WHITE & CASE

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UNITED STATES

GENERAL TRADE POLICY

SEC A Final Rule for Dodd-Frank Conflict Minerals Provisions

Summary

On August 22, 2012, the US Securities and Exchange Commission (SEC) held an open meeting at which SEC Commissioners voted 3-2 to approve a final rule required under Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (PL 111-203 or "Dodd-Frank Act"). The final rule requires certain companies to make specialized disclosures regarding their use of "conflict minerals," defined as gold, tin, tungsten and tantalum. The final rule uses the same three-step process as described in the proposed rule; however, many mechanisms and triggers within the process have been revised. According to SEC, the revisions made to the proposed rule are intended to reduce the burden of compliance associated with the requirements of Section 1502.

Analysis

I. BACKGROUND

Section 1502 of the Dodd-Frank Act states that it is the sense of Congress that the exploitation and trade of conflict minerals in the Democratic Republic of Congo (DRC) has financed conflict in the eastern region of that country. In an attempt to end this conflict, Section 1502 directs SEC to issue regulations requiring certain companies to make specialized disclosures regarding their use of conflict minerals.

Approximately five months after President Obama signed Dodd-Frank Act into law in July 2010, SEC published its proposed rule for the implementation of Section 1502. Although SEC intended, as required by the Dodd-Frank Act, to implement the final rule by April 15, 2011, SEC delayed taking action due to stakeholder disagreement over how to revise the proposed rule. SEC received over 400 individual comment letters on the proposed rule from lawmakers, humanitarian groups and industry representatives, among others. In October 2011, SEC hosted a public roundtable to assist in finalizing the rule (please refer to the W&C US Trade Report dated October 27, 2011). The roundtable revealed disagreement amongst stakeholders as to whether the final rule should, inter alia: (i) be phased-in over specified periods of time; (ii) provide exemptions or de minimus thresholds; (iii) require issuers to perform due diligence in accordance with a particular framework; and (iv) define certain terms.

During the August 22, 2012 meeting, SEC staff reported their determination that the initial cost of compliance with the final rule will be between USD 3-4 billion, and the annual cost of ongoing compliance will be between USD 206-609 million. SEC staff further stated that Congress determined these costs were necessary and appropriate in furthering its stated goal of ending the conflict in the DRC.

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Commissioners Schapiro, Walter and Aguilar voted in favor of the final rule. In contrast, Commissioners Paredes and Gallagher opposed the final rule noting, among other things: (i) the SEC is not the proper instrument for achieving the humanitarian objectives of Section 1502; and (ii) the final rule may unintentionally result in a de facto embargo of legitimate mining in DRC and, as a result, worsen rather than improve the situation in DRC.

Below we provide an overview of the proposed rule, as well as a comparison of the proposed and final rules.

II. PROPOSED RULE

In the December 2010 proposed rule, SEC proposed a disclosure requirement for conflict minerals that would be divided into the three steps, which can be summarized as follows:

- Step One: Determining Issuers Covered by the Conflict Mineral Provision. First, a company that files reports under Exchange Act sections 13(a) or 15(d) ("issuer") would have to determine whether it is subject to the "Conflict Minerals Statutory Provision" under Section 1502 of the Dodd-Frank Act. An issuer is considered subject to the Provision if conflict minerals are necessary to the functionality or production of a product the issuer manufactures or contracts to manufacture;

- Step Two: Determining Whether Conflict Minerals Originated in the DRC or Adjoining Countries and the Resulting Disclosure. If the issuer determines that it is subject to the Provision, the issuer would then proceed to the second step, under which it would be required to determine, through a reasonable country of origin inquiry, whether the conflict minerals it uses originate in the DRC or an adjoining country ("countries of interest"). If the issuer determines its conflict minerals do not originate from the countries of interest, they must disclose to the SEC this determination and a description of its reasonable country of origin inquiry; and

- Step Three: Conflict Minerals Report's Content and Supply Chain Due Diligence. An issuer would proceed to the third step if it: (i) determines its conflict minerals originate in the countries of interest; or (ii) is unable to conclude their conflict minerals did not originate in the countries of interest. Under the third step, an issuer would be required to provide the SEC with a Conflict Minerals Report that includes, inter alia: (i) a description of measures taken to exercise due diligence on the source and chain of custody of its conflict minerals; (ii) an audit of the Report; and (iii) a description of its products that are considered DRC conflict-free and not DRC conflict-free.

