



The Customs Practice of Sidley Austin Brown & Wood LLP

Our customs practice group is adept at the “nuts and bolts” of customs issues while at the same time being well-versed in the nuances of trade policy. Members of our group have served in numerous U.S. government roles involving the regulation of imports. In addition, our involvement with several prominent trade associations, companies, and foreign sovereign clients ensures that we are on the front lines of customs reform and modernization.

Our customs experience extends to administrative proceedings before U.S. Customs and Border Protection and all other federal agencies regulating trade, to the U.S. Congress, and to the court system. In litigation, we regularly appear before the U.S. Court of International Trade, the Court of Appeals for the Federal Circuit, and the U.S. Supreme Court. The multidisciplinary approach we bring to the changing trade and security landscape has proven to offer practical solutions to the challenges of managing trade efficiently while still being in compliance with the complicated set of rules governing imports.

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FDA Seeks More Comments on BTA - Concern Over Compliance Gap

On April 14th, the Food and Drug Administration ("FDA") published notices seeking additional public comments on its prior notice and facility registration rules that implement the requirements of the Bioterrorism Act of 2002. Under the law, all food "facilities" must register with the FDA. In addition, all food imports into the United States must be preceded by notice to FDA and the Bureau of Customs and Border Protection ("CBP"). The interim final rule implementing these requirements was published on October 10, 2003, and the rules went into effect on December 12, 2003.

Now that the prior notice system has been operational for several weeks, FDA is inviting interested parties to submit comments on the system and has specifically requested commenters to address the extent to which CBP timelines and procedures can be incorporated into the Bioterrorism Act program. For example, the Free and Secure Trade (FAST) program at CBP allows truck shipments from Canada and Mexico to enter the U.S. with notice only one hour or thirty minutes prior to arrival, but the Bioterrorism Act currently requires notice two hours prior to arrival of food shipments by truck. Also, importers who are members of the Customs-Trade Partnership Against Terrorism (C-TPAT) are eligible for reduced inspections of imports. However, the FDA Bioterrorism Act screening system currently makes no distinction between C-TPAT members and non-members.

In a joint statement issued by FDA and CBP on April 14th, the two agencies emphasized that they are working to improve coordination of the agencies on the prior notice issues. All of the FDA prior notice staff is being moved to the CBP's National Targeting Center. Also, the staff are working on improvements to communication and cooperation between the information exchange personnel and the inspection personnel to ensure timely resolution of holds placed on food imports. However, the

Also Inside This Issue:

[Study of California Trade Has Warnings for National Trade Trends](#)

[Federal Circuit Invalidates Customs Regulations on "Operations Incidental to Assembly"](#)

[Current developments in the EU GSP scheme](#)

[Mandatory Marketing Fees: Going the Way of the Dinosaur?](#)

disparities in standards in addition to anecdotal evidence suggests that the reality of the process is still far from these announced goals. Furthermore, the most recent public data on prior notice submissions indicates that the number of notices is still lower than the total number of food imports, and that many submissions are still incomplete. These facts suggest that many importers have not yet fully implemented all of the new requirements. The consequences on non-compliance will become more severe in just a few months. The CBP has stated that it will begin refusing entry to non-compliant food imports on August 12, 2004.

The comment period for the Bioterrorism Act regulations will remain open until May 14, 2004. Additional information about the implementation of the Bioterrorism Act can be found on the FDA's Bioterrorism Act web page: <http://www.fda.gov/oc/bioterrorism/bioact.html>.

Study of California Trade Has Warnings for National Trade Trends

A recently released study by the Public Policy Institute of California contains some troubling findings about the ability of U.S. ports to handle projected increases in the volume of imports and exports. The study concludes that while the best economic projections suggest that international trade could triple by 2020, California's congested seaports, airports, highways, and railroad lines are not able to handle the increase without significant new resources. Because a majority of the imports handled by California's ports are ultimately destined for other parts of the country, this lack of capacity will have national implications. This fact was demonstrated in dramatic fashion when the west coast ports were shut down due to labor disputes in 2002.

The study concludes that an increasing amount of trade that currently comes through California will be displaced to other ports such as Anchorage and Tacoma. In addition, the study suggests that new user fees and taxes would be an appropriate approach to raise sufficient funds to expand the infrastructure. The study also concludes that it is too early to know whether Customs and Border Protection security initiatives will have a net effect of improving the efficiency at ports, or contributing to port congestion. A copy of the report is available at: <http://www.ppic.org/main/publication.asp?i=332>.

Federal Circuit Invalidates Customs Regulations on "Operations Incidental to Assembly"

On March 18, 2004, in *DaimlerChrysler Corporation v. U.S.*, the U.S. Court of Appeals for the Federal Circuit (CAFC) issued a [decision](#) limiting the discretion of U.S. Customs and Border Protection to promulgate regulations that limit the application of language specifically provided in the tariff schedule.

