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WTO Trade Facilitation Agreement implementation back on track



The US and India resolved an impasse over the implementation of the World Trade Organization (WTO) agreements reached in December 2013 at the WTO's 9th Ministerial Conference in Bali, Indonesia. The Trade Facilitation Agreement (TFA) and public stockholding for food security purposes were among a package of trade deals (often referred to as "the Bali package") agreed upon at the conference. In July 2014, a group of countries led by India raised concerns about the status of the WTO's work on food security issues and blocked consensus needed to implement the TFA. Following consultations in September, the President of the US and the Prime Minister of India agreed to deal with India's food security issues separately in future negotiations and move forward with TFA implementation.

Trade Facilitation Agreement moving forward

As the first multilateral agreement to be concluded since the WTO's inception 20 years ago, the TFA would establish a standard legal instrument for implementing new WTO agreements. Originally introduced in July 2004, WTO members reached agreement at the Bali Ministerial Conference in December 2013 on a consensus text with 13 articles and a section dealing with special and differential treatment provisions. Specifically, the TFA contains provisions for expediting the movement, release and clearance of goods and addresses the following issues:

- ▶ Publication (including on the internet) of laws, regulations and procedures
- ▶ Advance rulings
- ▶ Fees and penalties
- ▶ Pre-arrival processing of goods
- ▶ Electronic payments
- ▶ Guarantees to allow rapid release of goods
- ▶ "Authorized operators" schemes
- ▶ Procedures for expediting shipments
- ▶ Faster release of perishable goods
- ▶ Reduced documentation requirements and other formalities

- ▶ Use of a single window
- ▶ Uniform border procedures
- ▶ Temporary admission of goods
- ▶ Simplified transit procedures
- ▶ Customs cooperation and coordination

Understanding on food security programs

The US and India have also reached consensus on a WTO decision addressing specific food security programs maintained by many developing countries. India and a group of 46 developing countries have continued to make a strong case for changing some parameters in the current (albeit aged) WTO Agreement on Agriculture – specifically those addressing food security and subsidy programs – to better reflect current global economic realities. Developing countries are primarily concerned with antiquated WTO rules that do not account for the fact that prices of essential food items have risen more than 250% in the past 15 years. The US-India bilateral agreement permits the WTO Director-General to intensify consultations with WTO members toward a permanent solution regarding public stockholding for food security purposes.

The agreement between the US and India also paves the way for full implementation of the WTO's TFA and shared understandings regarding the WTO's work on food security. The elements agreed upon between the US and India will soon be discussed with the full WTO membership for consensus agreement.

Watch for updates on these developments in future issues of *TradeWatch*.

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US and China recommence negotiations to expand the WTO Information Technology Agreement



While talks on the expansion of the WTO Information Technology Agreement (ITA) have been suspended three times over the past year and a half, the US and China recently announced a major breakthrough in their negotiations. Following talks at the recent Asia-Pacific Economic Cooperation summit, the United States Trade Representative announced that the US and China have reached an understanding on an expanded ITA which could pave the way for the World Trade Organization's first major tariff-cutting agreement in nearly 17 years.

The revised ITA would reduce global tariffs on products such as:

- ▶ Next-generation semiconductors
- ▶ Global positioning system (GPS) devices
- ▶ Medical equipment
- ▶ Solid-state drives
- ▶ Loudspeakers

Entered into effect in 1997, the ITA covers more than USD4 trillion in annual trade by eliminating tariffs on computers and computer software, telecommunication equipment and other advanced technology products, according to the US government. Under the new agreement, the US estimates that the ITA would cover an additional USD1 trillion worth of global information technology sales by reducing more than 200 tariff lines to duty-free. For comparison, trade in information technology products is now bigger than the current trade in automotive products and three times bigger than trade in the clothing sector.

Leaders from the US and China, as well as WTO Director-General Roberto Azevêdo, are optimistic that ITA negotiations can be finalized and presented for approval to all WTO members currently participating in the agreement by the end of 2014.

Watch for updates on these developments in future issues of *TradeWatch*.

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WTO workshop on reference pricing



The WTO Valuation Agreement Article 7.2 prohibits customs authorities from basing customs value on minimum values, arbitrary or fictitious values, a value based on the higher of two values, or a value tied to the selling price in the country of importation. These prohibited approaches are generally referred to as “reference pricing.”

In recent years, the sophistication of databases maintained by customs administrations, many of which have been established for managing risk and detecting fraud, have led to a number of situations in which database information has also been used as a reference price. Business has been very concerned about the expansion of this practice; in some countries, related-party prices that vary from reference prices in customs administration databases have been the sole basis for rejecting transaction value.

The International Chamber of Commerce (ICC) has been voicing business concerns with reference pricing, including in a letter to the WTO last year. As a result, the WTO Valuation Committee agreed to host a workshop to discuss the issue. The ICC was invited to give a short (15 minute) presentation on business perception of the issues on 24 October 2014, which included specific examples. Following direction from the WTO, however, the examples were not attributed to any particular country. ICC representatives were also allowed to listen to some of the ensuing discussion, but much of the meeting was limited to members.

No actions expected

There were no outputs from the workshop, and no items scheduled for further action. Consequently, the workshop itself is unlikely to trigger any specific actions from individual countries with respect to current reference pricing practices. Nevertheless, the fact that the WTO hosted the forum with acknowledgement that business perceives WTO members to be overstepping bounds with regard to reference pricing is at least a positive first step in raising awareness, and in tacitly reminding countries that WTO rules do restrict how valuation databases may be used.

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Argentina

New customs regime for imports of used assets for the oil and gas industry



Under the framework of the “Argentine Oil and Gas Investments Plan,” Joint Resolution No. 184/2014 and No. 294/2014 issued by the Secretary of Commerce and the Ministry of Industry, respectively, provides some flexibility in terms of administrative requirements for the import and use of used assets for the oil and gas industry.

Under Resolution 909/1994, importers are granted the right to use imported used equipment only after prior evidence of compliance with requirements set forth by the regulation. As a welcome modification, importers can now obtain a “provisory import certificate,” valid for 180 days, which allows for the use of such imported assets prior to the submission of all required documentation necessary to be granted the “definitive import certificate of used assets.”

Eligible importers must be registered in the Argentine Oil and Gas Investment Registry or be third-party suppliers of assets and/or services in favor of a company included in the registry. Application for the provisory import certificate must be made to the International Trade Under-Department of the Ministry of Economy; we note that that there are strict time requirements that must be adhered to.

While this new regime recognizes the practical needs of business, we emphasize that the administrative requirements must still be met. If the entire documentation required under Resolution No. 909/1994 to obtain the definitive import certificate of used assets has not been submitted by the expiration of the above-mentioned term, the assets must be re-exported. Moreover, other criminal and/or customs penalties could be applicable in addition to restrictions from benefitting under the regime in the future.

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Brazil

Brazilian National Congress approves possible increase of the Reintegra benefit rate



In July 2014, Brazilian exporters succeeded in reclaiming an important tax incentive that expired at the end of 2013. Provisional Measure no. 651/2014 (MP 651/2014) reinstituted the Special Regime for Reintegration of Tax Values for Exporting Companies (*Regime Especial de Reintegração de Valores Tributários para as Empresas Exportadoras*, or *Reintegra*).

Reintegra aims to encourage exports by granting federal tax credits that are retained throughout the production chain. The Provisional Measure is different from the first version of the tax incentive in that it will have no expiration date and thus will be in force under a permanent basis.

Just recently, in November 2014, Brazilian exporters had more good news as the Brazilian Congress approved the MP, converted into Law 13,043/2014. The new normative included the possibility of increasing the Reintegra rate in some exceptional cases, from 3% to 5%.

The circumstances where the increased rate will apply still need to be regulated by the government. The legislation established that there are exceptional cases under which the tax residues in the supply chain of exported products justify a higher benefit rate, supported by studies and assessments made according to government guidelines that are yet to be formalized.

Initial market forecasts estimated around BRL6 billion in returned taxes for the year of 2015 if the higher rates are approved. With a higher rate, the benefit may be even more relevant for eligible companies. In terms of having a competitive cost advantage, this benefit is almost a requirement to do business in Brazil.

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Brazil's Supreme Federal Court affirms decision to exclude ICMS from PIS/COFINS tax basis



The Brazilian Supreme Federal Court has recently affirmed its earlier decision to allow importers to exclude state value-added tax (VAT) from the taxable basis of certain federal contributions, valid retroactively for relevant transactions over the last five years. The decision is not yet official and is subject to appeals by the government; however, there is reason for optimism.

Five different taxes apply to the importation of goods into Brazil:

- ▶ Import duty (*Imposto sobre Importação*, or II)
- ▶ Federal VAT (*Imposto sobre Produtos Industrializados*, or IPI)
- ▶ State VAT (*Imposto sobre Circulação de Mercadorias e Serviços de Transporte Interestadual e Intermunicipal e de Comunicação*, or ICMS)
- ▶ Federal contributions (two) (*Programas de Integração Social*, or PIS, and *Contribuição para Financiamento da Seguridade Social*, or COFINS).