III. COMPARISON OF THE PROPOSED AND FINAL RULES

Below we provide an overview of the major differences and similarities between the proposed and final rules with regard to each of the three steps within the rule as well as the location, timing and status of conflict minerals disclosures and Conflict Minerals Reports.

Location, Timing and Status of Conflict Minerals Disclosures and Conflict Minerals Reports

The final rule requires that, if necessary, an issuer provide conflict minerals disclosures in the body of a new specialized disclosure report on a new Form SD. An issuer required to submit a Conflict Minerals Report must provide such a Report as an exhibit to the specialized report. This contrasts with the proposed rule, in which

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issuers would have been required to provide such information as part of their annual report on Form 10-K, Form 20-F or Form 40-F.

Based on comments that it would reduce the burden on companies to have a uniform reporting period, the final rule dictates that the information included in the report should cover the calendar year January 1 to December 31, regardless of when an individual issuer's fiscal year ends. The report covering the prior year must be provided each year by May 31. The first report will be due on May 31, 2014.

Unlike the proposed rule, the final rule dictates that Form SD be "filed" instead of "furnished" under the Exchange Act and thereby subject to Exhange Act Section 18 liability provisions. A number of commenters urged the SEC to have the form furnished, not filed, under the Exchange Act. These commenters argued that issuers should not be held liable for the information included in Form SD when they are required to rely on third parties to gather the information and direct knowledge of relevant facts may not be available to them. In response, SEC noted that Section 18 does not create strict liability for filed information. Instead, it states that an issuer cannot be held liable if it can be established that it acted in good faith and had no knowledge that the statement was false or misleading. Issuers' chief executive and financial officers will not be required to certify their company's conflict minerals disclosures.

<u>Step One: Determining Issuers Covered by the Conflict Mineral Provision</u>

Similar to the proposed rule, the final rule does not define the terms "contract to manufacture," "necessary to the functionality," of a product, and "necessary to the production" of a product. SEC decided not to define these terms because of the wide variety of issuers; a definition could not be crafted that would be applicable to every issuer. In a departure from the proposed rule, however, the final rule provides additional guidance for issuers to consider when determining whether they are subject to the Conflict Minerals Statutory Provision. For example, the final rule states that an issuer will not be considered to "contract to manufacture" a product if it does no more than take the following actions: (i) specifies or negotiates contractual terms with a manufacturer that do not directly relate to the manufacturing of the product; (ii) affixes its brand, marks, logo, or label to a generic product manufactured by a third party; or (iii) services, maintains or repairs a product manufactured by a third party.

Unlike the proposed rule, the final rule does not treat an issuer that mines conflict minerals as manufacturing those minerals unless the issuer also engages in manufacturing. Furthermore, the final rule exempts any conflict minerals that are considered to be "outside the supply chain" prior to January 31, 2013. Conflict minerals are considered to be "outside the supply chain" if: (i) they have been smelted or fully refined; or (ii) they are located outside the countries of interest.

<u>Step Two: Determining Whether Conflict Minerals Originated in the DRC or Adjoining Countries and the Resulting Disclosure</u>

Similar to the proposed rule, if an issuer determines it is subject to the Conflict Minerals Statutory Provision, it must determine, through a reasonable country of origin inquiry, whether the conflict minerals they use originate in countries of interest. Also similar to the proposed rule, the final rule does not prescribe the actions required to be taken through a reasonable country of orgin inquiry. However, in a departure from the proposed rule, the final rule provides general standards applicable to the inquiry. More specifically, the rule states that an issuer's

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reasonable country of origin inquiry must be reasonably designed to determine whether the issuer's conflict minerals did originate in the countries of interest, or did come from recycled or scrap sources, and it must be performed in good faith.

