AMERICAN SHIPPING COMPANY

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Experts Don't Expect First Sale to Disappear for Chinese Products

The Court of International Trade's recent decision denying first sale valuation for cookware importer Meyer Corp. likely won't lead to the end of first sale treatment for goods originating from non-market economies, said customs lawyers in interviews. Despite broader questions raised by CIT Senior Judge Thomas Aquilino, it's unlikely that courts will do away with first sale for non-market countries entirely, but the decision does highlight the burden of demonstrating eligibility for first sale, lawyers said.

In the opinion, CIT Senior Judge Thomas Aquilino denied Meyer the right to use first sale valuation on the grounds that it failed to prove its Chinese-made cookware imports were sold at arm's length and undistorted by non-market influences (see ITT 03/02/2021). In the last pages of the decision, Aquilino questioned whether the first sale valuation was ever intended to be applied to transactions involving non-market economies, but stopped short of a clear resolution on the issue, instead leaving it for the Federal Circuit. A lawyer involved with the Meyer case said that discussions are ongoing about whether to appeal, but no final decision has been made.

A lawyer involved in first sale compliance said she doesn't expect the courts to throw out the use of first sale for non-market economy-made goods, but that the burden of proof may be higher for goods coming from China. "I don't think courts will throw out first sale just because a non-market economy is involved—and I hope this case is appealed to clear this issue up. In the interim—the burden of proof is rising when CBP/courts see China involvement," Jennifer Diaz of Diaz Trade Law told *International Trade Today*.

Matt Nakachi of Junker & Nakachi also drew attention to the burden of proof concerns, calling them a "wake up call" that "will absolutely motivate some importers to seek formal rulings in an attempt to proactively confirm their first sale programs." "One obvious takeaway here is that importers do bear the burden of proof in establishing the validity of their first sale programs. The 120-page decision is certainly a lesson as to how challenging the evidentiary issue can be within a litigation setting—particularly given the attention to China's non-market economy and the inherent complexity of transfer pricing in related party transactions," Nakachi said. Given the liability at stake, "one of course expects to see an appeal."

However, Sandler Travis' David Cohen contends that the burden of proof is not actually higher and that the court was simply rejecting a related party first value claim with scant evidence. "The CIT was clearly frustrated with this particular plaintiff and ruled based on the specific facts before it which were deemed frustratingly short of establishing the arm's-length price in the first sale transaction," he said. Cohen said that no new legal standard was set in regard to proving first sale valuation.

Larry Friedman, partner at Barnes Richardson, discussed the opinion on his blog and agreed with other lawyers that it may be farfetched to believe the courts will end first sale for non-market economy goods altogether. "This should give pause to everyone (and there are lots of them) using first-sale valuation from China (and Vietnam)," Friedman said. "Ultimately, the applicability of first sale depends on the facts of individual transactions and not on sweeping statements. But this notion that first sale may not apply to non-market economies seems like a stretch. ... I suspect that the reference to non-market influences had nothing to do with the lack of capitalism. Instead, it might have been a reference to the sort of factors that influence price that are not basic economic considerations like cost of production and supply and demand," he said, citing family discounts and losses for tax purposes. "These are the very concerns that make related party transactions subject to additional scrutiny."
— Jacob Kopnick

New CBP Task Force to Help Develop Customs Modernization Legislative Package

CBP is embarking "in earnest" on a process to develop a legislative package on a scale not seen since the Customs Modernization Act of 1993, said John Leonard, CBP executive director-trade policy and programs, at the March 17 meeting of the Commercial Customs Operations Advisory Committee. Coming out of the agency's work on the 21st Century Customs Framework (see ITT 11/12/2020), the effort will begin with a new task force to provide a transparent "vehicle" to work with the trade community on the details of the legislation.

