that § 1677a(c)(2)(B) required, Commerce had no statutory authority to make a deduction from GTC's EP and CEP starting prices. Those deductions, therefore, were contrary to law** and must be set aside.

As such, the Court has firmly rejected Commerce's irrecoverable VAT deduction policy, reasoning that it is based on a presumption and has no grounding in Chinese VAT laws. Pursuant to *China Mfrs. Alliance* Court's rebuke of Commerce's irrecoverable VAT deduction policy, the agency is absolutely forbidden from deducting any VAT amount from the US sale price, unless it could be unambiguously and specifically tied to the subject merchandise under Chinese VAT laws. In other words, the Department can no longer determine the irrecoverable VAT amount by applying a convenient and simplistic formula, based on the difference between the standard VAT rate and the export refund VAT rate being

applied to a common value basis, i.e., FOB price.

Earlier on, in *Fine Furniture (Shanghai), Ltd. v. United States*, 2016 Ct. Intl. Trade LEXIS 85, 11-15 (Ct. Int'l Trade Sept. 9, 2016) (emphasis added), while disapproving of the agency's methodology, the Court had been willing to accept a deduction that was consistent with "the amounts of irrecoverable Chinese VAT that actually were incurred":

> The statute provides that the starting price used to establish U.S. price "shall be reduced by . . . the *amount*, if included in such price, of any export tax . . . . *imposed by the exporting country* on the exportation of the subject merchandise to the United States." 19 U.S.C. § 1677a(c)(2)(B) (emphasis added). In this way, Congress expressly limited the deduction for export tax that Commerce is to make by the "amount" of export tax that China actually "imposed." **The Final Decision Memorandum, however, fails to reconcile the deduction for irrecoverable VAT that Commerce calculated from the prices paid by Double F to the importer with the amounts of irrecoverable Chinese VAT that actually were incurred. There is no explanation** in the Final Decision Memorandum of **why the latter amounts may not be ascertained from record evidence of the VAT payments on the inputs and of the VAT refund received upon exportation of the finished goods**.

As such, *China Mfrs. Alliance* marks a significant development concerning the legality of Commerce's five year old policy.

Besides the unlawful nature of Commerce's VAT adjustment, the formula used by the agency has no grounding in commercial reality. Commerce is authorized, pursuant to 19 U.S.C. §1677a(c)(2)(B), to make a deduction from U.S. price for "**the amount**" of any export tax or similar charge. Computing an adjustment based upon the difference between the VAT **rates** paid and refunded is obviously not the same as computing the actual **amount** paid when the applicable input VAT rate and refund rate are applied to two different value bases.

In other words, Commerce applies the following formula for irrecoverable VAT credit:

> Irrecoverable VAT credit = FOB price * (Standard VAT rate of 17% for finished goods sold in domestic market - VAT refund rate for finished goods that are exported).

The above formula is manifestly erroneous because it presumes that a Chinese exporter incurs the following VAT amount on input purchases -

> FOB price * 17% (Standard VAT rate for finished goods sold in domestic market)

To the contrary, total amount of input VAT paid by a Chinese exporter is equal to -

> Value of *inputs purchased* that is utilized for the production of subject merchandise * 17% (Standard VAT rates for inputs purchased).

On the other hand, the total amount of VAT refund that a Chinese exporter receives upon export of goods, is as per the following formula:

> FOB price * 9% (VAT refund rate for finished goods that are exported).

Thus, the correct amount of irrecoverable input VAT credit is provided by the following formula:

> Irrecoverable VAT = Value of *inputs purchased* that is utilized for the production of subject merchandise * 17% (Standard VAT rates for input purchased) - FOB price * 9% (VAT refund rate for finished goods that are exported).

The Department has never offered a credible explanation for deducting FOB * (17 - 9)% i.e. FOB * 8%, from the export sales price beyond its tautological claim that the difference between the VAT rate levied on subject merchandise sold in domestic market (17%) and the VAT refund rate on export of subject merchandise (9%) equals 8%. Likewise, the Department has failed to offer any explanation for applying a common value base - FOB price - when the input VAT paid and export VAT refund are based on separate value bases - input purchase prices and FOB prices, respectively.

Consequently, besides being unlawful, the Department's methodology for computing the irrecoverable VAT deduction, since it is based upon applying the difference in rates of VAT to a common value base instead of the difference between the amount of input VAT paid and the amount of export rebate VAT received, is also inaccurate.

Therefore, even assuming that the "irrecoverable VAT" is an "export tax," the Department cannot simply determine the irrecoverable VAT amount by applying a convenient and simplistic formula, based on the difference between the standard VAT rate and the export refund VAT rate being applied to a common value basis, i.e., FOB price.