If, through its reasonable country of origin inquiry, an issuer determines that the conflict minerals it uses come from scrap or recycled conflict minerals, its obligations end once it files a Form SD with the SEC that briefly describes how it undertook the reasonable country of origin inquiry as well as the results of the inquiry. This represents a departure from the proposed rule, which, among other things, would have also required such an issuer to provide a Conflict Minerals Report that included: (i) a description of measures taken to exercise due diligence; and (ii) an audit of its Report.

Step Three: Conflict Minerals Report's Content and Supply Chain Due Diligence

The circumstances under which an issuer must perform due diligence have changed. Under the proposed rule, an issuer would have to conduct due diligence if: (i) it determined that its conflict minerals originated in the countries of interest; (ii) was unable to determine that its conflict minerals did not originate in the country of interest; or (iii) its conflict minerals came from recycled or scrap sources. According to the final rule, an issuer must exercise due diligence under the following circmstances: (i) the issuer knows that it has necessary conflict minerals that originate in the countries of interest and did not come from scrap or recycled sources; or (ii) the issuer has reason to believe that its conflict minerals may have originated from the countries of interest and may not have come from recycled or scrap sources. If an issuer does not meet these requirements, it is not required to submit a Conflict Minerals Report or perform due diligence. Nonetheless, it still must submit a Form SD in which it describes the reasonable country of origin inquiry it undertook and the results of the same.

In another departure from the proposed rule, the final rule requires that those issuers performing due diligence use a nationally or internationally recognized due diligence framework. According to the SEC, the only due diligence framework currently available is that approved by the Organization for Economic Cooperation and Development (OECD).

Under the proposed rule, following due diligence, an issuer would have had to describe its products as: (i) not DRC conflict-free; or (ii) DRC conflict-free. Products would be described as not DRC conflict-free if the issuer was unable to determine that the conflict minerals did not directly or indirectly finance or benefit armed groups in the countries of interest. Products would be labled DRC conflict-free if the products containing conflict minerals did not directly or indirectly finance or benefit armed groups in the countries of interest. In contrast, the final rule dictates that, after due diligence has been performed, an issuer must describe its products with one of three descriptions: (i) DRC conflict-free; (ii) not having been found to be DRC conflict-free; or (iii) DRC conflict undeterminable. Under this revision, issuers can label their products DRC conflict undeterminable for two years if the products contain conflict minerals that the issuer can not determine: (i) did not originate in the countries of interest; (ii) did not directly or indirectly finance or benefit armed groups in the countries of interest; or (iii) originate from scrap or recycled resources. Smaller reporting companies are allowed to describe their products as DRC conflict undeterminable for four years. After a period of two-four years, a product that would have been classified as DRC conflict undeterminable would have to be classified as not having been found to be DRC conflict-free. The SEC noted that this revision was made in response to comments that the process for tracing

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conflict minerals through the supply chain may require additional time to develop before an issuer can make certain determinations.

Similar to the proposed rule, the final rule requires an independent private sector audit of an issuer's Conflict Minerals Report. However, in response to comments, SEC modified the final rule to set forth an audit objective. According to the final rule, the objective of the audit is to express an opinion or conclusion as to whether the design of the issuer's due diligence framework is in conformity with the criteria set forth in the nationally or internationally recognized due diligence framework used by the issuer, and whether the issuer's description of the due diligence measures is consistent with the due diligence process that the issuer undertook.

Outlook

The controversy that surrounded SEC's efforts to both propose and finalize a rule to implement Section 1502 of the Dodd-Frank Act is not expected to end now that a final rule has been approved. While some US companies praised SEC for making the final rule more flexible than the proposed rule, others criticized SEC for adopting such burdensome rules, which they argue will put US companies at a competitive disadvantage. In this regard, some experts note that legal challenges may be brought against the rule in an effort to overturn it.