Under a March 2013 Supreme Federal Court decision, ICMS is to be excluded from the taxable basis of PIS and COFINS on imported goods. Because the decision allows taxpayers to request refunds of PIS and COFINS levied on imported goods and the decision conflicts with the Brazilian Revenue Department's interests, the National Treasury appealed the decision. On 17 October 2014, the Supreme Court denied the appeal by unanimous vote.

The decision to exclude ICMS from the taxable basis of PIS and COFINS on imported goods affects all businesses and activities where the PIS/COFINS on imports represent an effective importation cost. In this sense, taking into consideration the existing system applied on the calculation of the PIS and COFINS, every business and revenue under the cumulative system may potentially benefit (lower rate and no credits allowed). This is also important for all import operations under which PIS and COFINS are paid and there is no corresponding right to the credit registry.

The National Treasury's appeal supports restricting the retroactive application of the exclusion to past transactions so that taxpayers would not be able to claim a refund of taxes paid improperly during the last five years, which would constitute a burden on the federal government of approximately BRL15 billion.

Please keep in mind that the original decision from 2010 providing that the ICMS may be excluded from the taxable basis of PIS and COFINS is not binding as it has not yet been published in the *Official Gazette*. In addition, the National Treasury is likely to file a new appeal as a way to postpone the negative impacts on its budget.

Although the outlook appears positive, proper caution is still appropriate until the Supreme Court's final decision becomes official and is duly implemented. Only after this process is completed will importers be able to determine the exact amounts overpaid in the past that are subject to refund claims, and the legal and practical procedures to be followed for such claims. Meanwhile, companies should evaluate the opportunity and assess the amounts that are potentially at stake on a case-by-case basis. Watch for updates in future issues of *TradeWatch*.

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The non-taxation of ICMS on imports with lease contracts



The Brazilian State VAT (ICMS) is charged not only on local sales or rendering of such services, but also on the importation of goods, regardless of the type of importation adopted (definitive or temporary), since Constitutional Amendment 33/2001. However, a recent decision issued by the Supreme Federal Court may change this scenario, particularly for the oil and gas industry, which usually uses special regimes.

The Supreme Court decided on 12 September 2014 that ICMS should not be levied on the temporary import of goods when supported by a leasing agreement. The decision was issued in the Extraordinary Appeal No. 540829 (*Recurso Extraordinário* n. 540829), in which the State of São Paulo defended the levy of this tax against the decision issued by a state court in favor of the taxpayer.

In the decision, the Supreme Court stressed that there is no transfer of ownership of the goods in operations carried out through a leasing agreement, and consequently, there is no circulation of the goods that corresponds to the trigger event of the ICMS. The only possibility of the ICMS levy in this kind of operation would be if the importer acquires the goods definitively, anticipating the purchase option provided on the leasing agreement.

This decision is very relevant to the oil and gas industry since the temporary special regimes are usually supported by leasing agreements, such as with Repetro and Temporary Admission.

It is important to highlight that the Supreme Court recognized the “general repercussion” (*repercussão geral*) in this Extraordinary Appeal. This mechanism is applied in cases of high legal, political, social or economic relevance. Once general repercussion is recognized in a case, other similar lawsuits remain suspended until the final decision in the case, which must subsequently be applied by the courts hearing the other cases.

The Supreme Court's decision presents a significant cost-saving opportunity for taxpayers that import goods under leasing agreements. Affected taxpayers should consider filing a lawsuit seeking abstention from the collection of ICMS and refunds for the tax already paid over the last five years as per the favorable decision. We emphasize, however, that it would be prudent to wait until the Supreme Court's decision is published to ensure the circumstances of the lawsuit support your case.

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Canada

Canada's new guidelines for relief of interest and penalties during voluntary disclosure



The Canada Border Services Agency (CBSA) has issued Departmental Memorandum D11-6-4 entitled "Relief of Interest and/or Penalties Including Voluntary Disclosure" (D11-6-4), which contains new guidelines for voluntary disclosure of errors in customs declarations (New VDP).¹ The New VDP's scope also applies to relief of interest and penalties generally, and includes corrections to export declarations, which the prior voluntary disclosure policy (Prior VDP)² did not cover.

Interest or penalties can be mitigated under the Customs Act, the Customs Tariff and the Special Import Measures Act. This includes civil penalties payable under the various acts as well as penalty interest. The New VDP will cancel interest in the case of non-commercial importations, or reduce it to the general lower rate for commercial importations where certain conditions are met, and provide for relief in certain extraordinary circumstances, such as natural disasters, unforeseeable civil or criminal disturbances, death or incapacity, subject to certain limitations.

In addition, the CBSA will provide relief where the failure to comply with legislation is the result of CBSA actions. This includes incorrect written advice, CBSA equipment or software malfunctions, CBSA errors in processing and subsequent adjustment of information.

While these two important bases for relief should not be overlooked, the most important part of the recently released policies and guidelines is the setting out of relief from interest or penalties in voluntary disclosures circumstances.

Voluntary disclosures

Voluntary disclosures can be of two types. The first type is voluntary self-correction under section 32.2 of the Customs Act to comply with the importer/exporter obligation to self-correct declarations within 90 days of having "reason to believe" that a correction to a declaration of origin, classification or valuation is required. Those self-corrections are made by way of voluntary amends and are considered a milder form of disclosure. The CBSA will waive penalties and reduce interest from the higher specified rate to the prescribed rate on commercial goods, and waive interest in full for non-commercial goods.

The second type of voluntary disclosure occurs where an importer discovers a significant compliance error on its own, or through outside counsel or consultants, beyond the 90 days after the "reason to believe" date and either cannot correct the error within the 90-day period or a correction would require action beyond what the CBSA would accept for a voluntary self-correction. If the disclosure is accepted, the CBSA will waive or reduce the penalties and interest.

What is "voluntary"?

A valid disclosure must be voluntary and involve potential penalties or specified interest, or possibly subject the goods to seizure or the individual to legal action.

The CBSA considers a disclosure voluntary so long as a notification letter has not been issued, or the matter is not discovered as a result of a Canada Revenue Agency audit or the action of another government department. Similarly, if a company is being verified for one trade program (for example, classification), this does not preclude presenting a disclosure on another trade program (for example, valuation).

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- 1 The new guidelines and policy are included in Departmental Memorandum D11-6-4, entitled "Relief of Interest and/or Penalties Including Voluntary Disclosure," released 29 October 2014.
 - 2 The prior guidelines and policy were included in Customs Notice N-332, "Voluntary Disclosures Program," Canada Customs and Revenue Agency, 12 June 2000, and in *Customs Voluntary Disclosures Program – Information for Clients*, Client Services Division, Canada Customs and Revenue Agency, 21 December 2001.



A voluntary disclosure must be “complete” and “non-repetitive.” A disclosure will be considered “complete” when all of the following are disclosed as applicable:

- (i) All incidences of trade program(s) non-compliance for which the company could be subject to a trade compliance verification and reassessment (four years)
- (ii) All incidences of failure to report or to account for the same or similar imported goods for the six years prior to the disclosure
- (iii) In the case of exported goods, all incidences of non-compliance up to six years prior to the disclosure in addition to the current year

A voluntary disclosure must also be “non-repetitive.” The CBSA will deny a voluntary disclosure where a previous voluntary disclosure has been granted for the same compliance issue. This is not a new requirement, but is an improvement over prior draft versions of the New VDP.

While the scope of the “non-repetitive” requirement could use more guidance, it seems to be aimed at not allowing the same specific issue to qualify for disclosure on more than one occasion. Nevertheless, importers can obtain such guidance through the “no name” procedure where third parties may request, on behalf of their clients, advice on whether a potential voluntary disclosure may be granted without disclosing the name of the client. In these cases, the CBSA will issue a response and importers are given 90 days from the day they receive the letter to make their final disclosure on a named basis. The CBSA will be bound by the response it has given for 90 calendar days instead of the 60 days under the Prior VDP.

Procedures

The procedure to make a disclosure can be complicated, but essentially the process is the same as before for both corrections under section 32.2 of the Customs Act and for full voluntary disclosures. Appendix A to D11-6-4 sets out procedures for self-corrections associated with section 32.2 of the Customs Act, and Appendix B to D11-6-4 sets out procedures for more complicated situations.

Applications for relief involving extraordinary circumstances or errors by the CBSA are still fairly complicated. These are set out in the Appendix C to D11-6-4. It is important to note also that the former VDP Client Agreement Form³ is replaced by a list of information that the CBSA requires to process the application.⁴

What is missing? Limitations to the New VDP

Certain submissions presented by practitioners and the trade community to improve the Prior VDP have not been included in the New VDP:

- The wash transaction policy no longer applies. According to the “wash transaction policy,” interest was waived in its entirety where goods were not dutiable and the only issue was the Goods and Services Tax, which was recoverable in any event.

