TRADE LAW UPDATE

December 2023

IN THIS ISSUE

HIGHLIGHTS FROM DECEMBER

DHS Adds More Companies to the UFLPA Entity List

The Department of Homeland Security announced on December 8, 2023 that it is adding three entities to the Uyghur Forced Labor Prevention Act ("UFLPA") Entity List, the consolidated register of four lists required by section 2(d)(2)(B)(ii) of the UFLPA. The UFLPA and its Entity List are explained in more detail in a prior post. The latest update adds three entities to section 2(d)(2)(B)(ii) of the list, which identifies "entities working with the government of the Xinjiang Uyghur Autonomous Region to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of the Xinjiang Uyghur Autonomous Region."

Customs Modernization Bill Addresses Trade Reform

On December 8, 2023, Senators Bill Cassidy and Sheldon Whitehouse introduced a new version of the Customs Modernization bill to amend the Tariff Act of 1930. The new proposal comes over two years after Senator Cassidy initially proposed draft legislation, which we explained in a prior post. The most recent proposed bill aims to strengthen U.S. Customs and Border Protection ("Customs") authority to enforce Customs regulations of international shipments.

Section 301 Exclusion Update

On December 26, 2023, the United States Trade Representative ("USTR") announced that it will further extend 352 reinstated exclusions and 77 COVID-related exclusions to duties imposed on goods from China pursuant to Section 301 of the Trade Act of 1974 until May 31, 2024. USTR imposed Section 301 duties in four tranches or "lists," and it established a process by which importers could request exclusions for particular products on each list. Both the reinstated exclusions and the COVID-related exclusions were previously extended but were set to expire on December 31, 2023.

CBP Further Defines Customs Business in New Ruling

A recent ruling analyzed whether certain functions performed in preparation for filing an entry with U.S. Customs and Border Protection ("CBP") arise to the level of "Customs Business" that must be performed by a licensed broker. Ruling HQ H326926, issued to Heizwerthy Customs & Freight Solutions ("Heizwerthy"), states that allowing an unlicensed company to extract and key in entry-related data elements constitutes impermissible Customs Business.

Petition Summary: Certain Glass Wine Bottles from the People's Republic of China, the United Mexican States, and Chile

On December 29, 2023, the U.S. Glass Producers Coalition ("GPC" or "Petitioner") filed a petition for the imposition of antidumping duties on imports of certain glass wine bottles from the People's Republic of China, the United Mexican States, and Chile as well as the imposition of countervailing duties on imports of certain glass wine bottles from China. GPC is comprised of U.S. producer Ardagh Glass Inc. and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW"). The Petition follows a previous negative injury determination on a petition filed by U.S. glass producers in 2019 covering a broader category of glass containers, including wine bottles.

U.S. DEPARTMENT OF COMMERCE DECISIONS

Investigations

- Brass Rod From Brazil: On December 1, 2023, Commerce issued its preliminary affirmative determination of sales at less than fair value, postponement of final determination, and extension of provisional measures.
- Brass Rod From India: On December 1, 2023, Commerce issued its preliminary affirmative determination of sales at less than fair value, postponement of final determination, and extension of provisional measures.
- Brass Rod From Mexico: On December 1, 2023, Commerce issued its preliminary affirmative determination of sales at less than fair value, postponement of final determination, and extension of provisional measures.
- Brass Rod From South Africa: On December 1, 2023, Commerce issued its preliminary affirmative determination of sales at less than fair value, postponement of final determination, and extension of provisional measures.
- Brass Rod From the Republic of Korea: On December 1, 2023, Commerce issued its preliminary affirmative determination of sales at less than fair value, postponement of final determination, and extension of provisional measures.
- Certain Non-Refillable Steel Cylinders From India: On December 1, 2023, Commerce issued its preliminary affirmative determination of sales at less than fair value, postponement of final determination, and extension of provisional measures.
- Brass Rod From Israel: On December 14, 2023, Commerce issued its preliminary affirmative determination of sales at less than fair value, postponement of final determination, and extension of provisional measures.
- Brass Rod From India: On December 18, 2023, Commerce issued its final affirmative countervailing duty determination.
- Certain Pea Protein From the People's Republic of China: On December 18, 2023, Commerce issued its preliminary affirmative countervailing duty determination, preliminary affirmative critical circumstances determination, and alignment of final determination with final antidumping duty determination.
- Gas Powered Pressure Washers From the People's Republic of China: On December 21, 2023, Commerce issued its final affirmative determination of sales at less-than-fair value, and final affirmative critical circumstances determinations, in part.
- Gas Powered Pressure Washers From the People's Republic of China: On December 22, 2023, Commerce issued its final affirmative countervailing duty determination and final affirmative critical circumstances determination, in part.

