

CLIENT ALERT

This Month in International Trade - November 2012

December 17, 2012

THIS MONTH'S TOP FIVE DEVELOPMENTS

1) As U.S. Eases Burma/Myanmar Sanctions, Many Challenges Remain for U.S. Businesses, Including Money Laundering and Corruption Risks

President Obama's historic visit to Burma/Myanmar on November 19, 2012 marked an important milestone in that country's path toward a more open society, and recognizes economic and other reforms in that country. In advance of the President's visit, on November 16, 2012, the Secretaries of the Treasury and State eased the ban on imports of Burmese-origin goods. This action is part of a gradual unwinding of once-expansive U.S. sanctions targeting the Government of Burma, and follows on the July 2012 authorizations for new investment in, and exports of financial services to, Burma. The easing of U.S. sanctions greatly opens up the potential for trade between the United States and Burma. While U.S. companies may be considering entering the long-closed Burmese market, they should not do so without first extensively evaluating a range of business and compliance risks.

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2) EU-Japan Free Trade Agreement: EU Member States' Give Green Light to Start Negotiations

In May 2012, the European Commission (EC) agreed with Japan on a very ambitious Free Trade Agreement (FTA) negotiation agenda, covering all EU market access priorities. The two parties also agreed on specific 'roadmaps' for the removal, in the context of the negotiations, of non-tariff barriers as well as on the opening up of public procurement for Japan's railways and urban transport market.

On 18 July 2012, the EC asked the EU Member States for their agreement on opening negotiations for a FTA with Japan and in November 2012 the Council of the European Union decided to give the EC 'the green light' to start trade negotiations with Japan, with a clear mandate setting Europe's objectives.

The mandate sets out a strict and clear parallelism between the elimination of duties at the EU customs border and non-tariff barriers in Japan. However, a safeguard clause will protect sensitive European sectors. In addition, the EU explicitly reserves itself the right 'to pull the plug' on the negotiations after one year if Japan does not live up to its commitments on removing non-tariff barriers.

Regarding the potential benefits of an EU-Japan FTA, it is estimated that a free trade deal with Japan would boost Europe's GDP by 0.8%. Moreover, EU exports to Japan could increase by 32.7%, while Japanese exports to the EU would increase by 23.5%. Furthermore, an estimated 420,000 additional jobs in the EU would result from an agreement.

Japan is the EU's second biggest trading partner in Asia, after China. In 2011 EU exports to Japan reached €49 billion, mainly in the sectors of machinery and transport equipment, chemical products and agricultural products. In 2011 EU imports from Japan accounted for €67.5 billion. In 2010, EU imports and exports of commercial services from and to Japan were €12.7 and €17.2 billion.

3) U.S. Extends PNTR to Russia

On December 14, President Obama signed H.R. 6156, the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, which should lead to greater market access in those nations for U.S. exports and services. Given Russia's membership in the World Trade Organization (WTO), repeal of the Jackson-Vanik amendment and extending permanent normal trade relation (PNTR) status to Russia was necessary for the U.S. to realize the full benefits of the WTO relationship. H.R. 6156 accomplishes both while also imposing sanctions on Russian officials for corruption and human rights abuses. After the U.S. House of Representatives passed the bill on November 14, the U.S. Senate followed on December 6 allowing the President to sign the resolution.

4) CBP To Open Six New CEEs In 2013

On November 28, U.S. Customs and Border Protection (CBP) Deputy Commissioner David V. Aguilar announced the opening of six new Centers of Excellence and Expertise (CEE) in Fiscal Year 2013. The industries covered by the new centers include:

- Agriculture & Prepared Products CEE - Miami, FL
- Apparel, Footwear & Textiles CEE - San Francisco, CA
- Base Metals CEE - Chicago, IL
- Consumer Products & Mass Merchandising CEE - Atlanta, GA
- Industrial & Manufacturing Materials CEE - Buffalo, NY
- Machinery CEE - Laredo, TX

The new centers will join four already in operation: the Electronics CEE in Long Beach, CA; the Pharmaceuticals, Health & Chemicals CEE in New York City; the Automotive & Aerospace CEE in Detroit, MI; and the Petroleum, Natural Gas & Minerals CEE in Houston, TX.

