

International Trade Today

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

TOP NEWS | 4 Mar 2021 | Ref: 2103040050 | by [Jacob Kopnick](#)

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 2103020040). 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."

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