"We really want this to be our next jump into the future, kind of like we did over 25 years ago with the Customs Mod Act," Leonard said. "We feel the time is right, and we're excited to collaborate with the COAC and other partners to move this on up to the Hill and take the next step." CBP Deputy Commissioner Robert Perez had announced the task force earlier in the meeting. The task force will "refine and advance the legislative package," Perez said.

The legislation will "remove modernization barriers" and "create a re-imagined entry process," Leonard said. It will "eliminate outdated requirements and provide sufficient legal flexibility to implement this vision over time," he said. "By updating our statutory regime in a way that aligns with the realities of modern trade, we'll be empowered to work together with industry and government to set the stage for this shared success," Leonard said, adding that CBP will be starting the process "pretty much right away." The task force takes an approach that puts "the utmost emphasis on being transparent, being collaborative, and absolutely, aggressively pursuing solutions" to bring "trade into the 21st century," Perez said. — ***Brian Feito and Tim Warren***

Former CBP Official Owen Predicts More Traditional Customs Enforcement Coming

Todd Owen, former executive assistant CBP commissioner who worked in the Office of Field Operations before retiring, said during a March 3 webinar that the trade community should expect to see a lot more traditional customs work over the next few years, such as missed descriptions, undervaluation, duty evasion and import safety. Owen, who is a senior trade adviser at Diaz Trade Law, also said during the webinar that he thinks stopping goods made with forced labor is going to continue to be a priority for the Biden administration. "I don't see this going away," he said.

He warned that if you are a Customs-Trade Partnership Against Terrorism company, you should be examining the screening you're doing of your business partners with regard to forced labor. "If you haven't done your due diligence … I think you're jeopardizing your CTPAT standing," he said. "You need to make sure your policies and procedures are strong, and you're doing business with folks you're comfortable with."

Owen and firm founder Jennifer Diaz also discussed the massive number of cases on Section 301 tariffs from lists 3 and 4A at the Court of International Trade. Diaz said she wishes either the CIT or CBP had issued an opinion on whether it was necessary to file a protest on the tariffs paid if you're a litigant in the suits. Owen said that processing more than 2,000 protests "has a significant impact on CBP." Diaz said those who are hoping for a reversal and refund of the tariffs are hopeful because of the makeup of the three-judge panel. But, she said, she expects the case to take a year or more to reach resolution.

The panelists talked about the executive orders issued so far from the White House, including one freezing all regulations that are in process. Diaz said the rule on continuing education for customs brokers is in the pipeline "and now we're going to have to wonder how much longer it will take to be finalized" because of the freeze.

Owen said, "Governing by executive orders really rattles the executive agencies, too. It is not a very effective way to run the government. It leads to poorly planned policy and poorly executed policy."

Owen said that right now, cargo processing is very well staffed because staffers that used to handle international passengers were moved to cargo as international travel dropped during the pandemic. But he reminded listeners that in the last surge of Central American migrants arriving at the southern border, 700 CBP officers were moved from seaports, airports and the northern border to assist. Just last week, it was reported that CBP was reassigning 250 staffers from maritime stations and the northern border, he said. "Keep an eye on this."

He also noted that the drop in travel means there are auditors who usually focus on air carrier payments who are freed up to do customs audits. "There's a lot of people playing games with 321s," he said, referring to the statute that lays out de minimis. He noted that CBP tried to clarify that only one shipment per day to a location can qualify for de minimis, and he said that rule is going to be a focus of auditors.

Diaz said that in general, her firm is seeing more enforcement. More requests for information, notice of action forms, evasion of China duties. "I'm seeing [intellectual property rights] penalties, and I haven't seen those in years," she said. She called the volume of letters of investigation related to China "an inundation." She said her firm is also seeing more Electronic Export Information violations. — ***Mara Lee***

Commerce Publishes Notice Delaying Aluminum Import Licensing Requirements

The Commerce Department on April 1 published its notice in the *Federal Register* about delaying aluminum import licensing requirements under its Aluminum Import Monitoring System until June 28, 2021 (see ITT 03/29/2021). "This delay will allow Commerce time to finalize the license application system and to provide both the public and U.S. Customs and Border Protection (CBP) with sufficient advance notice of the new compliance date," Commerce said in the notice. The delay also will allow the agency to respond to comments received on the scheme, and "Commerce intends to issue another notification addressing these comments prior to June 28, 2021," it said.