US General Trade Policy Highlights

United States and Japan Challenge Argentine Import Restrictions before the WTO; Argentina Responds with Complaints on Certain US Measures

On August 21, 2012, the United States and Japan requested World Trade Organization (WTO) dispute settlement consultations with Argentina concerning alleged Argentine import restrictions (*please refer to W&C Latin America Alert EU Challenge Argentine Import Restrictions at the WTO; Argentina Implements Additional Measures dated May 30, 2012*). According to US Trade Representative (USTR) Ron Kirk, Argentina's import measures adversely affect a broad segment of US industry, which annually exports billions of dollars in goods to Argentina.

The US and Japanese consultation requests initiate separate disputes under the WTO Dispute Settlement Understanding (DSU). Consultations give the United States, Japan and Argentina the opportunity to discuss the matter and to find a satisfactory solution without resorting to litigation. If these consultations do not reach a satisfactory solution within 60 days, the United States and Japan may request that a WTO Panel be established to rule on the WTO-consistency of Argentina's measures in question. Because the US and Japanese consultation requests are quite similar to the European Union's May 2012 consultations request (*Argentina — Measures Affecting the Importation of Goods* (DS438)), a single WTO panel could hear all three disputes concurrently. The EU has not yet requested the establishment of a panel in DS438.

According to the US request for consultations, Argentina's WTO-inconsistent import measures include:

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- **Non-Automatic Import Licenses.** Since 2008, Argentina has significantly expanded the list of products subject to non-automatic import licensing requirements (*Certificados de Importación* (CI)). Currently, such import licenses are required for approximately six hundred 8-digit tariff lines. The list of products covered includes, *inter alia*, laptops, home appliances, air conditioners, tractors, machinery and tools, automobiles and auto parts, plastics, chemicals, tires, toys, footwear, textiles and apparel, luggage, bicycles and paper products;

- **Pre-registration.** In February 2012, Argentina implemented regulations requiring pre-registration and pre-approval of all imports, *i.e.*, Advance Sworn Import Declaration (*Declaración Jurada Anticipada de Importación* (DJAI)); and

- ***De Facto* Trade Restrictive Practices.** Argentine officials have reportedly, on an unofficial basis, implemented the following policies: (i) trade balancing requirements, whereby companies seeking to import products must agree to export, dollar for dollar, goods of an equal or greater value; (ii) compulsory domestic content requirements, whereby domestic companies must increase the local content of the products they manufacture in Argentina; and (iii) capital controls, whereby multinational companies located in Argentina are prevented or discouraged from transferring revenues abroad. According to the United States and Japan, these practices are systematic, unwritten and non-transparent, and acceptance by importers to undertake these practices appears to be a condition for obtaining the CI and DJAI needed to import their goods.

According to US and Japanese trade officials, Argentine authorities systematically delay or refuse the issuance of CIs and the approval of DJAIs based on non-transparent grounds. Allegedly, Argentine measures: (i) restrict imports of goods; (ii) dictate a preference for domestically-produced goods over imported goods; (iii) do not appear to be related to the implementation of any measure justified under the WTO Agreements; and (iv) are aimed at advancing Argentina's stated policies of re-industrialization, import substitution and the elimination of trade balance deficits.

In response to the US request for consultations, the Argentine Ministry of Foreign Affairs and Worship (*Ministerio de Relaciones Exteriores y Culto* (MREC)) on August 21 published a press release announcing that Argentina will formally request WTO consultations concerning unjustified US sanitary and phytosanitary restrictions on Argentine meat and citrus fruits. Local sources also have indicated that Argentine officials are considering additional WTO consultations regarding an "undue delay" in the opening of the Japanese market to Argentine beef.

Click here for a copy of the USTR press release, here for the US request for consultations, here for a copy of the Japanese press release, and here for a copy of the Argentine press release.

Lawmakers Call for 12 Years Data Protection for Biologics in TPP

Between July 12 and August 6, 2012, three separate groups of Democratic lawmakers sent letters to President Obama, urging him to provide for 12 years of data protection for biologics within the Trans-Pacific Partnership (TPP). The data protection period for biologics refers to the time period after a new drug's approval before a company producing a generic version of the drug can rely on the safety and efficacy data of the company that

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developed the new drug in order to also enter the market. While the Affordable Care Act mandates 12 years of data protection for biologics, the Obama Administration's 2012 budget assumes 7 years of such data protection.