3 *Customs Voluntary Disclosures Program – Information for Clients*, Client Services Division, Canada Customs and Revenue Agency, 21 December 2001, Appendix C.

4 Such list of required information, which also includes applicable procedure, is now provided as Appendix D to D11-6-4, “Agreement for Voluntary Disclosure Application.”



- There is no relief from penalties or interest under the rules of other governmental department (OGD) requirements. There was hope that OGD requirements relief would be included in the New VDP. Considering that the CBSA administers legislation on behalf of OGDs, it would be appropriate to consider whether the CBSA should enter into discussions with OGDs to obtain the authority to provide relief.
- There is no immunity from criminal prosecution. According to the Prior VDP, in the case of accepted voluntary disclosures, the customs agency (now CBSA) would not pursue civil action and/or criminal prosecution under the Customs Act unless it was later learned that the VD was not truthful.⁵ Under the New VDP, the CBSA does not have authority to waive criminal prosecutions. Why this is different from the Canada Revenue Agency's ability to waive criminal prosecutions is unclear. This is an important change from the Prior VDP and may discourage disclosures in situations where clients perceive, or are advised of, the possibility of prosecution, even if that possibility is relatively remote.

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⁵ *Customs Voluntary Disclosures Program – Information for Clients*, Client Services Division, Canada Customs and Revenue Agency, 21 December 2001.

Mexico

Mexico's energy reforms present customs considerations



Mexico's recently initiated energy reforms will liberalize the oil and gas sector to allow foreign investment. As foreign oil and gas companies enter the market for the first time in recent history, it is important that cross-border tax planning also involve customs considerations.

Liberalization of the oil and gas industry

As background, in December 2013, the Mexican Constitution was amended as part of a comprehensive energy reform initiative in order to relax the restrictions on the oil and gas industry. The amendments provide a roadmap leading to a more competitive environment where *Petroleos Mexicanos* (PEMEX), Mexico's state-owned oil and gas company, and private entities will be able to openly compete for the exploration and production of oil and gas, as well as the sale and distribution of gasoline and diesel in Mexico.

The Constitutional amendments were the basis to expand the scope of oil and gas investment contract models with private investors. Fifteen draft laws were introduced in Congress in April 2014. Some are still undergoing the legislative process, but many have been adopted and are being implemented through additional regulations, which were published on 31 October 2014. A number of existing statutes and their regulations have been amended, or are in the process of being amended accordingly.

Historically, PEMEX has been the only entity authorized to import and sell gasoline and diesel to the general public. However, starting 1 January 2017 (or earlier, depending on market conditions), private entities will be able to import and sell gasoline and diesel to the general public in Mexico as long as they obtain the applicable import permits as well as those permits required to sell gasoline and diesel in their own facilities.

Customs considerations

Since PEMEX is state-owned and has had no competition, customs considerations – particularly with respect to duty-savings opportunities – have not been a hot topic for the energy sector. This will change as Mexico's energy sector opens up to private entities and becomes a competitive market.

Import costs can be significant. However, the current customs legislation does not establish any preferential customs regime specific to the oil and gas industry that can alleviate costs for the importation of products, such as gasoline and diesel, or for the machinery and equipment (M&E) required to distribute or sell such products in Mexico.

While current customs legislation allows for specific alternatives for the temporary import of M&E for the exploration and production of oil and gas by private entities under contracts with PEMEX, these customs regimes are limited to projects where there is a business relationship between PEMEX and the private entities performing the exploration or manufacturing activities.

Accordingly, it will be important that private entities entering the Mexican energy market proactively identify customs strategies under the current customs regulations that can benefit the industry and, more specifically, reduce the duty impact of their import operations. Considering that Mexico's energy sector is set to become very competitive, import duty savings can quickly translate into competitive cost advantages.

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Update on Mexican FTA audit program

In 2013, the Mexican tax authority (*Servicio de Administración Tributaria*, or SAT), under new leadership, initiated an ambitious free trade agreement (FTA) audit program (as reported in the June 2013 *TradeWatch*).

Over the last year, the SAT has made substantial progress in its audit efforts, such as increasing the number of companies audited. This increase was accomplished by introducing new sampling methodologies to verify FTA origin qualification. Sampling limits the review to a sample pool of transactions rather than the arduous undertaking of a comprehensive review. Reviews can thus be conducted in a more efficient and expeditious manner – for both the SAT and the company being audited. Accordingly, sampling frees up auditor resources, allowing the authorities to increase the number of audits. Additionally, the SAT has broadened the audit scope to focus on non-traditional areas, such as compliance with direct shipment requirements and duty deferral restrictions (i.e., article 303 of the North American Free Trade Agreement, NAFTA).

The SAT audit approach continues to focus on particular industry sectors. NAFTA audits, for example, are currently focused on companies that import the following goods:

- ▶ LCD screens
- ▶ Textiles
- ▶ Coaxial wires
- ▶ Steel
- ▶ Footwear
- ▶ Dairy
- ▶ Pharmaceuticals
- ▶ Paper

In the new audit environment, importers need to be prepared to support their FTA origin qualifications or risk significant consequences, including payment of omitted duties and fines. Producers exporting goods to Mexico should also expect increased scrutiny of origin determination. Particularly in the NAFTA countries, where auditors enjoy extra-territorial audit rights, producers are well advised to confirm strong origin determination processes are in place to enable them to effectively manage onsite origin verification visits and document the originating status of the goods properly and to the satisfaction of the auditors.

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Pacific Alliance – Colombia

Colombian Congress ratifies anew the Pacific Alliance after Constitutional Court rejects original ratification law



Colombia's Congress has again ratified the Framework Agreement of the Pacific Alliance (the Agreement) via Law 1721, dated 27 June 2014. This is an updated version of Law 1628 of 2013, which Colombia's Constitutional Court declared unconstitutional in April 2014, citing a number of deficiencies and irreparable procedural defects. These have been corrected and the newly adopted Law 1721 is currently undergoing the required review by the Constitutional Court.

The Pacific Alliance – composed by Chile, Mexico, Peru and Colombia – is a comprehensive mechanism for economic and trade integration that includes a cooperation and commitment component for a visa-free regime intended to increase the attractiveness of member countries' markets to the rest of the world.

The Pacific Alliance intends to form a free trade zone and eliminate 92% of customs duties. It provides for a 3.7% common tariff for certain products. Additionally, the Pacific Alliance makes ambitious proposals for market access, rules of origin, trade facilitation and customs cooperation. The agreement has strategic importance for Colombia, as the block of member countries represents a population of more than 209 million. This makes it the eighth-largest economy of the world, with a current gross national product (GNP) of over USD2 trillion and 50% of the region's trade (USD556 billion of exports and USD551 billion of imports).

The trade agreement is expected to help Colombia in many ways, including, among others:⁶

- ▶ Increasing exports by 0.9%
- ▶ Increasing the GNP by 0.7%
- ▶ Generating 44,000 new jobs
- ▶ Increasing investment by 1.4%
- ▶ Reducing the unemployment rate by 0.2 percentage points

Mexico ratified the Agreement in November 2012; Chile and Peru ratified it in July 2013. Colombia is the last signatory remaining, and once its ratification instrument is deposited, the Agreement will go into effect in 60 days. Accordingly, companies preparing to take advantage of the preferential trade benefits under the agreement are anxiously awaiting the Court's decision and for final ratification procedures to be completed.

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United States

Trek Leather decision expands customs penalty liability beyond importers of record



In September, the U.S. Court of Appeals for the Federal Circuit issued its long-awaited decision in *United States v. Trek Leather, Inc.*, 767 F.3d 1288 (16 September 2014). The proceedings were watched closely by the customs and trade community because *Trek Leather* weighed whether penalty liability for import-related activity could extend to persons other than an importer of record. The court answered that question in the affirmative, and as a result, those engaged in import-related activities should now monitor future developments to see how expansively this decision will be applied.

Penalties under 19 USC § 1592

19 USC § 1592 allows for the imposition of penalties on any person who enters or introduces, or attempts to enter or introduce, merchandise into US commerce by information which is material and false, or by a material omission. A person can be liable for such conduct when committed by negligence, gross negligence or intentional fraud. Additionally, a person who aids and abets a violation under 19 USC § 1592 may also be held liable. A person who commits a violation of § 1592 can be penalized even if the violation does not result in a loss of revenue to the government.

Until the September 2014 decision in *Trek Leather*, it was generally understood that liability under § 1592 could be imposed on (1) an importer of record, (2) a party that knowingly aided or abetted the importer of record in committing a violation, or (3) a corporate officer of the importer if the conditions for piercing the corporate veil were met.⁷

United States v. Trek Leather

The circumstances underlying *Trek Leather* date back to 2002. Harish Shadadpuri, president and sole shareholder of Trek Leather, Inc. (Trek Leather), previously held a similar position with an apparel importer, Mercantile Wholesale, Inc. (Mercantile). U.S. Customs and Border Protection (CBP) discovered in 2002 that Shadadpuri, acting on behalf of Mercantile, had provided fabric assists to Mercantile suppliers, but that the value of those assists had not been declared at entry. Mercantile admitted its failure to declare the value of the assists and tendered the unpaid duties to CBP.