In this case, the court invalidated Customs' regulations defining certain types of painting operations as being ineligible for duty benefits when they are performed as part of an assembly operation abroad of U.S.-origin goods. The Harmonized Tariff Schedule of the United States, ("HTSUS") has a special provision, heading 9802.00.80, that allows for greatly-reduced duties for products that "have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting." Customs has promulgated a regulation "interpreting" this provision to indicate that while it considers paint applied merely as a pro-

tectant or preservative to be an incidental operation, painting for decorative purposes is not incidental to assembly.

The court found that because the tariff schedule specifically identified "cleaning, lubricating and painting" as incidental operations, Customs does not have discretion to narrow this language through its regulations. The court also indicated that for other operations that are not specifically named, there is an appropriate role for Customs to play in clarifying that statutory language through regulation.

The decision will give companies with assembly operations abroad more opportunities to take advantage of the duty benefits of heading 9802.00.80, HTSUS. It also continues a trend of decisions by the CAFC limiting the regulatory discretion of Customs.

Current developments in the EU GSP scheme

Recent developments regarding the General System of Preferences ('GSP') of the European Union ('EU') are likely to have an impact on the commercial interests of companies doing business with developing countries and vice versa. The existing EU GSP scheme has been extended until 31 December 2005, and the discussions are about to begin regarding the new EU GSP scheme to take effect as of 1 January 2006.

New GSP regime under discussion

The process for adopting a new GSP regime is expected to take place in three phases:

- Brainstorming;
- Drafting session during which stakeholders should present their views;
- Formal legal process to adopt the new regime.

The Netherlands, which will hold the Presidency of the European Union the second half of 2004 is keen to have the new GSP Regulation adopted already by the end of 2004, so that businesses can plan taking the new legislation into account.

This process is likely to result in a re-focusing of the existing GSP scheme, also in view of the WTO Appellate Body ('AB') report, published 7 April 2004, which recognized that developed countries may distinguish among developing countries in their GSP schemes, as long as preferential treatment is accorded to all countries that have the same development, financial and trade needs.

Parties interested in the future shape of the EU GSP regime need to get organized and should already be actively involved in the consultation process, with a view to identifying opportunities and threats in relation to their commercial interests.

Future of origin rules in preferential agreements

Another important development which has an impact on the effect of the EU GSP regime is the recent public consultation by the European Commission (the 'Commission') on the future of the preferential origin rules.

In its *Green Paper*, which was published in late December 2003, the Commission asserts that preferential origin rules need a fundamental overhaul, especially in view of the decrease of import duties likely to emerge from various free trade agreements and more liberal market access policies.

The existing set of origin rules are considered to be complex both in terms of the criteria for acquiring originating status and administratively, to deal with proof and enforcement. Furthermore, the lack of uniformity is problematic, as a result of the multiplicity of schemes. In the light of these considerations, the Commission identifies three areas which need to be revisited:

- the definition of the conditions for acquiring originating status and the legal framework for this;
- supervision to ensure the conditions are applied fairly;
- the establishment of procedures ensuring an optimal division of tasks and responsibilities between companies and the authorities.

Conclusion

There is an opening for companies doing business in the Community to ensure that their products continue to benefit from the GSP regime. This requires, however, active participation in the upcoming discussions.

Furthermore, the proposals tabled by the Commission in its Green Paper may affect many companies. For instance, the Commission is proposing to introduce "approved" or "registered" exporters. This may deprive many companies of GSP preferences or, at least, will result in an increased administrative burden. Therefore, companies with an interest in the EU GSP regime should solicit the European Commission to make their views known.

Changes in EU GSP regime for 2005

Products and countries subject to graduation / de-graduation in 2005	
Preferences to be abolished as of 2005	Preferences to be re-established as from 2005
Clothing products originating in Pakistan	Footwear originating in Brazil
Base metals originating in Brazil and Russia	Leather, raw hides and skins originating in India
Jewellery and precious metals originating in China	Articles of leather and fur skins originating in Thailand
Glass and ceramics originating in Thailand	
Automobiles originating in Mexico	

Countries for which all tariff preferences are to be established as of 2005		
Argentina	Costa Rica	Philippines
Brunei Darussalem	Iran	Ukraine
Belarus	Kuwait	Uruguay
Chile	Macao	
Colombia	Mauritius	

Special preferences for Sri Lanka as of 1 February 2004

On 29 October 2003, the European Commission granted Sri Lanka special incentive arrangements within the scope of the existing GSP scheme for the protection of labor rights. On the basis of the Regulation (EC) No 2342/2003, the new status of Sri Lanka is applicable as of 1 February 2004. Thus, as of February 2004 for example, the preferential tariff for textile products is reduced from 9.6% to 7.7%.

Mandatory Marketing Fees: Going the Way of the Dinosaur?

Generic marketing and promotion fees assessed on importers and producers of skins and pelts—and on dozens of other commodities—may be headed for extinction. A recent federal court decision struck down such an assessment by Louisiana on alligator farmers, ruling that the fees violate the First Amendment right to freedom of speech and are therefore unconstitutional.