Lawmakers from the following three states sent the letters:

- **Washington**. In their July 12, 2012 letter, Sens. Patty Murray (D-WA) and Maria Cantwell (D-WA) urged President Obama to uphold current US law by ensuring that TPP provides for 12 year of data protection for biologics. According to the Senators, 12 years of protection within TPP will contribute significantly to Washington's biopharmaceutical industry, which directly employed 31,000 people in 2011;

- **Massachusetts.** In their July 13, 2012 letter, Reps. Edward Markey (D-MA), Richard Neal (D-MA), John Olver (D-MA), James McGovern (D-MA), John Tierney (D-MA), Stephen Lynch (D-MA), Niki Tsongas (D-MA), and William Keating (D-MA) urged President Obama to table text within the context of the TPP negotiations requiring 12 years of data protection for biologics. The lawmakers noted that such a period of data protection will allow Massachusetts' biotech and pharmaceutical companies, which directly employ 48,000 workers, to continue to invest in new drugs and create jobs; and

- **Missouri.** In her August 6, 2012 letter, Sen. Claire McCaskill (D-MO) called on President Obama to uphold the Affordable Care Act by ensuring that the TPP agreement requires 12 years of data protection for biologics. Sen. McCaskill also expressed concern regarding the possible entrance of Japan into the TPP, citing the potentially negative impact Japan's entrance could have on the US automobile industry.

While all three letters were written by Democratic lawmakers, data protection for biologics is not necessarily a partisan issue. Instead, lawmakers from states with sizeable brand-name pharmaceutical industries are those that often speak out in support of the longer period of data protection. These letters notwithstanding, US negotiators are not expected to engage TPP members on the issue of data protection for biologics during the 14th round of TPP negotiations, which are scheduled to take place September 6-15, 2012. The issue is controversial within the US domestic policy space but is also considered controversial among TPP members. Those TPP members with developing economies are pushing for less stringent intellectual property rights (IPR) provisions with respect to pharmaceuticals, which they believe will better ensure their citizens affordable access to medicines. Negotiations regarding this subject are likely to be postponed until later stages of negotiation.

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House and Senate Pass Bill on AGOA, CAFTA and Myanmar Sanctions

The House and Senate passed on August 2, 2012 legislation (S 3326 and HR 5986) principally extending the third-country fabric program under the African Growth and Opportunity Act (AGOA), modifying certain textile and apparel rules of origin (ROO) under the US-Dominican Republic-Central America Free Trade Agreement (DR-CAFTA), and renewing sanctions on imports of Myanmar-origin goods. President Obama is expected to enact the legislation into law within the near-term.

We highlight the legislation's principal components below:

- **AGOA.** The legislation extends through 2015 the third-country fabric program under AGOA whereby the United States allows duty-free access for apparel produced in sub-Saharan African AGOA beneficiary countries of third-country fabric, *i.e.,* fabric not originating in an AGOA beneficiary country or the United States. The AGOA third-country fabric program was set to expire in late-September 2012 and the majority of apparel imported from AGOA beneficiary countries is produced from third-country fabric. The legislation also adds South Sudan to the list of sub-Saharan nations eligible to qualify for duty-free access to the US market under AGOA for certain products, including certain apparel, footwear and textiles;

- **DR-CAFTA.** The legislation made largely non-controversial, technical corrections and modifications to the ROOs for certain textile and apparel products under DR-CAFTA in order to close a loophole that allowed for the use of non-originating sewing thread (*e.g.*, from China) in the assembly of textiles and apparel traded under the Agreement. The Trade Ministers of the Agreement's parties agreed to such corrections and modifications during the February 2011 DR-CAFTA Free Trade Commission meetings, and all DR-CAFTA countries except the United States have already approved the changes contemplated in the legislation; and

- **Myanmar.** The legislation renews for one year sanctions contemplated in the Burmese Freedom and Democracy Act of 2004 (PL 108-61) on imports of Myanmar-origin goods, and reauthorizes for three years a so-called "fast-track" process for Congress to approve the annual renewal of such sanctions. The bill leaves intact the President's authority to waive or terminate these import sanctions.