In 2004, CBP discovered that Trek Leather had imported garments without declaring the value of fabric assists provided to the foreign manufacturers. Shadadpuri admitted to CBP that he was aware that Trek Leather should have included the value of the assists in the declared value. At that point, the government initiated a penalty action in the Court of International Trade (CIT) against Trek Leather and Shadadpuri, in his personal capacity. The government alleged liability not only for the unpaid duties, but also for penalties resulting from Trek Leather's and Shadadpuri's failure to declare the value of the assists as the result of their fraud, gross negligence or negligence.

The CIT ruled in favor of the government, determining that both Trek Leather and Shadadpuri acted with gross negligence in failing to declare the value of the assists. Trek Leather conceded its liability for gross negligence, but Shadadpuri argued to the CIT that he could not be held liable under § 1592 because he did not aid and abet Trek in committing its violation. The CIT disagreed, concluding that liability under § 1592 is not limited to importers of record or those who aid and abet them, but that Shadadpuri was himself a "person" subject to liability for his own conduct under § 1592.

⁷ These aspects of the scope of liability under § 1592 were discussed in *United States v. Hitachi Am., Ltd.*, 964 F. Supp. 344 (CIT 1997) and *United States v. Hitachi Am., Ltd.*, 172 F.3d 1319 (Fed. Cir. 1999).



Shadadpuri had responsibility for examining the documents that would support Trek's entries, and for forwarding these documents to Trek's brokers. Because these documents did not include the value of the assists, and given Shadadpuri's past violation of the same requirement, the CIT concluded that Shadadpuri had committed his own violation of § 1592.

Shadadpuri appealed the CIT's decision, and in July 2013, a three-judge panel of the U.S. Court of Appeals ruled in favor of Shadadpuri, reversing the decision of the CIT. The court stated that while the word "person" generally has a broad meaning, it must still be read in the context of the statute within which it appears. Section 1592, the court concluded, does not simply prohibit a person from making false statements to CBP, but it prohibits them from doing so in connection with the entry of goods into the US, and in such a way that it may impact CBP's assessment of duties.

The government then asked the entire Court of Appeals to rehear the appeal, and in a rare occurrence, the court granted the request. The court issued its decision following this rehearing on September 16, 2014, upholding the decision of the CIT. In its decision, the court relied heavily on the fact that § 1592 allows for penalties against persons who "introduce" merchandise into the US, and concluded that this includes a broader range of activities than those involved in simply making entry. The court stated that Shadadpuri's actions, as described by the CIT, constituted their own violation of § 1592. The court also made clear that its decision did not require piercing the corporate veil, and that Shadadpuri's liability was not premised on his role as an officer or owner of Trek Leather. Rather, Shadadpuri was held personally liable because in approving invoices that failed to include the price of the assists, and providing those invoices to Trek's customs broker, he personally committed a violation of § 1592.

The scope of § 1592 liability following *Trek Leather*

Trek Leather did not limit any of the previously established bases for liability under § 1592. Importers of record who violate § 1592, and those who aid and abet them in those violations, will still be subject to penalties, as will officers of importers when the corporate veil is pierced. The difference after *Trek Leather* is that people not falling into those categories, but still involved in the importation process in such a way that they can be said to have "introduced" merchandise into the US, may also be subject to penalties for violating § 1592.

The court cited an old U.S. Supreme Court decision in defining Shadadpuri's conduct as within the scope of the term "introduce," stating that liability could result from actions taken before the filing of any formal entry papers to effectuate release of imported goods. Additionally, providing critical documents (such as invoices upon which valuation declarations will be based) for use in the preparation and filing of entry papers could result in liability if determined to violate § 1592. Unfortunately, the court in *Trek Leather* expressly stated that it would not attempt to define the full reach of the term "introduce," and it remains to be seen how far CBP, or the courts, might take the interpretation.

The full scope of changes made to the penalty landscape in the wake of *Trek Leather* will be defined in customs enforcement actions and court decisions over the coming years. In addition to monitoring these developments, importers and those involved in the importation process should continue to strive to develop controls and processes that allow for full and accurate information to be reported to CBP mindful of this expanded enforcement ability.

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C-TPAT exporter program implementation update

U.S. Customs and Border Protection (CBP) has continued to move forward in expanding the Customs-Trade Partnership Against Terrorism (C-TPAT) program to also apply to exporters. Following the agency's announcement of a new C-TPAT for Exporters program (see the September 2014 issue of *TradeWatch*, "US CBP continues adoption of AEO concept with announcement of two new programs"), CBP has released a two-page Fact Sheet on the program that highlights key incentives and eligibility requirements. As many of the highlighted incentives are aimed at promoting trade facilitation for participants, the C-TPAT for Exporters program should interest high-volume exporters whose supply chains could be made more globally competitive.

While the new program was initially announced as a pilot program, CBP has since clarified that inclusion of exporters in the C-TPAT program is not a pilot per se but, rather, there will be a slow implementation. CBP has indicated that it will likely not begin to accept C-TPAT applications from exporters until around March 2015; however, US exporters should begin now to gauge the appropriateness of their participation.

Anticipated incentives

With this new program, certain eligible exporters will have access to the incentives of the C-TPAT program for the first time. The CBP Fact Sheet has identified the following as some of the incentives that exporters in the program can receive:

- ▶ Access to the benefits under Mutual Recognition Arrangements (MRA) from foreign customs authorities that may provide heightened border facilitation at foreign ports for C-TPAT participants

- ▶ Priority processing of C-TPAT shipments
- ▶ Reduced examination rates and time
- ▶ Access to an individually assigned C-TPAT supply chain security specialist
- ▶ Eligibility to attend C-TPAT training and seminars⁸

Program eligibility

As indicated when the program was announced in July, access to the C-TPAT Exporter program will be limited to entities that meet CBP's definition of an exporter, which is "a person or company who, as the principal party in interest in the export transaction, has the power and responsibility for determining and controlling the sending of the items out of the United States." In addition, the CBP Fact Sheet has clarified that potential participants will be required to:

- ▶ Have a documented export security program and a designated officer or manager who will serve as the main C-TPAT liaison with CBP
- ▶ Provide CBP with a comprehensive C-TPAT supply-chain profile, which indicates how the exporter will ensure internal policy supports and meets C-TPAT security criteria
- ▶ Conduct a comprehensive risk assessment of their international supply chains, ensure adequate physical security requirements and work with existing and new business partners to maintain that level of security
- ▶ Have an acceptable level of compliance for export reporting for the latest 12-month period and be in good standing with relevant departments of the US federal government

⁸ "Fact Sheet," U.S. Customs and Border Protection, September 2014, www.cbp.gov/sites/default/files/documents/C-TPAT%20Exporter%20Entity%20Factsheet.pdf.

⁹ "Customs-Trade Partnership Against Terrorism Export Eligibility Requirements," U.S. Customs and Border Protection, 9 July 2014, www.ctpat.com/ctpat/Exporter-CTPAT-Eligibility-Requirements-and-Minimum-Security-Criteria.pdf.



We will continue to monitor the implementation of this program and highlight factors that potential C-TPAT Exporter participants should take into consideration. Watch for further developments in future issues of *TradeWatch*.

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China-Australia FTA

China-Australia free trade agreement negotiations concluded



On 17 November 2014, Australian Prime Minister Tony Abbott and Chinese President Xi Jinping officially concluded negotiations for the China-Australia Free Trade Agreement (ChAFTA). A formal Declaration of Intent was then signed by Australian Trade Minister Andrew Robb and Chinese Minister of Commerce Gao Hucheng, in Canberra, Australia. This is a significant agreement for both countries, as two-way trade between China and Australia was AUD150.9 billion in 2013 and China is Australia's largest trading partner.

The full text of ChAFTA is yet to be released; however, some key expected outcomes include:

- ▶ The immediate removal of 85% of all tariffs into China on Australian goods, with phased elimination to eventually reach elimination of 95% of all tariffs
- ▶ Removal of tariffs on Australian agricultural products, including dairy, beef, sheep and horticulture
- ▶ The elimination of tariffs on many Australian minerals, including coking coal, alumina, zinc, nickel, copper and uranium
- ▶ That Chinese imports into Australia will also receive the benefit of preferential tariffs – while official numbers have not been released, Australia's most recent free trade agreements provided for immediate tariff elimination on over 80% of eligible importations

We note that for ChAFTA to enter into force, both Australia and China must first complete their respective domestic ratification processes. After this occurs, Australia and China will exchange diplomatic notes to certify that they are ready for the agreement to enter into force. We expect that this process could take anywhere from 6 to 12 months to complete.