Administrative Reviews

- Monosodium Glutamate From the Republic of Indonesia: On December 5, 2023, Commerce issued its final results of antidumping duty administrative review (2021–2022).
- Strontium Chromate From Austria: On December 6, 2023, Commerce issued its preliminary results of antidumping duty administrative review (2021– 2022).
- Certain Carbon and Alloy Steel Cut-To-Length Plate From Italy: On December 7, 2023, Commerce issued its final results of antidumping duty administrative review (2021–2022).
- Certain Steel Nails From the United Arab Emirates: On December 7, 2023, Commerce issued its final results of antidumping duty administrative review (2021–2022).
- Large Diameter Welded Pipe From the Republic of Korea: On December 7, 2023, Commerce issued its final results of countervailing duty administrative review (2021).
- Mattresses From Indonesia: On December 7, 2023, Commerce issued its final results of antidumping duty administrative review (2020–2022).
- Circular Welded Carbon Steel Standard Pipe and Tube Products From Turkey: On December 8, 2023, Commerce issued its final results of antidumping duty administrative review (2021–2022).
- Diffusion-Annealed, Nickel-Plated FlatRolled Steel Products From Japan: On December 8, 2023, Commerce issued its final results of antidumping duty administrative review (2021–2022).
- Silicomanganese From India: On December 8, 2023, Commerce issued its final results of antidumping duty administrative review (2021–2022).
- Certain Steel Nails From the Sultanate of Oman: On December 11, 2023, Commerce issued its final results of antidumping duty administrative review (2021– 2022).
- Certain Corrosion-Resistant Steel Products From the Republic of Korea: On December 12, 2023, Commerce issued its final results of antidumping duty administrative review (2021–2022).
- Certain Carbon and Alloy Steel Cut-to Length Plate From the Republic of Korea: On December 13, 2023, Commerce issued its final results of countervailing duty administrative review (2021).
- Carbon and Alloy Steel Cut-to-Length Plate From the Republic of Korea: On December 14, 2023, Commerce issued its final results of antidumping duty administrative review (2021–2022).
- Certain Frozen Warmwater Shrimp From the People's Republic of China: On December 15, 2023, Commerce issued its final results of antidumping duty administrative review (2022–2023).
- Polyethylene Terephthalate Film, Sheet, and Strip From India: On December 19, 2023, Commerce issued its final results of antidumping duty administrative review (2017–2018 Correction).
- Finished Carbon Steel Flanges From Spain: On December 20, 2023, Commerce issued its final results of antidumping duty administrative review (2021– 2022).
- Glycine From Japan: On December 20, 2023, Commerce issued its final results of antidumping duty administrative review (2021–2022).
- Oil Country Tubular Goods From Ukraine: On December 21, 2023, Commerce issued its final results of antidumping duty administrative review (2021– 2022).
- Certain Collated Steel Staples From the People's Republic of China: On December 22, 2023, Commerce issued its final results of countervailing duty administrative review (2021).
- Finished Carbon Steel Flanges From India: On December 22, 2023, Commerce issued its final results of antidumping duty administrative review (2021– 2022).
- Large Diameter Welded Pipe From Greece: On December 22, 2023, Commerce issued its final results of antidumping duty administrative review (2021– 2022).
- Certain Oil Country Tubular Goods From the Republic of Korea: On December 27, 2023, Commerce issued its notice of court decision not in harmony with the results of antidumping duty administrative review; notice of amended final results.
- Silicon Metal From Malaysia: On December 28, 2023, Commerce issued its final results of antidumping duty administrative review (2021–2022).
- Steel Concrete Reinforcing Bar From the Republic of Turkey: On December 28, 2023, Commerce issued its final results of the antidumping duty administrative review (2021–2022).

- Citric Acid and Certain Citrate Salts From Belgium: On December 29, 2023, Commerce issued its final results of antidumping duty administrative review (2021–2022).

