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Customs, Trade and Transport Law e-alert

Exporters from China, Vietnam and other non-market economies to the US may now be entitled to refunds of countervailing duties

A recent decision of the US Court of Appeal for the Federal Circuit (“CAFC”) has confirmed that the US Department of Commerce is not able to impose both anti-dumping and countervailing duties on imports of goods from countries which the US treats as “non-market economies” (“NME”).

As many readers would be aware, WTO Agreements (adopted by member countries) allow for the imposition of anti-dumping duties (to remedy a situation where sales in export markets are at prices below values in country of origin causing material injury to the local industry in the country of import) and countervailing duties (where subsidies in export countries allow exporters to sell at an unreasonably cheap price causing damage to local industries in the importing countries). In Australia (for example), the legislative provisions allow for the imposition of both countervailing and dumping duties at the same time although only to the extent that the imposition of such duties is needed to bring the prices for the relevant goods to a “non-injurious” price. In the event that circumstances permit the imposition of both countervailing and dumping duties, countervailing duties are applied first and then dumping duties are only applied to the extent that prices need to be increased to avert material injury to local industry.

The decision of the CAFC endorses an earlier decision of the US Court of International Trade but according to different reasoning. In short, the CAFC reviewed the context of the US countervailing law and formed the view that the legislation did not allow for the imposition of countervailing duties on goods from NME.

There are a number of interesting consequential issues arising from the decision.

1. The ruling of the CAFC may yet be appealed to the US Supreme Court. However, in the meantime, the decision of the CAFC represents the legal position in the US.
2. The ruling applies to exports to the US from NME such as the PRC and Vietnam to which countervailing duties have been imposed.
3. According to US reports, even though the ruling has been made, the US Department of Commerce still insists on the collection of countervailing duties (at least for now). As a result, affected exporters would still need to pay the countervailing duty but would need to ensure it is paid “under protest” to allow for later challenge or refund.
4. If countervailing duties have been paid by exporters from relevant NME then those exporters should be applying for refunds of countervailing duty.
5. Australia already treats the PRC and Vietnam as “full market economies” rather than NME and operates under a very different regulatory regime to the US. Accordingly, there may be no immediate Australian impact of the US decision even though both countries operate under the same WTO Agreements.

We have excellent relationships with US lawyers and related service providers (such as customs brokers) in the US and would be pleased to assist exporters from NME with further advice on the topic and to secure refunds of countervailing duties.

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