

CLIENT ALERT

This Month In International Trade - March 2012

April 10, 2012

THIS MONTH'S TOP FIVE DEVELOPMENTS

1) Congress Invites Proposals for Miscellaneous Tariff Bills

The House Ways and Means Committee and the Senate Finance Committee have both announced the commencement of the 2012 Miscellaneous Tariff Bill (MTB) process. Members of the House and Senate have until April 30, 2012 to introduce temporary miscellaneous tariff bills in order to have them considered for inclusion in the overall MTB.

Items included in the MTB must fall into one of three categories: 1) a new temporary duty suspension or reduction on one particular product or item; 2) an extension of an existing temporary suspension or reduction; or 3) a technical correction. In addition, all proposals must be "non-controversial" (meaning there is no domestic industry opposition), and must result in a loss of revenue not to exceed \$500,000.

After April 30, the Committees will post on their websites each bill under consideration for public comment. The Congressional Budget Office will "score" each bill to estimate its revenue impact, and the International Trade Commission as well as the Department of Commerce and Customs and Border Protection will offer comments.

2) US Exporters to Russia Might Lose Trade Benefits Without PNTR

Without the repeal of Jackson-Vanik and the establishment of Permanent Normal Trade Relations (PNTR) with Russia, US companies exporting to or investing in Russia might lose the benefits of lower tariffs and access to services as part of Russia's official accession to the World Trade Organization (WTO). A summary of some of the trade benefits lost to US companies include:

- 14.9% for dairy products (previously 19.8%)
- 10.0% for cereals (15.1%)
- 7.1% for oilseeds, fats and oils (9.0%)
- 5.2% for chemicals (6.5%)
- 12.0% for automobiles (15.5%)
- 6.2% for electrical machinery (8.4%)
- 8.0% for wood and paper (13.4%)

The tariff rate on cotton and information technology (ITA) products will be zero (the current applied tariff on ITA products is 5.4%).

Additional tariff rates based on quotas:

- Beef - 15% in-quota (55% out-of-quota)
- Pork - zero (65%)
- For certain poultry products - 25% (80%)
- Certain whey products - 10% (15%)

The Russian Federation agreed to apply the terms of the WTO's Basic Telecommunications Agreement and will eliminate the foreign equity limitation (49%) on telecommunications service access four years after accession. Russia will also allow foreign banks to establish subsidiaries. Foreign equity in individual banking institutions would not be capped; overall foreign capital participation would be limited to 50%. Nine years after accession, foreign insurance companies would be allowed to establish branches. Russia made commitments in transport services, including freight and passenger transportation. Russia would allow 100% foreign-owned companies to engage in wholesale, retail and franchise sectors upon accession to the WTO.

3) New EU Iran Sanctions Regulation; US Determines Oil Supply Sufficient

On March 23, 2012, the Council of the European Union adopted Regulation No 267/2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010. The new Regulation No 267/2012 replaces Regulation 961/2010 and gives effect to Council Decision 2012 /35/ CFSP; it replicates provisions of Regulation 961/2010 and became effective March 24.

The new regulation implements additional restrictions agreed by the Council on January 23, 2012, such as provisions targeting the transportation, insurance and reinsurance of Iranian crude oil, petroleum products and petrochemicals; restrictions and notification requirements for the transfers of funds and financial services; ban of the supply of specialized financial messaging services to listed persons; restrictions on gold, precious metals and diamonds; restrictions with respect to Iranian banknotes and coinage; provisions expanding assets freeze list and extending prohibited dual-use items list; provisions introducing derogations from freezing of funds and economic resources; amendments to the provisions regarding the diligence of EU financial and credit institutions; and clarifies certain existing implementing provisions.

On March 30, the Obama Administration released a statement declaring that, despite oil production disruptions, the world oil supply was sufficient to implement sanctions against the central bank of Iran to limit oil trading between that nation and other countries. The sanctions, coupled with an oil embargo from the European Union (EU), will take full effect in June. After that date, any entity doing business with Iran's central bank could be subject to U.S. sanctions.

4) Focus on Antiboycott Enforcement Continues

The Commerce Department's Bureau of Industry and Security announced the settlement of another antiboycott enforcement action, bringing the total number of antiboycott settlements announced in 2012 to five. The case, settled in January against Banco Sabadell SA 's Miami Branch alleged that the U.S. branch of the Spanish bank violated the antiboycott regulations in 2010

by furnishing the following two prohibited representations to a Syrian bank in response to a documentary collections order on behalf of Banco Sabadell's customer:

- Invoice - "The Merchandise mentioned [sic] in this invoice is neither of Israeli origin nor [sic] it contains any Israeli material."
- Bill of Lading - "The ship is not of Israeli flag and will not call any [sic] Israeli ports waters and/or territories and is not entered into black list of Arabic countries."

The published documents do not reflect the nature of the export transaction giving rise to the violations or indicate whether it was authorized under the U.S. export embargo of Syria. Banco Sabadell settled the allegations for \$14,000 without admitting or denying fault.

5) Deadlines? What Deadlines? CAFC Confirms 2-Year Deadline to Decide a Protest is Not Really a Deadline

On March 30, The Court of Appeals for the Federal Circuit (CAFC) denied a petition for rehearing to reconsider its decision in *Hitachi Home Electronics (America), Inc. vs. United States*. In the original hearing, the CAFC affirmed that failure of CBP to rule on a protest within the two-year deadline mandated by statute does not result in either a deemed denial or approval. In essence, therefore, CBP can take longer than the two-year period to make a ruling. Judge Reyna, dissenting, strongly disagreed with the denial, arguing that Congress has made it clear CBP has only two options to act on a protest within two years, to allow or deny, but that "[t]he majority writes into the statute a third option for Customs - to delay beyond the two years or, in its discretion, to never make a substantive determination on a protest."