Changed Circumstances Reviews

- None

Sunset Reviews

- Forged Steel Fittings From the People's Republic of China: On December 1, 2023, Commerce issued its final results of the expedited first sunset review of the countervailing duty order.
- Forged Steel Fittings From the People's Republic of China, Taiwan, and Italy: On December 1, 2023, Commerce issued its final results of the expedited first sunset reviews of the antidumping duty orders.
- Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: On December 15, 2023, Commerce issued its final results of the expedited fifth sunset review of antidumping duty order.
- Citric Acid and Certain Citrate Salts From Belgium: On December 21, 2023, Commerce issued its final results of the sunset review of the antidumping duty order.

Scope Ruling

- None

Circumvention

- Antidumping Duty Order on Hydrofluorocarbon Blends From the People's Republic of China: On December 11, 2023, Commerce issued its preliminary affirmative determination of circumvention with respect to R– 410A and R–407C from Malaysia
- Antidumping Duty Order on Hydrofluorocarbon Blends From the People's Republic of China: On December 11, 2023, Commerce issued its preliminary affirmative determination of circumvention with respect to R– 410A from the Republic of Turkey.

U.S. INTERNATIONAL TRADE COMMISSION

Section 701/731 Proceedings

Investigations

- Frozen Warmwater Shrimp From Ecuador, India, Indonesia, and Vietnam: On December 14, 2023, the ITC issued its affirmative determination of less-than-fair-value investigation.

U.S. CUSTOMS & BORDER PROTECTION

EAPA Case Number 7830: CP Kelco U.S. Inc.

On December 11, 2023, CBP issued a Notice of Initiation related to U.S. Importer, Adi Chemtech LLC (Adi Chemtech). CBP is investigating whether Adi Chemtech evaded antidumping duty (AD) order A-570-985 on xanthan gum from the People's Republic of China (China). CBP found that reasonable suspicion exists that Adi Chemtech entered covered merchandise into the customs territory of the United States by the transshipping of Chinese-origin xanthan gum through India by the shipper Prachin Chemical (Prachin). As a result, CBP is issuing a formal notice of initiation of investigation and interim measures (NOI) and imposing the interim measures.

EAPA Case Number 7794: Colony Gums Inc.

On December 4, 2023, CBP issued a Notice of Determination as to Evasion related to U.S. Importer, Colony Gums Inc. (Colony Gums or, the Importer). CBP has determined there is substantial evidence that Colony Gums entered merchandise covered by antidumping duty (AD) order A-570-985 into the customs territory of the United States through evasion. Substantial evidence demonstrates that Colony Gums evaded the Order by importing xanthan gum from the People's Republic of China (China) that had been transshipped through India. Colony Gums did not declare that the merchandise was subject to the Order on entry and, as a result, no cash deposits were applied to the merchandise at the time of entry.

EAPA Case Number 7788: Cast Iron Soil Pipe Institute

On December 4, 2023, CBP issued a Notice of Determination as to Evasion related to U.S. Importer, Muller Import Inc. (Muller) and U.S. Castings Inc. (US Castings) (collectively, the Importers). CBP has determined there is not substantial evidence that the Importers entered merchandise covered by antidumping duty (AD) order A-and countervailing duty (CVD) orders A-570-079 and C-570-080 on Cast Iron Soil Pipe (()CISP) CISP Orders), nor substantial evidence that Muller is evading AD/CVD orders A-570-062 and C-570-063 on Cast Iron Soil Pipe Fittings ((CISPF) CISPF Orders) (collectively, ASD/CVD Orders), from the People's Republic of China (China) into the customs territory of the United States through evasion during the period of investigation (POI). Specifically, CBP determined that there is not substantial evidence that the Importers imported Chinese-origin CISP and CISPF through India via Bengal Iron Corporation (BIC).

COURT OF INTERNATIONAL TRADE

Summary of Decisions

Slip Op. 23-165 Wilmar Trading v. United States

The Court sustained Commerce's remand redetermination in the antidumping investigation on biodiesel fuel from Indonesia. The Court affirmed Commerce's use of total adverse facts available assigned to consolidated plaintiff P.T. Musim Mas. because it agreed that the company failed to provide the information necessary for Commerce to calculate an accurate margin.

With respect to respondent Wilmar Trading Pte Ltd. et al. (Wilmar), the Court sustained Commerce's remand redetermination which found that Wilmar's credits received under the U.S. Environmental Protection Agency's Renewable Identification Numbers (RIN) was not a benefit warranting an increase to U.S. price but rather a deduction from U.S. sales prices. However, the Court remanded several issues for further explanation by Commerce. In its initial remand, the Court had instructed Commerce to explain why it disregarded certain sales that "may not have benefited from an Indonesian biodiesel fuel subsidy" in conjunction with its particular market situation analysis. The Court found in the remand redetermination that Commerce had still not sufficiently explained its reasoning as to why including these subsidies in the particular market situation analysis would not constitute a double remedy given that the same program was found to be countervailable in the parallel countervailing duty investigation. Finally, the Court remanded for further explanation from Commerce as to why Wilmar's sales under the Indonesian "Public Obligation Program" were outside the ordinary course of trade given that the sales were not made under the specified program.