The agency's straightforward formula for computing the irrecoverable VAT amount, i.e., FOB price * 8%, also contains an anomaly. Since the FOB price includes the amount of irrecoverable VAT (as Commerce claims), applying plain logic, the proportion of such irrecoverable VAT cannot be determined by the formula, FOB price * 8%. The agency should first determine an adjusted FOB price, as follows: Adjusted FOB price = FOB price / 1.08. The correct irrecoverable VAT amount is then provided by the following formula:

> (FOB price / 1.08) * 8%

Of course, the above proposal to finetune the "amount" of irrecoverable VAT is moot until Commerce is able to satisfactorily address the threshold legality concerns raised by the *China Mfrs. Alliance* Court.

Homeland Security and Data Privacy: A Primer on Customs' Global Entry Program

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The U.S. Department of Homeland Security, and particularly its U.S. Customs and Border Protection (CBP), have a "Trusted Traveler" program entitled "Global Entry". See www.GlobalEntry.gov. Most likely, as international lawyers, many of us are already members of Global Entry, and receive the expedited international traveler clearance by CBP upon arrival to the United States. Plus, we get the extra advantage of automatic membership in TSAPre. There are now over 2 million members in the Global Entry program.

Unfortunately, the reality for many applicants to Global Entry is that their applications are denied, or current members have their membership revoked by CBP for one reason or another. This article will describe eligibility requirements for membership in Global Entry, the benefits of membership in Global Entry, how to apply for membership, and, importantly, how you can challenge any denial of, or revocation of, membership with CBP.

Global Entry is a CBP program that allows expedited clearance for pre-approved, low-risk travelers upon arrival in the United States. At airports, program members proceed to Global Entry kiosks, present their machine-readable passport or U.S. permanent resident card, place their fingerprints on the scanner for fingerprint verification and complete a customs declaration. The kiosk issues the traveler a transaction receipt and directs the traveler to baggage claim and the exit.

Global entry members are eligible to participate in TSAPre. U.S. citizens and U.S. lawful permanent residents enrolled in NEXUS or SENTRI are also eligible to participate in TSAPre, as well as Canadian citizens who are members of NEXUS. A Global Entry member or eligible NEXUS or SENTRI member may enter his or her membership number (PASS ID) in the "Known Traveler Number" field when booking airline reservations. Better yet, enter your PASS ID into your frequent flyer profile with the airline. The membership number enables Transportation Security Administration's (TSA) Secure Flight System to verify that you are a legitimate CBP Trusted Traveler and eligible to participate in TSAPre.

Global Entry is CBP's most popular Trusted Traveler program. But not everyone is eligible. U.S. citizens, U.S. lawful permanent residents, and citizens of the following countries are eligible for Global Entry membership: Citizens of Colombia, Citizens of United Kingdom, Citizens of Germany, Citizens of Panama, Citizens of Singapore, Citizens of South Korea, and Mexican nationals. Canadian citizens and residents are eligible for Global Entry benefits through membership in the NEXUS program. Please note that applicants under the age of 18 must have

parental or a legal guardian's consent to participate in the program.

Travelers must be pre-approved for the Global Entry program. Global Entry is a voluntary program available to travelers that pass a comprehensive background investigation. There is a computer check against criminal, law enforcement, customs, immigration, agriculture, and terrorist indices to include biometric fingerprint checks, and then a personal interview with a CBP officer. Most applicants receive a formal letter which states, in part: "We are pleased to inform you that your U.S. Customs and Border Protection (CBP), Global Entry program membership has been approved. You may use the program as soon as you receive and activate your new Global Entry card."

Many applicants never receive such a welcoming letter from CBP. An applicant may not be eligible for participation in the Global Entry program if he or she:

1. Provided false or incomplete information on the application;
2. Have been convicted of any criminal offense or have pending criminal charges or outstanding warrants (to include driving under the influence);
3. Has been found in violation of any customs, immigration or agriculture regulations or laws in any country;
4. Is the subject of an ongoing investigation by any federal, state or local law enforcement agency;
5. Is inadmissible to the United States under immigration regulation, including applicants with approved waivers of inadmissibility or parole documentation; or
6. Cannot satisfy CBP of his or her low-risk status

Now, you realize the benefits of membership in Global Entry and you are eligible to apply for Global Entry, so the next step is to apply. The steps are very simple.