Although S 3326 was easily approved by the Senate Finance Committee and was expected to move quickly through the House and Senate plenaries, Sens. Robert Menendez (D-NJ) and Tom Coburn (R-OK) placed holds on the legislation on July 23, 2012, *i.e.,* they informed Senate leadership that they did not wish the legislation to reach the Senate plenary for consideration (*please refer to the W&C US Trade Alert dated July 26, 2012*). Sen. Coburn placed his hold on the bill because he opposed the way in which AGOA was to be funded, and Sen. Menendez placed his hold because he wanted assurances regarding the passage of legislation reauthorizing the Cotton Trust Fund. S 3326 was eventually allowed to move forward to a Senate plenary vote as Sen. Coburn was allowed to introduce an amendment to the bill relating to funding AGOA, which was not adopted, and Sen. Menendez received assurances from Senate Democratic leadership that separate legislation would be introduced at a later time in support of the Cotton Trust Fund.

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Following the passage of the legislation in both chambers, the Office of the United States Trade Representative (USTR), issued a statement lauding congressional Democrats and Republicans for passing the measures related to AGOA and DR-CAFTA. Although the USTR statement did not mention the legislation's provisions on Myanmar, congressional lawmakers of both parties issued statements in support of the renewed import sanctions in order to further pressure the Burmese government to continue recent efforts toward democratic reform. This import ban comes in the context of recent actions taken by the Obama Administration to ease other sanctions against Myanmar by allowing for US investments in and exports of US financial services to Myanmar (*please refer to the W&C US Trade Alert dated May 24, 2012*).

China Finds Foreign Trade Barriers Exist In US Subsidies for Renewable Energy Industry

On August 20, 2012, China's Ministry of Commerce (MOFCOM) published Notice No. 52 [2012] announcing affirmative definitive findings in the foreign trade barrier investigation of state-level government policy support and subsidies allegedly afforded to the renewable energy industry in six US states. According to the definitive findings, MOFCOM has determined that these states maintain subsidies to renewable energy producers that are contingent upon the use of domestic (US-origin) goods and, as such, constitute impermissible local content requirements and prohibited "import substitution" subsidies in violation of World Trade Organization (WTO) rules. MOFCOM also concluded that the six programs constitute foreign trade barriers toward imports of relevant Chinese products into the United States.

The China Chamber of Commerce for Import and Export of Machinery and Electronic Products and the New Energy Chamber of the All-China Federation of Industry & Commerce filed the petition in this case on October 24, 2011. The investigation, initiated on November 25, 2011, covered products, equipment and accessories relating to wind, solar, hydro energy, in addition to other types of renewable energy (*please refer to the W&C China Trade Alert dated on November 29, 2011*). On May 24, 2012, the MOFCOM released the preliminary results of the investigation, concluding that the following US subsidy programs constituted prohibited subsidies under Articles I & III of the WTO Agreement on Subsidies and Countervailable Measures (SCM Agreement) and discriminatory local content requirements in violation of the "National Treatment" principle of Article III of the General Agreement on Tariffs and Trade 1994 (GATT 1994) (*please refer to relevant W&C Trade Alert dated on May 29, 2011*):

- **State of Washington:** Renewable Energy Cost Recovery Incentive Program
- **State of Massachusetts:** Commonwealth Solar II
- **State of Ohio:** Ohio Wind Production and Manufacturing Incentive Program
- **State of New Jersey:** Renewable Energy Incentive Program
- **State of New Jersey:** Renewable Energy Manufacturer's Incentive Program
- **State of California:** Self-Generation Incentive Program

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Pursuant to China's Investigation Rules into Foreign Trade Barriers, when a foreign trade barrier is found, MOFCOM shall: (i) hold bilateral consultations with the corresponding government; (ii) request consultations with the corresponding government within the WTO; or (iii) take any other proper measure, according to circumstances. It is unclear how the Chinese government will proceed. Experts in China have opined that the government in other cases has abstained from immediately pursuing formal WTO dispute settlement proceedings in order to use the potential for such action as a deterrent against other countries' initiation of domestic or multilateral trade actions against Chinese imports or domestic measures. Thus, China may not quickly take action against the United States on the basis of MOFCOM's definitive final findings in this case.