Slip Op. 23-170 Nutricia North America v. United States

The Court held that CBP correctly classified plaintiff's imports of infant formula as food preparations and not as pharmaceuticals. Plaintiff Nutricia argued that the five products at issue were intended for use by infants/toddlers who suffer from a variety of diseases and disorders and therefore fell under HTSUS subheading 3004.50.5040, which covers "[m]edicaments . . . put up in measured doses . . . or in forms or packings for retail sale." At the time of liquidation, CBP classified the products under HTSUS subheading 2106.90.9998, which covers "[f]ood preparations not elsewhere specified or included." The Court noted that "there can be no genuine dispute over whether the five 'medical foods' at issue in this case, being specially-formulated combinations of nutritional substances, are 'food preparations," ultimately rejecting all of Nutricia's arguments in favor of classifying the infant formula under its desired provision, and relying on explanatory notes specifically excluding foods and beverages from Chapter 30.

Slip Op. 23-171 Southern Cross Seafoods v. United States

The Court found that it lacked subject matter jurisdiction to consider plaintiff Southern Cross Seafoods' (Southern Cross) challenge to the National Marine Fisheries Service's (NMFS) decision to reject its application for pre-approval to import Chilean sea bass. The Court determined that the denial of plaintiff's application does not constitute an "embargo or other quantitative restriction" that is reviewable under the Court's residual jurisdiction set forth in 28 U.S.C. §1581(i). The NMFS cited the lack of a conservation measure in force for the Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention) as the reason for the denial, which Southern Cross argued was in error because the sea bass was not harvested in violation of any CCAMLR conservation measure. The Court did not consider the merits of Southern Cross's arguments as it lacked jurisdiction but noted that the CAMLR Convention "do not impose a non-zero numerical or quantitative limit or quota on the importation of toothfish" and invited the parties to file motions to transfer the case to the appropriate district court.

Slip Op. 23-172 Kisaan Die Tech v. United States

In the first administrative review of the antidumping order on stainless steel flanges from India, the Court sustained in part and remanded in part Commerce's final results of its review. Commerce reviewed only one mandatory respondent, to which it assigned an adverse facts available (AFA) rate of 145.25 percent. Commerce also assigned this rate to an additional 12 companies that were not individually examined as the "All Others" rate. The Court sustained Commerce's decision to apply AFA to the mandatory respondent, as it failed to provide the requested information and did not "act to the best of its ability" to cooperate.

The Court remanded back to Commerce its decision to utilize AFA for the non-selected companies, as this was contrary to the Court of Appeals for the Federal Circuit's (Federal Circuit) decision in YC Rubber Co. v. U.S. This case holds that Commerce may not base its rate for unexamined companies upon the selection and examination of a single company, as the statute mandates that a "reasonable number" of companies to be examined, which is "generally more than one." Contrary to the governing statute, Commerce's analysis did not "'weight average,' let alone average, anything in determining its all-others rate." Because the term "averaging" rates involves "the situations of different exporters and thus rests on a wider data base than does use of only one margin," the Court found that the reliance on one respondent's margin to determine the all-others rate was contrary to law.

Slip Op. No. 23-173 Vecoplan, LLC v. United States

The Court held that certain size-reduction machinery is properly classified under HTSUS subheading 8479.82.00, which covers "[m]ixing, kneading, crushing, grinding or screening… machines." The machinery models, "VAZ 1600" and "VAZ 1800," are machines that reduce solid waste material of various kinds, including plastic, paper, wood, and solid waste. CBP classified the machines under HTSUS subheading 8479.89.94, which covers "[m]achines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter…." After describing the machines and the size-reduction process, including the two stages of the crushing process and the importance of the hydraulic ram's pressure, the Court agreed with plaintiff that the machines are both grinding and screening machines and are therefore properly classified under HTSUS subheading 8479.82.00.