While compliance with import licensing requirements is no longer required as of March 29, other effective dates set by Commerce's December rule remain unchanged. "The remaining portions of the regulations concerning the removal of the option to state 'unknown' for certain fields on the aluminum license form will be effective on December 24, 2021, as stated in the relevant sections of part 361, unless otherwise announced," Commerce said. "Further guidance on licenses already issued and the issuance of new licenses in the intervening period before June 28, 2021 will be provided on the AIM system website."

However, Commerce will at this time move forward with its public aluminum import monitor on its website. "When released, the public AIM monitor will provide information on U.S. imports of aluminum from all countries by broad product categories in both value and volume measures. The public AIM monitor will initially only include publicly available import data, as the license information will not be available. Once the license collection begins, and Commerce has had sufficient time to review the license data, the public AIM monitor will report certain aggregate information on imports of aluminum product categories using both publicly available import data and data obtained from the aluminum licenses," the agency said.

USTR Extends Tariff Exclusions for COVID-19 Treatment Goods Through September

The Office of the U.S. Trade Representative will extend exclusions on goods used to treat COVID-19 from the Section 301 tariffs on goods from China, the USTR said in a notice on its website. The exclusions were previously set to expire at the end of March (see ITT 12/23/2020).

The exclusions will now expire Sept. 30, USTR said. "In light of the continuing efforts to combat COVID-19, the U.S. Trade Representative has determined that it is inappropriate to allow the exclusions for certain products to lapse," the agency said. The extension applies to "each of the article descriptions of headings 9903.88.62, 9903.88.63, 9903.88.64 and 9903.88.65 of the Harmonized Tariff Schedule," it said. — ***Tim Warren***

Tai Says China Tariffs Will Stay for a While

U.S. Trade Representative Katherine Tai, in her first interview since taking office, said that she's hearing from stakeholders who say the additional tariffs on hundreds of billions of dollars worth of goods from China damages the economy, but she's not inclined to remove them without concessions from China. "No negotiator walks away from leverage, right?" she said. "I have heard people say, 'Please just take these tariffs off,'" Tai told *The Wall Street Journal*. But "yanking off tariffs," she warned, could harm the economy unless the change is "communicated in a way so that the actors in the economy can make adjustments." — ***Mara Lee***

Brady Says MTB, GSP Renewal Unlikely Before Infrastructure Bill Passage

The Generalized System of Preferences benefits program and the Miscellaneous Tariff Bill are unlikely to get a vote

in the House for months, as an infrastructure bill and the taxes to pay for those projects is shaped by committees, a top lawmaker said during a press call April 1. The top Republican on the House Ways and Means Committee said that while "all the oxygen is being sucked up" by the infrastructure bill, "my sense of Chairman [Richard] Neal is that he, too, believes they are crucial to America's economic leadership and wants to find consensus on how to end the delay on both of the programs."

Rep. Kevin Brady, R-Texas, who was responding to a question from *International Trade Today*, said, "I think there is a strong appetite among House Democrats and Republicans to renew both the Miscellaneous Tariff Bill and Generalized System of Preferences." He reiterated that Republicans are open to reasonable changes to GSP program eligibility requirements.

Brady also expressed concern that the Biden administration will let fast track authority, also known as Trade Promotion Authority, lapse this summer. "Every president needs authority to negotiate trade agreements," he said. If the president does not press for TPA renewal, "does that signal that new trade agreements are a lower priority for this White House? It sure looks like that. And I think that would be a mistake."