If you do business in both Australia and China, this is a timely reminder for you to consider whether any of the goods you purchase are entitled to receive the benefit of preferential status. Importantly, start considering whether you have appropriate relationships with your suppliers to obtain relevant documentation; whether you have offshore distribution centers or warehouses that may dilute FTA benefits; and whether you have internal systems with the ability to identify which goods are entitled to preference and which are not.

In our experience, those businesses that benefit most from FTAs are the businesses that are well prepared for implementation and have documentation and processes in place to capture savings from day one. Now is the time for you to start considering whether you may benefit from ChAFTA and what business processes may need amending prior to implementation to ensure that the benefits of ChAFTA can be maximized.

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China

China Customs' new enterprise rating criteria



In line with the World Customs Organization (WCO) SAFE Framework of Standards to Secure and Facilitate Global Trade, the General Administration of Customs (GAC) has recently introduced new interim measures as GAC Decree No. 225 for the entity credit/risk management in replacement of the previous rating mechanism.

Traditionally, China Customs implemented a rating system (i.e., AA, A, B, C and D), which rewarded higher-rated companies while placing restrictions on lower-rated companies. The mechanism attached importance to a company's track record, but was also largely dependent on the size of the company.

With the increasing growth of international trade in the past few decades, it is clear that China Customs is determined to align the traditional rating system with international standards, such as the US C-TPAT and Importer Self-Assessment programs, and Authorized Economic Operator (AEO) programs found in other countries. As per GAC Decree No. 225, effective from 1 December 2014, enterprises will now be classified into the following four categories according to their credit standing instead of the five categories traditionally used by China Customs.

Proposed categories in GAC Decree No. 225	Requirements/conditions
Advanced authorized enterprises	"Enterprise standard for Customs authorization"
Normal authorized enterprises	
General enterprises	<ul style="list-style-type: none"> ▶ An enterprise initially registered with Customs ▶ An authorized enterprise no longer meeting the conditions to classify as an authorized enterprise but not falling to the level of a blacklist enterprise ▶ An enterprise under the administration applicable to blacklist enterprises for one year, but without any further violation as a blacklist enterprise during that year
Blacklist enterprises	<ul style="list-style-type: none"> ▶ Committing a smuggling crime or act ▶ Failing to pay taxes/penalty payable/confiscatory sum in due time ▶ Having a declaration error rate for the previous quarter that is higher than the double of the national average for the same period ▶ Refusing to collaborate with Customs' investigation when the enterprise is suspected of violating Customs regulations, and/or being suspended from the customs declaration process ▶ Acquiring illegal benefits or engaging in fraudulent behaviors ▶ Other circumstances identified by Customs



Similar to the AEO programs implemented by the EU and countries in other regions, the new interim measures propose examining and determining the category of credit/risk for each enterprise from the following four perspectives:

1. Internal management
2. Proven financial solvency
3. Appropriate record of compliance with customs requirements
4. Appropriate security and safety standards

Notwithstanding the above general perspectives, the GAC has not yet announced the specific “enterprise standard for Customs authorization” that an enterprise must meet to be classified as an “advanced” or “normal authorized enterprise” (refer to table above).

With regard to the authorization process, we have observed that the interim measures allow an enterprise to engage an external third-party professional (as an additional option to Customs) and to use its assessment as a reference. This is an interesting development which is notably different from the previous mechanism where the assessment was dependent solely on the audit by Customs.

In addition, a “normal enterprise” is likely permitted to apply for “advanced authorized enterprise” status directly rather than having to first apply for “normal authorized enterprise” status (note, however, that an enterprise classified as a “blacklist enterprise” must first be classified as a “normal enterprise” before applying for authorized enterprise status). In the previous system, an enterprise would have to follow the order of the rating system – for instance, an enterprise rated B would first have to achieve an A rating before applying for AA status. This change will decrease the time it takes to achieve the highest status for those companies working to improve compliance.

Authorized enterprises (advanced and normal) will be granted mutual recognition by customs in other countries that have implemented AEO programs. In addition, authorized enterprises will enjoy benefits including, but not limited to, the following:

Benefits	Advanced authorized enterprises	Normal authorized enterprises
Lower inspection rate for imported and exported goods	X	X
Simplified examination procedures for document on imported and exported goods	X	X
Priority in handling customs clearance formalities for imported and exported goods	X	X
Other administrative benefits as specified by the GAC	X	X
Verification and release formalities shall be handled before the confirmation of the categories, customs valuation and places of origin of the imported and exported goods or the completion of other customs formalities.	X	
Customs designates coordinators for the enterprises.	X	
Enterprises engaged in processing trade shall not be subject to the bank deposit account system.	X	
Measures for clearance facilitation will be provided by customs in the countries or regions under mutual recognition of AEO.	X	



In contrast to the above benefits, the “blacklist enterprises” are subject to the following administrative measures:

1. Higher inspection rate for imported and exported goods
2. Careful examination of documents on imported and exported goods
3. Special supervision on the processing trade and other processes
4. Other administrative principles and measures as specified by the GAC

While the purpose of these changes is to align China's rating system with international standards, it is unclear at this time how these changes will be implemented in practice. As a result, it will take time for businesses to see the effects on their actual operations. Multinational companies with operations in China should keep monitoring changes in this area closely.

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Japan

Proposed GSP changes to benefit the textile industry



The Generalized System of Preferences (GSP) is a trade program that aims to assist the economic development of developing countries by granting preferential access to the Japanese market with zero or reduced customs duty rates for certain qualifying products from such countries. To qualify for preferential access, the goods are required to satisfy product-specific origin criteria.

A significant relaxation of the origin criteria for knitted apparel of Chapter 61 (articles of apparel and clothing accessories, knitted or crocheted) is currently under consideration for implementation on 1 April 2015. If implemented, the new origin criteria will grant duty-free access to certain knitted apparel from designated “least developed countries” (LDCs) that currently do not qualify for benefits due to the inability to meet the strict origin criteria.¹⁰

Current and proposed origin criteria for knitted apparel

Despite the generous preferences granted, importers have not significantly utilized GSP for knitted apparel, in part due to the historically strict origin criteria, which requires the use of originating yarn and/or originating fabric. As a result, goods sewn from imported fabric could not qualify for GSP.

The proposed rules will require that the articles be sewn in the LDC from originating or non-originating fabric. This change in the rules means that goods sewn in an LDC from imported fabric can qualify for GSP preferences, if the proposed rules are implemented.

GSP preferences for knitted apparel

Japan grants considerable preference to knitted apparel of Chapter 61 from LDCs:

Items	MFN duty rate	GSP rate (LDCs only)
Knitted garments (overcoats, jackets, sweaters, shirts, trousers, skirts, etc.)	5.4%-10.9% (Majority is 7.4%-10.9%)	0%
Knitted clothing accessories (gloves, socks, scarves, neckties)	5%-8.4%	0%

¹⁰ As of 1 April 2014, 47 countries are designated as an LDC for the purpose of the GSP program, including Bangladesh, Burma, Cambodia and Nepal. While some preferences under Chapter 61 are also extended to developing countries, they are very limited.



	Rules effective up to March 2011	Rules effective from April 2011	Proposed rules
Use of originating yarn	Required	Not required	Not required
Use of originating fabric	Required	Required	Not required
Sewing	Required	Required	Required

The proposed rules will bring the origin criteria in line with the criteria used under the EU and Canada GSP programs, and would give the manufacturer more flexibility in the procurement of fabrics while still qualifying for GSP benefits. This will also resolve the disparity in Japanese GSP origin criteria between knit and woven apparel (under current rules, woven apparel only requires sewing from originating or non-originating woven fabrics).

Keep watch

The proposal to relax the GSP origin criteria for knit fabrics is raised in the context of the annual tax reform discussions. Based on prior years, a summary of tax reforms is expected to be made public in late December 2014, and the Tax Reform Law passed in late March 2015, with the new rules generally applicable from 1 April 2015.

Watch for updates in future issues of *TradeWatch*.

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Urgent need for new legislation for customs disputes



Based on our experience and a comparison of the disputes process for customs in contrast to income tax, it is clear that importers and manufacturers of goods subject to excise tax are far worse off for customs purposes than for tax purposes. With the Customs & Excise Act 1996 currently under review, greater fairness needs to be introduced into the legislation for these impacted businesses.

The following features of the customs disputes process illustrate the current significant imbalance:

- Once Customs has amended an assessment, the importer has just 20 working days to appeal to the Custom Appeal Authority regarding an assessment amended by Customs. The following approach prescribed for tax purposes appears very generous in comparison:

Stage of dispute (for a Commissioner-initiated dispute)	Time period
Notice of Proposed Adjustment (NOPA) issued by the Commissioner	Within 4 years of the self-assessed tax position
Notice of Response (NOR) issued by the taxpayer	Within 2 months of the NOPA being issued
Conference stage	An offer of a facilitated conference is made generally 1 month after the NOR; average timeframe for the conference is 3 months
Disclosure notice and Statement of Position (SOP) issued by the Commissioner	Usually within 3 months from the end of the conference stage
SOP issued by taxpayer	Within 2 months of the Commissioner's SOP
Addendum to the Commissioner's SOP may be issued by the Commissioner	Within 2 months of the taxpayer's SOP
Addendum to the taxpayer's SOP may be issued by the taxpayer provided the Commissioner agrees to the issuance (to which the Commissioner will generally respond)	Within 1 month of the Commissioner's Addendum
Review by the Disputes Review Unit (the decision of which is binding on the Commissioner, but not on the taxpayer)	Generally 3 to 4 months to issue its decision

The above applies before cases are heard by the Taxation Review Authority (broadly the tax equivalent of the Customs Appeal Authority) or High Court. It is possible to agree with the Commissioner in certain circumstances to truncate the dispute at the conference stage and proceed straight to the litigation stage.