Click here for a copy of Notice No. 52 [2012] (in Chinese).

CUSTOMS

Customs Highlights

Plaintiffs in GPX Case File Briefs on Unconstitutionality of New CVD Statute for NME Imports; Statute's Retroactive Application a Key Issue

On August 17, 2012, plaintiffs[1] in *GPX International Tire Corporation et al vs. United States* (*GPX*) filed briefs before the US Court of International Trade (CIT) arguing that the recent US law amending the countervailing duty (CVD) statute to apply to imports from non-market economy (NME) countries was unconstitutional. The two plaintiffs request that CIT Judge Jane Restani declare the CVD/NME law unconstitutional, and remand the case to the Department of Commerce (DOC) with instructions to: (i) forego the imposition of CVDs on imports of off-the-road (OTR) tires from China subject to the CVD order at issue in *GPX*; and (ii) rescind the CVD order.

In March 2012, President Obama enacted the CVD/NME law "to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes" (Public Law 112-99). The law came in response to the United States Court of Appeals for the Federal Circuit's (CAFC) December 19, 2011 ruling in the *GPX*, which found that DOC lacked the legal authority to impose CVDs on imports of merchandise from countries designated as NMEs under the US antidumping law. There are two principle components of the law:

[1] The plaintiffs include GPX International Tire Corporation, Hebei Starbright Tire Co., Ltd., and Tianjin United Tire & Rubber International Co., Ltd. ("plaintiffs")

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- **Section 1** amends US law to include an additional section specifically stating that CVDs can be applied to imports from NME countries. It is retroactive to all proceedings initiated on or after November 20, 2006; and

- **Section 2** authorizes DOC to address the issue of "double counting," *i.e.*, the simultaneous application of both antidumping (AD) duties and CVDs on imported merchandise from NMEs. It applies prospectively to all AD/CVD investigations and reviews initiated on or after law's enactment.

After the CVD/NME law's passage, the CAFC subsequently remanded the GPX case to CIT in May 2012 for a determination of the constitutionality of the retroactive application contemplated in Section 1 of the law.

According to the briefs submitted, the plaintiffs agree that the CVD/NME law's retroactivity provision violates the Fifth Amendment's Due Process Clause because it denies equal protection under the law (*i.e.*, it refuses to afford past importers equal rights and opportunities as those afforded to future importers). Plaintiff GPX International Tire Corporation additionally argues that: (i) the retroactive provision violates the *ex post facto* clause of Article I of the Constitution because it singles out past importers, condemning and punishing their conduct which was not illegal or punishable at the time it was committed; and (ii) the retroactivity provision also violates the Fifth Amendment's Due Process Clause because it levies taxes on importers far beyond the limited period of retroactivity typically allowed and without notice. The plaintiffs disagree in regard to the severability of the alleged unconstitutional provisions from the CVD/NME law; GPX argues that "the offending provision of the […] law cannot be removed without affecting the remainder of the law," while Plaintiff Tianjin United Tire & Rubber International Co., Ltd. requests that such provision "be severed from the remainder of the statute."

As this is a case of first impression, its outcome remains uncertain. Should Judge Restani rule that the CVD/NME law is unconstitutional, the 25 CVD orders on NME imports (24 China; 1 Vietnam) and five pending CVD investigation (3 China; 2 Vietnam) could be affected. The US government would, however, likely appeal any such ruling. Pursuant to Judge Restani's July 2 scheduling order, the US government's brief responding to the plaintiffs' August 17 briefs is due on October 1, and plaintiffs' rebuttal briefs are due 15 days after submission of the government's response brief. There is no timeframe for Judge Restani's final decision.

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