Brady said Ways and Means Republicans are seeking a meeting with new U.S. Trade Representative Katherine Tai to tell her about their interest in opening export markets, and their hopes she will restart negotiations with the United Kingdom, which he called a "trade opportunity right in front of us." — ***Mara Lee***

Uyghur Forced Labor Bill Could Pass in April, Lobbyist Says

The Senate and House versions of the Uyghur Forced Labor Prevention Act have diverged fairly substantially and the law seems likely to ultimately be closer to the Senate approach, said Ray Bucheger, a lobbyist at FBB Federal Relations. The House bill is more punitive, including a requirement for CBP to name and shame importers whose goods are detained. The Senate bill requires public comment and a public hearing open to importers before establishing a strategy to prevent the importation of goods made with forced labor. Part of that process is expected to produce guidance to importers, and there will still be a rebuttable presumption that goods from China's Xinjiang region were made with forced labor, but if importers implemented the guidance, that would change the burden of proof, according to Bucheger.

Bucheger, who was speaking March 18 to a Coalition of New England Companies for Trade audience, said that Senate Majority Leader Chuck Schumer, D-N.Y., is looking to assemble a package of China legislation to move as soon as April, and that a forced labor bill could be one plank of it. "The political attention to this issue of forced labor is only going to grow," Bucheger said. He said that while the House version of the bill was largely unchanged when it was reintroduced, the Senate version's updates "better reflect reality, which is companies are actively working to decouple their supply chains from Xinjiang."

The moderator described the Senate bill as one that would give importers more time to get their houses in order, and Bucheger said that's also appropriate, given that new tools that would allow tracking of inputs in the supply chain are being developed.

Therese Randazzo, director of the forced labor division in the trade remedy and law enforcement directorate at CBP, said that while the agency is exploring whether there are technologies that could pinpoint the presence of cotton grown in Xinjiang, for instance, there isn't yet a technology that companies could use to learn where all the cotton in their garments came from. "We wish there was a silver

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bullet as much as you do," she said on the CONECT call. "It is resource-intensive on both sides."

Randazzo referred to how small her team is, and said that while CBP will be updating statistics on the number of detentions quarterly, it is too thinly staffed to attribute the detentions to specific withhold release orders. She also said "the detentions themselves don't tell the whole story" because they "don't capture the other impacts of the WROs, for example, where companies don't ship those goods to the United States anymore."

Bucheger said members of Congress want to know how many detentions are attributable to specific WROs, and also want information about what specific evidence is being used to make the determination that a WRO is warranted. Randazzo has said that releasing more information about evidence could compromise ongoing investigations (see ITT 03/12/2021). Bucheger said that because of the intensity of interest among members, he's heard that Senate Finance Committee staff and House Ways and Means Committee staff spend more time on forced labor than any other issue.

Bucheger said that Congress appropriated an additional $8 million for forced labor enforcement at CBP in this fiscal year, and he thinks members will "push for an even bigger increase this year." He added, "To be clear, we don't expect congressional action to be limited to Uyghur forced labor."

Brian Bensman, senior director compliance in global logistics for Cintas Corporation, a uniform manufacturer, said Cintas has no nexus to Xinjiang, but now that customers are asking about forced labor, the company is going beyond its past practice of doing annual third-party compliance audits of Tier 1 suppliers. Bensman said it's important that companies are able to talk with CBP and other agencies about what is feasible in terms of due diligence across multiple tiers.

He said companies want to have input into what the standards will be for proving something's not made with forced labor. Bucheger agreed. Importers support congressional action, he said, but they want to make sure that whatever is passed is implementable and enforceable. — ***Mara Lee***

CBP Issues New Forced Labor Finding on Disposable Gloves From Malaysia

Imports of disposable gloves made by Top Glove Corporation in Malaysia may be seized by CBP as of March 29 under a finding that the company uses forced labor, CBP said in a notice released March 26. CBP's finding follows a withhold release order aimed at the company's gloves in July last year (see ITT 07/15/2020). A CBP official recently said more findings are likely to come (see ITT 03/12/2021).