One of the major benefits of the disputes process for tax purposes is the ability for the taxpayer and Inland Revenue to agree on the facts, key issues and propositions of law that need to be considered by the Disputes Review Unit of Inland Revenue. Further, the Commissioner and Taxpayer are free to settle their dispute at any stage prior to the litigation stage, as well as after litigation has commenced. The power to settle is grounded in specific sections of the Tax Administration Act, supported by case law.

For customs purposes, businesses may find Customs officers are overly eager to issue amended assessments because after an amended assessment has been issued, they know the odds are stacked in their favor. This is reflected by the low number of cases heard before the Customs Appeal Authority.

While Customs may not have the resources to set up its own Disputes Review Unit, the review of the Customs & Excise Act 1996 provides an opportunity for greater fairness to be introduced into the legislation for businesses.



- ▶ The importer still has to pay the reassessment regardless of whether an appeal is made to the Customs Appeal Authority. In other words, pay now and argue later. In 2012, this resulted in the unusual situation of a business obtaining interim orders from the High Court restraining the Comptroller of Customs from making an assessment of duty. Had these orders not been granted, the obligation to pay a significant amount of duty would have not allowed the substantive issues at stake to be considered by the courts. This does not need to happen for tax purposes. This is because the tax that is being disputed does not become payable until the dispute is resolved, allowing for taxpayers to challenge reassessments made by Inland Revenue without immediately funding the disputed amounts of tax.
- ▶ The final nail in the coffin for importers and manufactures of excisable goods is “additional duty,” which is the equivalent of interest charged by Inland Revenue for tax purposes. Additional duty is initially 5% of the unpaid duty and then it compounds at 2% for each subsequent month the amount of duty (including additional duty) remains unpaid. While the rate of interest for tax purposes is currently higher, at 8.40%, the compounding nature of additional duty means that an interest bill for customs purposes could end up higher than it would for tax purposes.

The lack of a statutory dispute resolution procedure that occurs prior to reassessments being issued for customs disputes, like there is for tax disputes, makes it critical to ensure that your customs position is managed proactively both before, to prevent a problem, and once questions have been asked by a Customs officer.

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Europe, Middle East and Africa

European Union

Union Customs Code: European Commission issues second preliminary draft of delegated and implementing acts



In October 2013, the Union Customs Code (UCC) was jointly adopted by the Parliament and the Council, although most provisions will go into force as of 1 May 2016. Thereafter, the Community Customs Code, which currently still applies, will be repealed. The European Commission (Commission) has been assigned with the task of ensuring that the delegated and implementing acts enter into force sufficiently in advance to allow EU Member States to implement the UCC in a timely manner.

In the March 2013 edition of *TradeWatch*, we touched upon the UCC and the first preliminary draft of the implementing acts. We highlighted the key issues, like customs valuation and Authorized Economic Operator (AEO), which were defined by the Commission in the first draft of delegated and implementing acts.

The Commission has recently issued a second preliminary draft of a selection of titles of the delegated and implementing acts, which include:

- a) Title I (general provisions), more specifically Sections 1 to 4 of Chapter 2
- b) Title II (factors on the basis of which import or export duty and other measures regarding trade in goods are applied)
- c) Title III (customs debt and guarantees)

The comment period for the second draft of the delegated and implementing acts has ended. Further titles will be issued in due course with the complete review of the draft texts expected to conclude by the end of 2014. Below we briefly discuss the more notable topics in the context of the second preliminary draft.

'First sale for export' is still restricted

The second draft of the implementing acts does not introduce any changes in the wording of the first draft regarding the transaction on the basis of which the customs value is determined. The value of the goods is to be "determined at the time of acceptance of the customs declaration on the basis of the transaction occurring immediately before the goods are declared for free circulation." This will significantly limit the existing "first sale for export" rules according to which EU importers that meet certain requirements are allowed to declare the price paid in the earlier sale (i.e., the first sale) for customs purposes, resulting in a lower dutiable value and, thus, lower customs duty liability.

Royalties and license fees: 'condition of sale' requirements remain open-ended

The second-draft text remains unchanged from that of the first draft regarding royalties and license fees. As a rule, relevant royalties are to be added to the transaction value (i.e., customs value) of imported goods only if they are payable as a condition of sale of those goods for export to the EU. The draft implementing acts broaden the "condition of sale" determination so that royalties are much more easily included in the customs value, thus increasing the tax burden on affected traders.



When are persons deemed related?

The implementing acts outline eight cases in which persons are deemed to be related, one of which is the situation where one of them directly or indirectly controls the other.

The fact that a buyer and seller are related is not in itself sufficient to invalidate the transaction value. Where necessary, the circumstances surrounding the sale may be examined to determine whether the transaction value declared between two related parties is “at arm’s length.”

To support an “arm’s length” determination, two related persons would have to show that neither person directly or indirectly controls the other. The second preliminary draft of the implementing acts states that “one person is only deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.” Without this legal or operational position to exercise restraint or direction, a person does not succeed in the direct or indirect control over another person. This is a welcomed clarification, as it seems to limit the scope of an open-ended provision. Under the current legislation in force, this clarification is included as a note to Article 143 of the customs code implementing provisions.

AEO: ‘practical standards of competence’

The second preliminary draft of the implementing acts includes minor textual changes regarding the conditions for granting AEO authorization for customs simplifications, more specifically the “practical standards of competence.”

Companies granted AEO authorization for customs simplifications may benefit from certain simplifications (which are still to be specified by the Commission in delegating acts). In order to be granted with this authorization, companies have to meet certain criteria, one of which includes the “practical standards of competence or professional qualifications directly related to the activity carried out.” The criteria for granting the authorization are further specified in the draft implementing acts.

The proposed implementing acts state “a minimum of three years practical experience on customs matters” or an “application of a quality standard adopted by a European standardization body.” In addition to professional qualifications, the draft implementing acts refer to an applicant who has “undertaken training and passed an examination or, depending on the activities carried out, can present a certificate of completion, consistent with the extent of his involvement in customs activities, covering customs legislation.”

The above criteria and the modalities as outlined in the draft implementing acts represent a major restriction for granting the authorization compared to the current situation.

Final thoughts

Although the Commission has implied that the draft implementing acts are preliminary and open to additional stakeholder input, certain aspects are cause for concern. Watch for further developments in future issues of *TradeWatch*.

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The European Court of Justice to rule on part consignments originating in GSP beneficiary countries



Importers of goods from Generalized System of Preferences (GSP) beneficiary countries into the EU whose products are blended with other part-consignments en route may have to restructure their supply chain planning in the near future to continue to benefit from preferential duty rates. The European Court of Justice (ECJ) is expected to issue a preliminary ruling (Case No. C 294/14) in 2015 regarding compliance with the “same products” requirement under the GSP in similar situations.

Background: a ‘new simpler and more flexible rule’

To import goods into the EU at a reduced or zero rate of duty under the EU GSP scheme, the imported products must be the same products as those exported from the GSP beneficiary country of origin. This provision under Article 74(1) of Commission Regulation (EEC) No 2454/93 (Customs Code Implementing Provisions, CCIP) was originally introduced to reduce the practical constraints of the previous rule, which required evidence of direct transport to the EU. In practice, some goods that were accompanied by a valid proof of origin could not actually benefit from preference due to the direct transshipment rule. For this reason, the European Commission introduced “a new simpler and more flexible rule” which provides that goods presented to customs upon declaration for release for free circulation in the EU are the same ones that left the beneficiary country of export and have not been altered or transformed in any way en route.

The underlying case

In the case at hand, several part-consignments of crude palm kernel oil were exported from different GSP countries of origin, i.e., Colombia, Panama, Costa Rica and Ecuador. Subsequently, the part-consignments were imported into the EU through Germany, however, not as physically separate consignments. Instead, they were all exported after being poured into the same tank of the cargo vessel and imported into the EU as a mixture in that tank. In this respect, the importers could show that no other products (products not eligible for preferential treatment) had been put into the tank of the cargo vessel during the time the products were being transported until they were released for free circulation. The German court (*Finanzgericht Hamburg*) has lodged a request with the ECJ to determine whether the factual condition as outlined in Article 74(1) CCIP (whether the imported products are the same as those exported) has been met in the underlying case. If so, the product should have been subject to a duty rate of zero instead of 6.4%.