Slip Op. 23-175 PT Asia Pacific Fibers v. United States

The Court remanded Commerce's final results in the antidumping investigation of polyester textured yarn from Indonesia. During the investigation, Commerce did not conduct an on-site verification and only relied upon a questionnaire for verification due to the ongoing COVID-19 pandemic. The verification questionnaire was issued after the preliminary determination, and Commerce subsequently established a briefing schedule but issued no verification report. In its final determination, Commerce concluded that plaintiff PT Asia failed to provide sufficient information and resorted to the use of adverse facts available. PT Asia first learned that it had failed verification only upon the issuance of Commerce's final determination. The Court found that Commerce failed to provide PT Asia with an opportunity to address deficiencies identified by the agency in the verification responses. On remand, the Court ordered Commerce to prepare a verification report, provide PT Asia with a reasonable opportunity to place information on the record addressing any deficiencies, and allow all parties to file case briefs that, per Commerce's regulations, "present all arguments that continue," in the party's view, "to be relevant to the Secretary's final determination."

Slip Op. 23-176 Far East American Inc. et al. v. United States

The Court granted CBP's motion for voluntary remand to reconsider its evasion determination but denied CBP's motion to amend the judicial protective order. In the underlying EAPA investigation involving the antidumping and countervailing duty orders of hardwood plywood products from China, CBP requested that Commerce determine whether certain two-ply panels from China and further processed in Vietnam were subject to the orders. Commerce determined that the merchandise was subject to the orders because it was not substantially transformed in Vietnam. Following Commerce's findings, CBP ruled that the merchandise at issue in the EAPA investigation was subject to the orders. However, the same issue was on appeal in a parallel litigation, where Commerce reversed its prior determination and found that two-ply panels were not subject to the orders. As a result, CBP sought a voluntary remand to reconsider its evasion determination, which the Court granted. The Court denied CBP's motion to amend the judicial protective order so that it would govern the remand proceedings because CBP has inherent authority to issue its own administrative protective order.

Slip Op. 23-177 Royal Brush v. United States

In an EAPA investigation on pencils from China, the Court ruled that importers must file a protest even to contest the liquidation of entries subject to an evasion determination on appeal. During the appeal, CBP had liquidated plaintiff's entries prior to the Court issuing a preliminary injunction. The Federal Circuit returned the matter to the Court, noting that the EAPA statute does not require a protest for judicial review, and instructing the Court to remand to CBP for further proceedings consistent with the Federal Circuit's decision. The Court ultimately determined that, while EAPA does not require a protest for judicial review, the Court lacks subject matter jurisdiction because the remedy sought by plaintiff, i.e., reliquidation, is no longer available because the liquidations of the entries is final and conclusion pursuant to the protest statute. Citing Federal Circuit precedent, the Court noted that "all liquidations, whether legal or not, are subject to the timely protest requirement.

Slip Op. 23-178 Adisseo Espana v. United States

The Court found that in the injury investigations on methionine from France, Japan, and Spain, the International Trade Commission (ITC) is not required to make a specific determination with respect to underselling, but it is required to consider it as part of its investigation and subsequent analysis. The Court further opined that a finding of overselling of a product by importers does not necessarily mean that the U.S. domestic industry's prices would not have been impacted by reason of the imports. The Court, however, remanded the ITC's lost sales analysis for further explanation, stating that the ITC had failed to consider and fully address the lost sales pricing analysis presented by the importer. The Court affirmed all other aspects of the ITC's injury determination which followed the statutory approach normally employed.

Slip Op. 23-179 Dalian Hualing Wood v. United States

In the antidumping review of wooden cabinets from China, the Court sustained Commerce's determination that plaintiff's single sale was not bona fide and that it therefore did not have reviewable entries. The plaintiff, a Chinese exporter, first requested a new shipper review (NSR) for one U.S. sale. Commerce rescinded the NSR as the sale was made prior to the NSR review period. Plaintiff then requested an administrative review for the same sale. In the context of the administrative review, Commerce determined that the sale was not bona fide and that the respondent was therefore not entitled to a separate rate. However, in the companion countervailing duty review, where plaintiff was a mandatory respondent, Commerce found that the same sale was bona fide. The Court held that (1) the law does not require consistency between antidumping and countervailing duty proceedings and that each remedy different "behaviors," (2) Commerce was not legally limited to conducting a bona fides analysis in the context of an administrative review, and (3) Commerce's analysis was supported by substantial evidence which included information submitted in the NSR request. For example, Commerce found that the sale was priced highly, was of "low" quantity, and that it lacked profit.