1. Create a Global Online Enrollment System (GOES) account.
2. Log in to your GOES account and complete the application. A $100 non-refundable fee is required with each completed application.
3. After accepting your completed application and fee, CBP will review your application. If your application is conditionally approved, then your GOES account will instruct you to schedule an interview at a Global Entry Enrollment Center located at most international airports. Each applicant must schedule a separate interview.
4. You will need to bring your valid passport(s) and one other form of identification, such as a driver's license or ID card to the interview. If you are a lawful permanent resident, you must present your machine readable permanent resident card.

In the event an applicant is denied or membership has been revoked from Global Entry or other Trusted Traveler Program, the person should be provided information in writing detailing the reason for this action. Unfortunately, the reality is that the standard statement provided to the applicant merely concludes "You do not meet the program eligibility requirements." For members whose membership is revoked, the standard instruction from CBP is "You have been found to have violated CBP laws,
regulations, or other related laws." That's it; nothing else is provided. The only

appeal to such a denial or revocation is a written appeal to the CBP Trusted Traveler Ombudsman to request reconsideration.

I have seen many applicants, including attorneys, who have been denied membership in Global Entry. There are a variety of reasons. For example, juvenile criminal history, immigration problems, court expunged criminal information, and questionable international travel history. Even a shoplifting or assault misdemeanor is sufficient for CBP to deny an applicant membership in Global Entry. A violation that occurred 30 or 40 years ago, or was committed in another country is sufficient for CBP to deny membership in Global Entry. The U.S. Department of Homeland Security has extremely extensive data available to it worldwide to determine whether someone is a low-risk international traveler who should be admitted into the Global Entry program. If your believe your data is private, when it comes to the U.S. Department of Homeland Security, think again.

Nevertheless, the U.S. Congress and CBP itself want to expand the number of people to become members of Global Entry. When the Committee on Appropriations for the U.S. House of Representatives made its 2015 annual appropriations for the U.S. Department of Homeland Security, including CBP, it made special mention of the Global Entry program. It stated, in relevant part:

> The Committee is pleased to see the Global Entry program transition from a successful pilot to a permanent trusted traveler program. The Committee encourages CBP to continue to increase individual enrollment as well as the number of nations eligible to participate in the program. This will allow greater numbers of low risk travelers to efficiently move through security screening and give CBP personnel the ability to put greater focus on higher-risk travelers....

If an applicant believes he or she is exactly the type of low-risk international traveler that the members of the Committee on Appropriates were contemplating in funding the Global Entry program, the applicant should file a request for reconsideration with CBP.
Please note that being admitted into Global Entry is a privilege, not a right. As explained in the case of *Roberts. V. Napolitano*, 792 F. Supp. 2d 67, 73 (D.D.C. 2011):

> The Global Entry program was authorized by the Intelligence Reform and Terrorism Prevention Act of 2004 (hereinafter "IRTPA"). *See* 8 U.S.C. § 1365b(k). The IRTPA instructs the Secretary of Homeland Security to "establish an international registered traveler program" in order to "expedite the screening and processing of international travelers, including United States Citizens and residents, who enter and exit the United States." 8 U.S.C. § 1365b(k)(3)(A). The Secretary was further instructed to "initiate a rulemaking to establish the program [and] criteria for participation," and ensure that the program "incudes as many participants as practicable by . . . providing applicants with clear and consistent eligibility guidelines." 8 U.S.C. § 1365b(k)(3)(C), (E).

The applicant gets one chance to appeal a denial or one chance for a member to challenge revocation of membership in Global Entry. There is no judge, no

hearing, no discovery, no face to face meeting, or even a telephone call to the deciding official at CBP. As stated above, CBP has absolute discretion to grant or deny Global Entry membership. Moreover, it does not have to provide any specific reason for denial or revocation of membership.

In conclusion, I recommend anyone who is eligible for participation as a member in Global Entry to apply. For those who have a Platinum American Express card, the $100 application fee is waived. Acceptable is routinely made within a few weeks. For someone like me who travels from China or Japan on a 16 hour flight back to the United States, I want to clear CBP, and get out of the airport as soon as possible. Global Entry does that for you. If, by chance, an applicant is denied or a revocation occurs, the person should seriously consider challenging that denial or revocation because it may have been made without complete information by CBP. Appeals are successful in getting previously denied applicants accepted into the Global Entry program, or to get prior members whose membership has been revoked, reactivated into the Global Entry program.

CITBA ONLINE

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MEMBERSHIP

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Not a CITBA member? Apply for membership now! CITBA offers different membership levels - active, associate and retired/student. For additional information, check out the CITBA website: Join CITBA or Renew.

Are you already a member, but late in paying your dues? Need to update your contact information? Get current today and enjoy the benefits of membership. Contact William J. Maloney at wmaloney@rode-qualey.com for details.