The finding covers disposable gloves classified in "subheadings 3926.20.1020, 4015.11.0150, 4015.19.0510, 4015.19.0550, 4015.19.1010, 4015.19.1050, and 4015.19.5000, which are mined, produced or manufactured wholly or in part by Top Glove Corporation Bhd in Malaysia," CBP said. Based on the finding that the goods made through forced labor "are being, or are likely to be, imported" into the U.S., the port director may seize any covered goods and begin forfeiture proceedings, it said. The applies to goods imported on or after March 29 and "merchandise which has already been imported and has not been released from CBP custody before" that date, the agency said.

The company submitted an audit to CBP last year to show no forced labor was used (see ITT 09/08/2020), but that apparently was not sufficient. Skepticism over the use of such audits as evidence against the use of forced labor has grown in recent years (see ITT 09/10/2020). CBP issued its first forced labor finding in decades in October (see ITT 10/19/2020), and this finding marks the second one issued since 1996. Top Glove didn't respond to a request for comment. — ***Tim Warren***

NCBFAA Says More Detail Needed on Imports in FDA's Food Traceability Proposal

FDA's proposed rule on traceability requirements for high-risk foods needs some reworking to "reflect the unique characteristics of the import supply chain," the National Customs Brokers & Forwarders Association of America said in Feb. 22 comments to the agency. As proposed, the requirements do not account for complex import supply chains, and changes are also necessary to account for the roles of parties within that supply chain to better reflect the import process, the NCBFAA said.

The NCBFAA specifically identified as problematic the proposed rule's requirement for "persons who ship a food on the Food Traceability List" to maintain records of the customs entry number for each lot code of imported food. For imported food, the shipper is generally not in a position to know the entry number because that shipper is a foreign farm, producer or distributor, and the entry number does not exist when the food leaves the shipper's location. "Nor does the foreign shipper subsequently have access to the customs entry number (except in those instances when the foreign party is also the importer of record)," the NCBFAA said.

Likewise, the shipper does not have access to the date of entry or even the "deliver to address," the NCBFAA said. "In the ocean environment, the shipper sells FOB port of export. They may know the port of discharge but the importer would decide which warehouse to move it to from the ocean terminal," it said.

"Since the Importer of Record is the party that has the entry number, we urge FDA to provide specific rules for imported foods that reflect the unique characteristics of the import supply chain," the NCBFAA said. "It should also account for the differences between ocean, truck and air shipments. In its current form, the proposed rule creates confusion by its use of the general term 'shipper' for both domestic and imported shipments."

The FDA also needs to address scenarios where a food's supply chain does not conform to a basic "A to B" model. For example, foods may be purchased from the importer by an intermediate food broker that does not take possession of the food, which is then transported to a third-party warehouse. That warehouse would not be in a position to know import-related information like the entry number. "We encourage the FDA to review the variety of different supply chain relationships as you craft the final rule so that the various traceability information hand-offs are realistic and feasible," the NCBFAA said.

The NCBFAA did praise the FDA for specifying that parties that coordinate importation of a food but do not take physical possession—like customs brokers—are not subject to the traceability requirements. But the trade group said the agency should be careful in the rule to avoid mentions of "brokers," which may refer to either a food broker or a customs broker. "To avoid confusion, we urge the FDA in each instance to specify precisely which broker they are referring to," the NCBFAA said. — ***Brian Feito***

Bipartisan Bill Would Increase Inspections on Imported Seafood

A bill that would increase inspections on imported seafood has been reintroduced, after a 2020 and a 2018 version (see ITT 06/28/2018) did not get a hearing or a vote in committee. The text of the bill was published March 22. The bill would require that 20% of shipments be inspected annually. If more than three shipments imported failed inspection during a year, imports from that party would be banned for the following year. — ***Mara Lee***