The CEE directors will maintain offices in the locations listed above; however, the centers themselves are "virtual" in that they include industry expert specialists in other locations (including other CEEs and Ports of Entry). The CEE system is intended to provide a centralized, single contact for importers in an industry, utilizing account management principles. CEEs are expected to handle many post entry functions including entry cancellations, rejected ACS entry summaries, Requests for Information (CF-28), Notice of Action (CF-29), Requests for Internal Advice, extensions and suspensions of liquidation, protests and prior disclosures.

Assignment to a CEE is based on a company's highest percentage of imports within a particular industry (by tariff classification) despite a company's multi-industry footprint. This allows CBP to pair each company with an account manager to provide a single point of contact for any import issues. Currently, participation in a CEE is limited to "trusted partner" companies such as participants in the Customs and Trade Partnership Against Terrorism (C-TPAT) and/or Importer Self Assessment (ISA) programs.

5) Supreme Court Refuses to Review Protest Deadline Case

The U.S. Supreme Court denied certiorari to review the Court of Appeals for the Federal Circuit's decision in *Hitachi Home Electronics (America) Inc. v. U.S. et al.*, 661 F.3d 1343 (Fed Circ. 2011) wherein the Federal Circuit affirmed the Court of International Trade's decision that CBP is not required to review and act on a protest within the two years of filing as stated in 19 C.F.R. § 174.21. Hitachi had taken CBP to the Court of International Trade (CIT) for failing to make a determination on protests within two years as mandated by 19 U.S.C. 1515(a).

The underlying CIT decision held that the use of "shall" in 19 C.F.R. § 174.21 did not mean "must" and there is no automatic grant or denial for CBP's failure to review and act on a protest within two years. In its reasoning, the CIT stated that the statute and regulations do not specify any action or consequence when the two year period expires; a protestant can force CBP to act by requesting accelerated disposition under 19 U.S.C. § 1515(b).

On appeal, the Federal Circuit affirmed and Hitachi appealed to the Supreme Court. The resulting impact of the Supreme Court's denial of certiorari means practically, that for protestants, CBP is not obliged to decide a protest before the two year deadline and that if the importer wants a decision, it must file a request for accelerated disposition.

THIS MONTH IN TRADE – OTHER NEWS

U.S. Mining Marketer Allegedly Violates Antiboycott Laws Through Use of Agents

Falling victim to a threat present in many transactions in the Middle East, Climax Molybdenum Marketing Company settled allegations that it committed three violations of the U.S. Commerce Department's antiboycott regulations for \$9,000. Allegedly, the company made the mistake of permitting its agent to sign a vessel eligibility certificate, thereby violating the antiboycott regulations:

We ... agents for and on behalf of Master Senator Lines GMBH., herewith certify that the carrying vessel is allowed to enter Kuwaiti port/port of discharge.

Additionally, the company allegedly failed to report the receipt of two requests for vessel eligibility certificates which permitted the use of agent-signed certifications, prohibited under the antiboycott regulations. The alleged violations occurred in 2008 in transactions involving Kuwait.

New CAMEX Resolution Regarding Brazilian Tariffs

On November 14, the Brazilian Foreign Trade Chamber (CAMEX) released Resolution n. 80/2012 published in the Official Gazette. The Resolution provides for the procedures to be followed by Brazilian companies that want to suggest products to be featured in the second round of tariff increases. The second round will be comprised of another set of 100 products.

Brazilian companies must present their proposals by January 14, 2013 with regards to the list of exceptions to the common external tariff (TEC) of Mercosur. The proposals should include, among other things, detailed information on the product in question - presentation, weight, trademarks, necessary inputs to manufacture the product, and chemical composition. In

addition, companies should provide certain economic information, such as possible substitutes to the product, analysis of the impact of the tariff increase, quantity of product manufactured by each of Mercosur countries and their respective existing nominal industrial capacity of that product.

Tougher Penalties as Taiwan Seeks To Reform Trade Secrets Law

The Economics Committee of Taiwan's legislature, the Legislative Yuan, cleared a new bill to amend the nation's Trade Secrets act. The amendments impose severe penalties, including prison time and much higher fines, for leaking trade secret information. The current Trade Secrets Act in Taiwan only stipulates civil liability. The bill must now pass two screenings in the full legislature prior to becoming law.