Slip Op. 23-180 Jing Mei Auto v. United States

The Court determined that CBP correctly classified chrome-plated plastic automobile parts from China. CBP had classified three of the four categories of imported goods under various provisions of HTSUS Chapter 39, which covers "plastics and articles thereof," and it classified a forth category of imported goods (mirror scalps) under subheading 8708.29.50, which covers "parts and accessories of bodies (including cabs)." Plaintiff, a U.S importer, sought reliquidation of all the imported goods under HTSUS

subheading 8708.99.81, which covers "[p]arts and accessories of. . . motor vehicles." With respect to the first three categories, the Court determined that the imported goods are excluded from heading 8708 by operation of a section note that excludes "parts of general use," defined as the base metal articles "of heading . . . 8302." As a result, the Court determined that CBP correctly classified these goods as articles of plastic in Chapter 39. As for the final category of goods, the mirror scalps, the parties agreed that they were classifiable under heading 8708 but disagreed on the appropriate subheading. The Court found that because the mirror scraps are attached to the side of a vehicle, they are properly classified as "accessories of bodies" under CBP's preferred provision.

Slip Op. 23-181 Nexteel Co. v. United States

The Court sustained Commerce's calculation and application of the 0.8 threshold in its Cohen's d analysis, which was at issue in the fourth remand of the 2015-2016 review of the antidumping order of oil country tubular goods (OCTG) from Korea. The Cohen's d test measures the degree of price disparity between two groups to detect "masked" or "targeted" dumping in an antidumping investigation, and Commerce uses a 0.8 threshold (identified by Professor Cohen, after whom the test is named), as a measure of a significant price difference. The Court determined that Commerce reasonably explained that the 0.8 threshold is a uniform approach that has been widely accepted, and that the sales prices used in its analysis "include all of the sales prices that are used to calculate each respondent's weighted-average dumping margin and represent the full population of sales prices to each test and comparison group."

Slip Op. 23-182 Hyundai Steel v. United States

In the 2019 review of the countervailing duty order on cut-to-length carbon-quality steel plate from Korea, the Court remanded Commerce's analysis of Korea's cap-and-trade system, which Commerce had determined was a countervailable program. The Korean government requires that companies "pay" for emitting more than a certain volume of carbon emission by surrendering Korean Allowance Units (KAU). Certain business sectors that meet "high international trade intensity" or "high production cost" receive 100 percent of their KAUs at the begging of the year, as opposed to the 97 percent that most participants receive. Plaintiff Hyundai Steel Company met the threshold to receive the 100 percent. The Court sustained Commerce's determination that the KAU program provided a benefit that was financial in nature (the extra three KAUs). However, it remanded to Commerce to explain how the program was specific, that is, how the program "explicitly assigns limits to or restricts the bounds of a particular subsidy."

Slip Op. 23-182 Hyundai Steel v. United States

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Slip Op. 23-183 Hyundai Steel v. United States

In the 2019-2020 review of the antidumping order on OCTG from Korea, the Court sustained Commerce's final remand. The Court had remanded the case for Commerce to reconsider certain calculations, including Hyundai Steel Company's constructed export price profit, constructed value profit and selling expenses, and constructed value profit cap. On remand, with respect to constructed export price profit, Commerce revised its methodology to rely on Hyundai Steel's actual sales data. No party objected and the Court sustained this determination as reasonable. As for constructed value profit and selling expenses, as well as value profit cap, Commerce continued to use unaffiliated Korean SeAH Steel Corporation's third-country market sales to Kuwait, as well as the constructed value profit cap, which the Court determined was reasonable and supported by substantial evidence.

Slip Op. 23-184 CVB Inc. vs. United States

The Court sustained the ITC's final affirmative injury determination in its antidumping and countervailing duty investigations of mattresses from Cambodia, China, Indonesia, Malaysia, Serbia, Thailand, Turkey, and Vietnam. In its opinion, the Court noted that the ITC committed errors in its analysis. For example, plaintiff, a U.S. importer, argued that the market was segmented between boxed and flat-packed mattresses, which the ITC failed to address. Notwithstanding, the Court found that the errors were harmless and that the ITC's determination was otherwise supported by substantial evidence.

Slip Op. 23-185 Risen Energy vs. United States

The Court upheld Commerce's third remand redetermination in the 2017 countervailing duty administrative review of solar cells from China. Following the second remand, the Court instructed Commerce to (1) remove the "Export Buyer Credit Program" rate from the total CVD rate calculated for Risen Energy Co., Ltd.; and (2) use the land benchmark to calculate the land subsidy rate that Commerce used in the first remand. In a one-page opinion, the Court noted that Commerce's third remand results, to which no party objected, complied with the Court's order and would be sustained.