The decision by the U.S. Court of Appeals for the Fifth Circuit in [Pelts & Skins, LLC v. Landreneau](#) is just the latest in

a swamp of litigation that has challenged state and federal government programs designed to support generic marketing programs. The programs typically collect fees from producers and importers of a particular product, then set up a board or council to create catchy advertising campaigns. Among the most well known examples are cotton ("the Fabric of Our Lives"), dairy products ("Got Milk?"), pork ("The Other White Meat"), and eggs ("The Incredible, Edible Egg").

In *Pelts & Skins*, the Fifth Circuit held that the Louisiana Alligator Resource Fund violates the First Amendment because the state used mandatory fees imposed on alligator hunters, farmers, and processors for generic marketing activities. The fees were collected in the form of a charge for the tag that Louisiana requires be attached to every harvested alligator skin.

Plaintiff Pelts & Skins, LLC, an alligator farmer, challenged the state government, objecting to generic marketing, which does not differentiate among particular types, qualities, or brands of alligator products. The state government responded that the program was immune from constitutional challenge because the marketing program constitutes "government speech" rather than "private speech," the former of which is subject to lower constitutional thresholds. Government speech covers instances in which the government uses general taxpayer funds to promote a particular policy.

The Fifth Circuit rejected the state's "government speech" argument on several grounds, including the fact that the marketing program was funded solely by alligator ranchers, a discrete group, rather than by general taxpayer revenues of the state of Louisiana. Further, the alligator marketing council's message was for the specific benefit of alligator ranchers, not for the benefit of the government generally.

Similar Federal Court Rulings

In 2001, the U.S. Supreme Court issued the landmark decision on mandatory marketing fee programs in *United States v.*

United Foods. In that case, a U.S. importer of **mushrooms** argued that mandatory fees imposed on mushroom imports violated its First Amendment right to freedom of speech, or in this case, the freedom not to speak if one so chooses. The Supreme Court agreed with the importer and struck down the law mandating collection of the fees, holding that mandatory assessments to support the marketing program for mushrooms unconstitutionally compelled the importer to support speech with which it did not agree.

Since the *United Foods* decision, federal trial and appellate courts throughout the country have struck down similar laws exacting fees on imports of other commodities.

- **Beef and Beef Products:** In October 2003, a full panel of the U.S. Court of Appeals for the Eighth Circuit upheld its initial ruling that a law requiring importers of beef and beef products to pay marketing fees violates the First Amendment and is therefore unconstitutional. The Eighth Circuit panel rejected the government's argument that the program amounted to "government speech" and was therefore immune from strict scrutiny by the court. Instead, the court held that, because the program was funded by importers and producers, rather than by general taxpayer funds, the program was not "government speech."
- **Pork and Pork Products:** Also in October 2003, the U.S. Court of Appeals for the Sixth Circuit held that a law exacting fees on imports of pork and pork products was unconstitutional on First Amendment grounds. The Sixth Circuit also rejected the argument that the program constituted "government speech."

Both of these decisions have been appealed to the U.S. Supreme Court. Although the Court has not yet determined whether it will hear the cases, the issue of whether the programs constitute "government speech" has not yet been squarely addressed by the Supreme Court. Until the Court does address this issue, however, the federal government and numerous states are continuing to use this argument to support other mandatory marketing fee programs.

More Cases Pending

Cases involving various commodities (including **cotton**, **avocados**, and **honey**) are now pending before the U.S. Department of Agriculture (USDA) as well as various federal courts. In the cotton case, an apparel importer is challenging the Cotton Research and Promotion Act of 1966 before the USDA, where the government is also raising the government speech defense. A hearing is scheduled for October. In addition, a class action was recently filed in the U.S. Court of International Trade (CIT) by three apparel importers, also challenging the assessment of the fees on imports of products containing cotton. The fees are collected by the Bureau of Customs and Border Protection (CBP) and channeled to the Cotton Board to pay for advertising and other promotion of cotton products. Over 100 other importers have also filed cases at the CIT.

The importers argue that the Cotton Act violates their First Amendment rights to freedom of speech—because it forces the importers to pay for generic advertising—as well as their First Amendment rights to freedom of association—because it forces the importers to associate others in the industry with whom they do not wish to associate. The government has moved to dismiss the Cotton Act case, arguing that the CIT

does not have jurisdiction to hear the case because the statute requires initial review by the administrative agency, followed by judicial review in the federal district courts (i.e., trial courts other than the CIT).

The CIT has not yet ruled on the jurisdictional issue, although the higher U.S. Court of Appeals for the Federal Circuit has already ruled in a similar case, involving **beef**, that the CIT has exclusive jurisdiction over matters involving fees collected on imports of articles into the United States. In the beef case, however, the statute did not expressly require challenges to begin at the agency. If the CIT finds that it has jurisdiction in the Cotton Act case, it would then move to the merits of the importers' First Amendment claims. In the meantime, a decision by the Supreme Court not to take up the government speech defense could foretell a major restructuring of these promotion programs.

★★★

Importers that have paid such mandatory marketing fees pursuant to promotion and research statutes should determine whether actions have already been or should be filed in federal court to strike down such statutes. With the legal landscape possibly improving for importers on this issue, the coming year looks to be an opportune time to seek to discontinue Customs' collection of the fees and seek refunds of fees already paid.

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