The new bill stipulates that anyone who steals or discloses trade secrets may be subject to up to five years in prison and a fine of NT\$1 million (New Taiwan Dollars; approximately \$30,000 USD) to NT\$10 million (or \$300,000 USD). If the gains from the theft of trade secrets exceed NT\$ 10 million, the court has the discretion to raise the fine by up to 300%. In addition, those guilty of stealing or disclosing trade secrets to foreign countries, including China, Hong Kong, or Macau, may be imprisoned for one to 10 years and fined between NT\$1 million to NT\$50 million (or \$1.6 million USD). If the gains from the disclosure exceed NT\$50 million, the court could increase the resulting fine by two to ten times at its discretion.

The Legislative Yuan is processing the bill amid public concerns stemming from a series of trade secrets leaks. Earlier this year, the American Chamber of Commerce in Taipei proposed the legislature enact amendments to protect trade secrets more effectively. In October, two former senior officials in AU Optronics Corp (AUO), a world leading LCD manufacturer based in Taiwan, allegedly stole files containing information on AUO's panel production technology before defecting to AUO's Chinese rival, TCL Group. In another incident, former employees of Taiwan-based TSMC, the world's largest chip equipment producer, allegedly leaked its trade secrets to Korean rivals.

President Nominates Professor Kelly for CIT

On November 14, President Obama nominated Claire R. Kelly, professor at Brooklyn Law School, to serve on the U.S. Court of International Trade (CIT). Kelly takes the seat vacated by Evan Wallach who joined the U.S. Court of Appeals for the Federal Circuit (CAFC) in November of 2011. Kelly joins Mark Barrett as one of two of Obama's pending nominations to the CIT.

Kelly earned her B.A. cum laude from Barnard College in 1987 and her J.D. magna cum laude from Brooklyn Law School in 1993. She worked as an associate at Coudert Brothers in New York City before joining the law school in 1997. Kelly is co-director of the Dennis J. Block Center for the Study of International Business Law at Brooklyn Law School; she also serves as faculty advisor for the school's Journal of International Law. As a member of the Customs and International Law Bar Association's board of directors, Kelly chairs the association's Trade Adjustment Assistance Subcommittee.

CROWELL AND MORING SPEAKS

Elena Klonitskaya spoke on "Representation of private companies in the context of the WTO dispute settlement mechanism" at the conference organized by ICC Russia in Moscow on 24 October, 2012.

Alan W. H. Gourley delivered a presentation on "Lessons from the US in Applying Rules of Origin to Public Procurement" at the International Chamber of Commerce (ICC) Seminar on Procurement & Trade in Paris, France on November 7, 2012.

Jonathan S. ("Josh") Kallmer spoke on "Using International Trade to Enforce International Arbitration Awards" at a luncheon hosted by D.C. Bar's International Law Section in Washington, D.C. on November 29, 2012.

Cari N. Stinebower spoke on "Doing Business in Burma/Myanmar: What You Can and CANNOT Do Under New, Eased Sanctions Restrictions," at ACI's OFAC Boot Camp, in New York City, December 5-6, 2012. Cari also spoke on anti-bribery and anti-corruption enforcement before the Reinsurance Association of America on December 13, 2012.

CROWELL AND MORING WELCOMES

We are pleased to welcome **Jochen Beck** and **Richard Massony** to the International Trade group.

Jochen earned his Masters degree in Law and Ph.D. from the Vienna University (Austria). He earned his LL.M. from Cornell University in New York. In 2011 he obtained a diploma in Competition Law from Kings College in London. As an associate in law firms in Brussels, Jochen focused on trade and customs matters, with experience in EU and national antitrust and merger control law and general EU law. Jochen joins the Brussels office beginning in January 2013.

Richard earned his J.D. from the University of Virginia School of Law in 2012 and his A.B. in Art and Archaeology from Princeton University in 2004. He joined the Washington, D.C. office in November.

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John B. Brew, **Laurent Ruessmann** and **Jeffrey L. Snyder** have been recognized by Who's Who Legal in the area of trade and customs.

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