Slip Op. 23-186 Cambria et al. vs. United States

In the first administrative review of the antidumping duty order on quartz surface products (QSP) from India, the Court denied two cross-motions regarding the liquidation of entries subject to the order. In the first motion, QSP importers sought the partial dissolution of existing injunctions due to changed circumstance, specifically an expected lengthy litigation and a desire to "free up" certain collateral. The Court denied the motion because neither demonstrated changed circumstances warranting the requested relief. Plaintiff/domestic producer, Cambria Company LLC (Cambria) filed a separate motion seeking to enjoin the liquidation of entries for which the QSP importers sought dissolution of the present injunctions, and to enjoin the liquidation of additional entries from additional producers/exporters. The Court denied the portion of the motion concerning entries covered by the QSP importers' motion (which it had granted in their favor) and denied the remainder of the motion because it was untimely, and Cambria failed to show good cause for the delay.

Slip Op. 23-187 AG der Dillinger v. United States

The Court sustained Commerce's fourth remand redetermination in the antidumping investigation of carbon and alloy steel cut-to-length plate (CTL Plate) from Germany. The Court had ordered Commerce to reconsider its rejection of AG der Dillinger Hüttenwerke's (Dillinger) proposed quality code for sour service petroleum transport plate (SSTP). Commerce did so on remand and included the codes in the antidumping margin calculation. However, Dillinger argued that Commerce should also accept Dillinger's quality code for sour service pressure vessel steel. In response, Commerce noted that the matter had already been decided by the Court and that there was no reason to revisit, and the Court agreed. Next, Nucor Corporation argued that Commerce did not support and explain its remand results with respect to the higher costs and net prices for SSTP. The Court disagreed, noting that Commerce had analogized the facts of this remand to Court precedent on CTL Plate from Australia and that, based on that analysis and explanation, accounted for the different physical characteristics of STTP.

Slip Op. 23-188 Jilin Bright vs United States

In the fourteenth administrative review of the antidumping duty order on activated carbon from China, the Court sustained Commerce's final results. At issue was the Malaysian surrogate values Commerce used to value the respondents' bituminous coal and coal tar pitch. In its preliminary determination, Commerce identified a calorific value conversion formula and requested that respondent Jilin Bright Future Chemicals Co., Ltd. (Jilin Bright) provide information regarding its bituminous coal. While Jilin Bright provided the information, the Court ruled that it could not challenge Commerce's use of the formula because it did not raise this issue at the administrative level. Next, Jilin Bright argued that Commerce did not consider all record evidence when it rejected bituminous coal benchmark data. Here, the Court ruled that Commerce considered the record as a whole, explaining that it preferred benchmark data from economically comparable countries' global prices. The Court also ruled that Jilin Bright did not demonstrate that Commerce was required to disaggregate surrogate value data for Turkey and Russia in order to test pricing of non-coking coal, as Commerce determined that Malaysia was the only surrogate country that was a significant producer of comparable merchandise.

With respect to coal tar pitch, the Court ruled that Commerce reasonably explained why it did not rely on the UMR Coal Tar Report on the record, which Jilin Bright argued showed that the Malaysian import data was higher than the Report's value. Here, the Court ruled that "Commerce explained that the report lacked sufficient information and explanation for Commerce to confirm the validity of the data contained therein or to confirm the data was representative of a broad market average and free from taxes and duties."

Slip Op. 23-189 Brooklyn Bedding v. United States

In the antidumping duty investigation of mattresses from Thailand, the Court sustained Commerce's final remand redetermination wherein Commerce relied on adverse facts available in assigning the exporter Saffron Living Co., Ltd. (Saffron) a 763.28 percent rate. The Court had ordered Commerce to verify Saffron and explain certain aspects of its calculations (e.g., why it departed from the "transaction disregarded rule.)" Saffron ceased participation in the investigation and subsequent litigation and Commerce was therefore unable to verify the exporter on remand. No party opposed the remand redetermination, which the Court sustained.