Practical implications

The factual condition is not interpreted uniformly in the EU. For instance, customs authorities from certain EU countries would consider the mixture of crude palm kernel oil as being the same product as the product that was exported from the beneficiary countries, whereas Germany has a more restrictive approach, according to which an oil blend consisting of several part-consignments can no longer be considered “the same product.” The ECJ’s judgment will most likely result in a more uniform application of Article 74(1) CCIP. However, it can also have a significant impact on companies importing goods originating in GSP countries into EU Member States with a more flexible approach, e.g., the Netherlands, where the outcome of the case may introduce a restriction on blending part-consignments for export to the EU. However, hopefully the ECJ will allow the more flexible approach, since it would accommodate the practical needs of businesses much better.



The underlying case shows that businesses should act carefully where goods from beneficiary countries are exported to the EU, especially if these goods are not directly shipped to the EU, or in case these products are blended with other part-consignments en route. The above would apply to both goods originating in GSP countries and goods originating in countries that have concluded free trade agreements with the EU. In this regard, free trade agreements often use the more restrictive direct transport rule and customs may reject the import at lower preferential duty rates despite the fact that the importer is able to submit a valid proof of origin (e.g., a certificate of origin). Hence, careful supply chain planning is key.

We expect the hearing and, where applicable, the opinion from the Advocate-General by mid-2015.

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Excise duties on alcohol and alcoholic beverages: continued scrutiny

The Dutch Supreme Court recently lodged prejudicial questions to the ECJ in two cases that involve the tariff classification of alcoholic beverages – specifically, fermented-alcohol-based beverages. In essence, the question is whether the products fall under heading 2206¹¹ or heading 2208¹² of the Combined Nomenclature (CN).

These cases are significant, as the ECJ's judgment on the proper classification will also shed light on the applicable rate of excise duty – i.e., whether the products are considered “intermediate products” or “ethyl alcohol” for excise duty purposes. Given that the excise duty rate connected to “ethyl alcohol” can be significantly higher than the rate for “intermediate products,” the outcome may have financial consequences for companies across the EU engaged in the production and supply of these beverages.

Excise tax implications

The EU has established a common definition for alcohol and alcoholic beverages in order to ensure the correct application of the minimum rates of excise duty applicable to those products within the Member States. This definition is linked to the tariff classification of the goods for customs purposes (i.e., under the CN):

- ▶ Intermediate products: covers all products of an actual alcoholic strength by volume exceeding 1.2%, but not exceeding 22% and falling within headings 2204, 2205 and 2206 under the CN, other than beer, wine and specific fermented beverages
- ▶ Ethyl alcohol: includes all products with an actual alcohol strength by volume exceeding 1.2%, which fall within headings 2207 and 2208 under the CN

By way of example, 100 liters of an “intermediate product” with an alcoholic strength of 14% released for consumption in the Netherlands is subject to excise duty in the amount of EUR105.98; 100 liters of “ethyl alcohol” with an alcoholic strength of 14% is subject to excise duty in the amount of EUR234.04. In other words, the excise duty cost can be significantly higher, depending on the tariff classification.

Tariff classification at issue

The tariff classification of solutions of alcohol (a mixture of both fermented and distilled alcohol), water and other substances has been under discussion for years – specifically, whether such products fall under heading 2206 or 2208 of the CN.

In 2009, the ECJ provided a set of criteria on how to classify a specific type of mixture of fermented and distilled alcohol in the *Siebrand* judgment (C-150/08). The ECJ ruled that fermented alcohol-based beverages corresponding originally to heading 2206, to which a certain proportion of distilled alcohol, water and other substances have been added, resulting in the loss of the taste, smell and/or appearance of a beverage produced from a particular fruit or natural product, are classified under heading 2208 instead of heading 2206.

11 Heading 2206 of the CN covers: other fermented beverages; mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included.

12 Heading 2208 of the CN covers: undenatured ethyl alcohol of an alcoholic strength by volume of less than 80%; spirits, liqueurs and other spirituous beverages.



In two related cases, the Dutch Supreme Court has recently lodged questions to the ECJ regarding the tariff classification of alcoholic beverages:

- The first case has been initiated with reference to a retroactive assessment of excise duties. It refers to various alcoholic beverages with an alcohol percentage by volume of 14% to which sugar, flavors, coloring agents, flavoring agents, thickening agents and/or preservatives have been added, except distilled alcohol. The beverage base has an alcohol percentage by volume of 16% and is obtained by the fermentation of an apple concentrate. As a result of its purification (including ultrafiltration), the beverage base is neutral in color, smell and taste. No distilled alcohol has been added to it. The Dutch Supreme Court would like to confirm the tariff classification of both the compound beverages and the beverage base.
- The second case is not strictly about excise duties, but was brought to court after the Dutch customs authorities issued an unfavorable tariff ruling. The case refers to an alcoholic beverage with an alcohol percentage by volume of 13.4%. The beverage is produced by mixing the above beverage base with distilled alcohol, sugar (syrops), skim milk, vegetable fat and aromas. At least 51% of the alcohol content is attributable to the alcohol obtained by fermentation. The Dutch Supreme Court has posed a question about the tariff classification of this compound beverage.

In both cases, the fermented alcohol accounts for more of the alcohol content than the distilled alcohol (beverages of the first case do not contain distilled alcohol at all). This could lead to the conclusion that the beverages are classified under heading 2206 and should be considered as “intermediate products” for excise duty purposes. However, the Supreme Court has doubts about the relevance of other objective characteristics, such as the color, smell and taste of the products, which seem to correspond to those of products of heading 2208 – goods that can be considered “ethyl alcohol” for excise duty purposes.

Final comments

Most likely, the ECJ will clarify whether the underlying products should be considered “intermediate products” or “ethyl alcohol” for excise duty purposes. The outcome could potentially expand the group of beverages that are subject to higher rates of excise duty, which would apply throughout the EU. We expect the hearing and, where applicable, the opinion from the Advocate-General by late 2015.

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Turkey

New regulations regarding customs valuation treatment of royalty and license payments



The Ministry of Trade and Customs recently published Customs General Communiqué (Customs Value) (Series No. 2) in the *Official Gazette* dated 28 June 2014 (the Communiqué), which establishes new regulations under the customs law with respect to the customs valuation treatment of royalties and license fees. The Communiqué provides some clarity as to when royalty and license payments are to be included in the customs value, along with specific procedures on how importers should declare them.

In basic terms, royalty and license fees paid by the importer must be added to the price paid for the product to determine transaction value when the royalty is (1) related to the goods being valued and (2) payable as a condition of sale of the imported goods. Such additions must be based on objective and measurable data, particularly where only a portion of the royalty or license fee is dutiable.

Determining the customs treatment of royalty and license fees

Related to the goods being valued

The circumstances under which the royalty payment is related to the goods being valued has been a matter of dispute to date. This Communiqué provides some welcome clarity on this issue.

According to the Communiqué, royalty or license fees shall be deemed to be related to the imported goods if one of the following conditions is met:

- ▶ The rights transferred in the scope of the license or royalty agreement are embodied in the imported goods.
- ▶ The imported goods are manufactured by using the rights in question.
- ▶ The imported goods are linked with the brand for which the royalty or license fee is paid.

In this context, the royalty or license fee shall be deemed to be related to the imported goods under the following circumstances:

- ▶ The royalty or license fee is determined according to the price, amount or quantity of imported goods.
- ▶ The royalty or license fee is calculated according to the resale of goods, which are imported and sold in the same condition.
- ▶ The royalty or license fee is calculated on the basis of the product derived after the processing, in case of goods subject to minor processes, such as dilution, packaging or assembly after being imported.

Further, the Communiqué provides a long list of circumstances where certain royalty or license payments are deemed to be related to the imported goods, such as:

- ▶ Design rights – if the imported good contains the whole or part of the design right and represents the design, part or components of goods to be manufactured in Turkey
- ▶ Brands – if the brand is affixed to the imported goods or affixed after a minor process, such as dilution, mixing, classification, simple assembly, etc.
- ▶ Copyrights – if the imported goods contain relevant words, melodies, pictures, software, etc.
- ▶ Utility model rights or business secrets – if related to the imported goods



Payable as a condition of sale of the imported goods

One of the determining factors for the condition of sale requirement is whether the buyer can purchase the goods without making the royalty or license fee payment, even if the payment is made to a third party other than the seller. In making this determination, all circumstances concerning the sale and importation, including the link between the sales and royalty/license agreements and other relevant information, should be evaluated.

Based on the Communiqué, the royalty or license fee is payable as a condition of sale where at least one of the following conditions is met:

- ▶ A reference is made to the royalty or license fee payment in the sales agreement or relevant documents.
- ▶ A reference is made to the sale of goods in the royalty or license agreement.
- ▶ The sales agreement contains any termination provisions in case the royalty or license fee is not paid to the licensor according to the terms of the sales agreement or royalty or license fee agreement.
- ▶ The royalty or license agreement contains any provisions that prevent the manufacturer from manufacturing or selling the goods related to the rights of the licensor in case the royalty or license fee is not paid.
- ▶ The royalty or license agreement contains provisions that allow the licensor to control the production or sale between the manufacturer or the importer beyond quality control.