In a similar case, broker Norman G. Jensen Inc. asked the CAFC for an alternative remedy for its case against CBP for failing to respond to its protests within the congressionally mandated two-year deadline. Jensen's original case had been thrown out of the CIT last year. The company filed protests on the valuation of softwood lumber products with applications for administrative review. CBP failed to respond within two years, but claimed that a draft decision had been completed and was delayed due to Jensen's filing of extraneous court cases.

THIS MONTH IN TRADE – OTHER NEWS

New EU Public Procurement Legislation

On March 21, 2012, the European Commission issued a proposal for a Regulation which establishes a comprehensive EU external public procurement policy and indirectly aims to improve the access of EU companies to the worldwide procurement market. The proposal would give the Commission powers to allow contracting authorities in the EU to exclude certain tenders of non-EU goods and services, and to conduct investigations of restrictive procurement practices in third countries which could serve as the basis for further actions by the EU.

Congress Responds to GPX; but Litigation Continues

The House and Senate moved with remarkable efficiency and passed a bill (March 6th and 7th, respectively) explicitly granting the Commerce Department the authority to impose countervailing duties on unfairly subsidized goods from nonmarket

economies such as China and Vietnam. Signed into law (P.L. 112-099) by President Obama on March 13, 2012, the statute's provision on countervailing duties is retroactive to Nov. 20, 2006, which is before Commerce initiated the countervailing duty investigation that led to the GPX litigation.

On March 23, plaintiffs and the government delivered new filings to the Court of Appeals for the Federal Circuit (CAFC) in the *GPX International v. United States* case regarding retroactive countervailing duty (CVD) provisions in P.L. 112-099. Plaintiffs attacked the statute on constitutional grounds because it is retroactive to November 2006, separation of powers grounds claiming it interfering with a decision of an Article III court and that the statute violates due process. The government asked the CAFC to vacate the decision; if vacated, the case should be remanded to the Court of International Trade (CIT) to determine the issue of new Department of Commerce CVD margin calculations under the new law. The CAFC is already considering cross-petitions of rehearing *en banc*.

CBP Proposes Rulemaking To Allow Refusal of Imports For Noncompliance with Energy Conservation or Labeling Standards

On March 26, U.S. Customs and Border Protection (CBP) released a notice of proposed rulemaking to amend part 12 of title 19 of the Code of Federal Regulations (19 CFR Part 12) regarding consumer products and industrial equipment subject to energy conservation or labeling standards. If finalized, the proposed rule would allow CBP, upon notification from the Department of Energy (DOE) or the Federal Trade Commission (FTC) that an imported article is in violation of Section 6302 of title 42 of the United States Code (42 U.S.C. 6302) involving energy conservation and labeling standards, to refuse admission of the subject articles into the commerce of the United States. Conditional release of noncompliant articles under CBP basic importation and entry bond would be allowed for the purpose of bringing the merchandise into compliance, if recommended by the DOE or FTC. Interested parties should send comments to CBP by May 25, 2012.

Recast of the Modernized Customs Code to establish a Union Customs Code

On 20 February 2012, the European Commission proposed a recast of the Regulation establishing the Modernized Customs Code (MCC-Reg. (EU) 450/2008) to establish a Union Customs Code. The MCC Regulation was adopted and entered into force in 2008 but was not yet in application. The latest legal date for its implementation was 24 June 2013.

The recast is due to the following reasons:

- The new customs IT systems cannot be introduced within 2013
- The need to align the MCC and the related implementing provisions to the Lisbon Treaty
- The need to adjust some provisions of the MCC because of the evolution of the relevant EU legislation (e.g. transport safety and security) or the actual functioning of customs procedures (e.g. temporary storage)

GSP - Argentina Out, South Sudan In

President Obama recently issued a presidential proclamation designating the Republic of South Sudan as a new beneficiary of the Generalized System of Preferences (GSP) allowing the newly independent nation to boost its economic prosperity with trade. In the same proclamation, GSP eligibility was suspended for Argentina due to non-compliance with GSP eligibility criteria.

EPA Proposes to Limit New Uses of Certain Chemical Imports

On March 20, The U.S. Environmental Protection Agency (EPA) proposed Significant New Use Rules (SNURs) under the Toxic Substances Control Act (TSCA) to require companies that manufacture, import, or process any of five groups of certain chemicals to submit a notification to EPA at least 90 days before beginning any activity. The five chemicals groups targeted by the EPA are polybrominated diphenyl ethers (PBDEs), benzidine dyes, a short chain chlorinated paraffin, hexabromocyclododecane (HBCD), and phthalate di-n-pentyl phthalate (DnPP).

The subject chemicals are used in a wide range of consumer products and industrial applications, including paints, printing inks, textile pigments and dyes, foam flame retardants, and plasticizers. Under the proposed rules, notification would give the EPA the opportunity to evaluate the new use and take action to prohibit or limit the activity.

CROWELL & MORING SPEAKS

John Brew, Alan Gourley and **Laurent Ruessmann** will speak on "Avoiding Anti-Corruption Violations during Customs Transactions" at C5's 7th Annual Advanced Forum on Global Customs Compliance, May 23-24, 2012, in Brussels, Belgium.

Lindsay Denault will speak on a panel about "Facilitating Access to International Markets" at the AICPA International Business Conference, June 11-12, 2012.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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