Slip Op. 23-190, GoPro, Inc. v. United States

The Court found that plaintiff GoPro's camera housings are correctly classified as camera parts and not cases. The Court ruled that the eight models at issue were correctly classified under HTSUS subheading 8529.90.86, which includes parts used solely or principally with cameras of heading 8525, and not as "camera cases" under subheading 4202.99.9000, CBP's preferred heading. In order to qualify as a "case" of heading 4202, goods must possess four essential characteristics: goods must store, transport, protect, and organize. The Court examined each of these factors and relied upon "industry-specific encyclopedias" to determine that GoPro products actually enhance the use of the camera itself, and that the primary function is not for storing the cameras. Additionally, the Court found that the housings did not offer protection comparable to other similar containers, as required within the meaning of heading 4202.

Slip Op. 23-191, Navneet Education Ltd. v. United States

The Court affirmed Commerce's administrative findings and declined to order Commerce to ignore information placed on the administrative record by plaintiff, Navneet, in the administrative review of the antidumping duty order on notebook paper from India. The main issue in the case was the form in which Navneet provided information in response to Commerce's questionnaires. At issue was whether Navneet had provided the physical characteristics of the goods such that Commerce could analyze the data. The Court found that while plaintiff had not placed the characteristics in its cost database on the record, it had provided that same information in data and documents submitted to Commerce, and that Commerce had a right to utilize that information in its analysis. The Court also rejected plaintiff's claims that Commerce should use alternative voluntarily submitted data that was not solicited as part of its margin analysis. Finally, the Court rejected plaintiff's arguments related to how the submitted costs distorted the dumping analysis for failure to exhaust administrative remedies, because Navneet had only filed "vague, conclusory statements" on the administrative record, which were then expanded into complex sophisticated legal arguments on appeal.

COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 2022-1175 Saha Thai Steel et al. v. Wheatland Tube Company

The Federal Circuit affirmed that the 2015 Trade Preference Extension Act (TPEA) allows Commerce to adjust an exporter's constructive value (CV) when it determines that a "particular market situation" (PMS) exists, but not to adjust the exporter's cost of production (COP). A PMS exists when the exporter's market is distorted, thus affecting its sales prices in the home market and making it difficult for Commerce to compare the exporter's home market to its U.S. sales prices to determine whether dumping is occurring and by how much.

In the 2018 antidumping review of welded steel pipe from Thailand, Commerce determined that a PMS existed and adjusted the two respondents' COP upward, thus increasing the home market sales costs. The respondents sued, arguing that Commerce could not legally adjust their COP. Citing 2021 Federal Circuit precedent, the Court of International Trade (CIT) agreed with the respondents and remanded to Commerce to revise its calculations. In the first remand, Commerce continued to find that a PMS existed and thus did not change its calculation. The CIT remanded again, and Commerce removed the PMS adjustments in a second remand redetermination. Wheatland, a domestic producer, appealed to the Federal Circuit. Affirming the second remand redetermination, the Federal Circuit ruled, inter alia, that Commerce "cannot use [CV] language found in [the COP portion of the law] as a backdoor to slip in a PMS adjustment for [COP] calculations." The United States did not participate in this ruling.

Appeal No. 2022-1793 Magid Glove v. United States

The Federal Circuit affirmed the CIT's ruling that CBP properly classified certain knit gloves that are coated with plastic (polyurethane). Plaintiff-Appellant Magid Glove & Safety Manufacturing Co. LLC (Magid) had classified the gloves duty-free under HTSUS heading 3926, which covers "[o]ther articles of plastics." CBP reclassified the goods under heading 6116, which covers "[g]loves…knitted or crocheted," and which is dutiable at 13.2 percent.

The Federal Circuit started its analysis by comparing the competing headings, noting that the goods meet the terms of HTSUS heading 6116 because they are machine knitted, and they do not meet the terms of HTSUS heading 3926, because they are not "of plastics" for tariff classification purposes. Magid argued that Section XI Note 1(h) excluded the gloves from heading 6116, as it excludes certain fabrics from this provision. The Court rejected the argument, however, finding that this section note only excludes fabrics that are "impregnated, coated, covered or laminated with plastics," and that are "in basic uncut or rectangular form."

EXPORT CONTROLS AND SANCTIONS

Executive Order Imposes New Russia Sanctions for Foreign Financial Institutions and Prohibits Additional Russian Imports

On December 22, 2023, President Biden issued Executive Order 14114, which amended previous Executive Orders in order to authorize the US Treasury Department's Office of Foreign Assets Control ("OFAC") to impose additional Russia-related sanctions on foreign financial institutions and expand the scope of existing import prohibitions for certain Russian goods.