Objective and measurable data

In determining the customs value, additions to the price paid or payable (e.g., dutiable royalty and license fees) must be based on objective and measurable data, particularly where the royalty or license fee also covers other goods, rights or services in addition to the imported goods. In this case, an allocation can be made so that only the part of the payment associated with the imported goods is added to the customs value.

Previously, in cases where the dutiable royalty and license fees could not be calculated based on objective and measurable data, such royalty and license fees were not included in the customs value.

The latest Communiqué addresses this issue, basically stating that additions to the price paid or payable must be based on objective and measurable data; if the sales price cannot be determined under such conditions, then another method of valuation under the customs law must be applied. In other words, transaction value cannot be used.

Business considerations

The new regulation introduced under the Communiqué could have significant implications for importers. While the new rules provide clarity in some respects, there are also more grounds for the customs authorities to scrutinize royalty and license fees that are not included in the customs value. In some cases, the failure to declare dutiable royalty and license fees could constitute grounds for the customs authorities to deny the use of the transaction value method. This could be administratively burdensome and potentially result in higher customs values and, thus, higher duty payments.



Procedures for declaring royalty and license fees

The Communiqué provides the procedures for declaring dutiable royalty and license fee payments to the customs authorities, as summarized below:

- ▶ *Declaration during importation* – when the amount of the royalty or license fee is known during importation
- ▶ *Declaration with exceptional value* – when the amount of the royalty or license fee will be known after importation, a simplified procedure exists whereby the importer can make a declaration based on existing documentation and revise that amount at a later date (no longer than the evening of the 26th day of the month following the month when the deficient value accrued) with any additional taxes paid within the same timeframe
- ▶ *Estimated declaration during importation* – when the royalty or license fee should be calculated on the net or gross sales revenue or profit as stipulated in the agreements, the importer can make a complementary declaration (no later than the evening of the 26th day of the month following the month when the deficient value accrued) with any additional taxes paid within the same timeframe
- ▶ *Periodic declaration* – when the amount of the royalty or license fee is determined periodically, the importer may request permission to declare such additions to the customs value periodically (no later than the evening of the 26th day of the month following the month when the deficient value accrued)

Final thoughts

The Communiqué provides welcome clarity on a range of issues surrounding the customs treatment of royalty and license fees, in particular, specific factors for the determination as to whether the criteria are met (i.e., the payment is related to the products being valued and made as a condition of sale). Additionally, the Communiqué contains some decisions by the World Customs Organization's Technical Committee on Customs Valuation for guidance purposes.

Importers should assess their customs position with respect to royalty and license fees, keeping in mind that such payments must be determined based on objective and measurable data, and determine which declaration method is best under the circumstances.

Further, importers should be aware of interrelated issues related to value-added tax (VAT) – for instance, there can be penalty implications when such amounts were declared for VAT purposes but not for customs purposes.

Overall, the Communiqué has put the spotlight on royalty and license fees, and importers should expect increased scrutiny by the customs authorities on this topic.

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Russia

Increased customs scrutiny



In view of the economic situation in Russia, the customs authorities have not been meeting budget targets. In response, the Federal Customs Service conducted an analysis of the collection rate of customs payments and the potential for increasing that rate in September 2014. Based on the analysis, the customs authorities have been set the following tasks:

- ▶ Increase scrutiny of the customs value of imported goods
- ▶ Perform additional checks during both customs clearance and post-entry reviews

The Federal Customs Service identified companies targeted for customs checks with the aim of increasing the collection rate of customs payments. The list of companies includes both major international organizations and small and medium-sized businesses. The customs authorities have already begun work on these tasks by carrying out inspections at company offices and warehouses.

The risk of customs verifications is concerning. Customs fines in Russia are among the highest and the imposition of such fines is not always commensurate with the seriousness of the offence committed. Given the increased risk of customs verifications and administrative sanctions, it is important that companies review their customs transactions, identify any compliance gaps and improve internal controls. Companies that discover violations may consider voluntarily disclosing the errors to the customs authorities with the payment of additional duties owed in hopes that sanctions may be avoided or mitigated. However, there is currently no legislation to provide certainty in this respect.

We note that a bill has been presented that, if passed, would provide the opportunity for the importer to voluntarily disclose errors with respect to quantity. For instance, it frequently occurs in practice that an importer discovers upon receiving goods at its warehouse that the actual quantity of goods is greater than the quantity shown in the customs declaration and consignment documents. Under the bill, if the importer identifies the violation after customs clearance of goods, he or she could avoid administrative sanctions as long as certain conditions are met.

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Supreme Court takes new position on customs treatment of license fees



The Russian Supreme Court has taken a new position on the customs treatment of license payments in the customs value of imported goods in a case in which a customs representative was held liable under Article 16.2, part 2 of the Administrative Offenses Code for failing to include license payments in the customs value (Ruling No. 57-AD14-1 of 24 April 2014). Customs law requires that license payments be included in the customs value of goods, provided that such payments are related to the subject goods and are, or will be, directly or indirectly made by the purchaser as a condition of sale for the imported goods.

The Supreme Court reviewed an agreement on the license of exclusive trademark rights in which the parties agreed on a single license fee, which was not broken down into components to differentiate amounts for goods and for services. The Supreme Court stated that, under this agreement, the rights holder has the exclusive right to use two trademarks relating to several International Classification of Goods and Services (ICGS) classes (for both goods and services). The Supreme Court noted that the lower courts did not consider the issue of the imported goods' ICGS class or whether exclusive trademark rights had been transferred in connection with this class. In ordering a new hearing, the Supreme Court emphasized that the court hearing the case should treat the fixed license payment as including cost components relating to two trademarks in different ICGS classes, including services unrelated to imported goods.

We note that the arbitration courts, in considering this issue, took a different position, finding that if a license payment under an agreement for the transfer of exclusive intellectual property rights is not broken down into components – goods or services – and is a single fixed amount or a single percentage of earnings, it should be included in full in the customs value of imported goods.

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Ukraine

EU-UA Association Agreement promises improved Ukrainian customs practices



The EU-Ukraine Association agreement (AA) has been ratified by both the EU Parliament and Ukraine's Parliament (*Верхобна Рада України* or *Verkhovna Rada* of Ukraine). While each EU Member State will have to ratify the agreement, the European Union and Ukraine have agreed to provisionally apply certain parts of the AA and have done so since 1 November 2014.

At the same time, Title IV of the AA, "Trade and Trade-related Matters" (that inter alia provides for establishment of a deep and comprehensive free trade area (DCFTA) between Ukraine and the EU; duty-free regime; and harmonization of Ukrainian technical regulations, customs legislation, sanitary and veterinary regulation with EU directives) is excluded from the scope of the AA provisional application. Notice of the DCFTA effective date is pending, though it is expected to be 1 January 2016.

While Ukraine retains its import duties for EU-originating goods in 2014-15, the EU Parliament has issued a decision that extends the autonomous trade preferences for Ukraine until the end of 2015. This means that throughout 2015, many Ukrainian goods may be imported into the EU duty-free so long as they comply with the rules of origin for preferential treatment. Formal approval by the Council of the European Union – needed before the decision goes into effect – is pending.

Ukraine is already taking preliminary measures to implement the AA. According to a recently adopted governmental resolution, during 2015 Ukrainian ministries and agencies will be directed to draft a number of legislative bills in line with European regulations and guidelines.

Thus, Ukraine will harmonize its Customs Code, legislation and regulations with EU legislation. The new European Union Customs Code, adopted in September 2013 (while the draft agreement was still being negotiated), has introduced a number of positive innovations worth implementing into Ukrainian legislation, such as centralized customs clearance, preliminary declaration of the goods and additional benefits for authorized traders.

Ukraine has started to implement modern customs techniques, including those developed by the WTO, WCO and EU (e.g., "Customs Blueprints," which are best practices for customs administrations). In particular, Ukrainian customs authorities will apply risk analysis methods during customs control of the goods, thus thoroughly checking only suspicious shipments. To facilitate border crossing and prompt release of goods into circulation, customs authorities will conduct post-clearance audits of importers and exporters.

Ukrainian rules for completion of customs declarations (which are rather complicated at present) will be brought in line with European practices and the EU Single Administrative Document customs convention.

Ukraine and the EU will develop a common methodology to deal with customs valuation issues according to the Agreement on the Implementation of Article VII of the GATT 1994, WTO and WCO guidelines. It is notable that the AA explicitly prohibits using minimum customs values. These improvements will help to reduce the number of customs valuation disputes that currently burden many Ukrainian importers.

In the case of disagreement with any decision of the customs authorities (e.g., a refusal to apply a tax relief in respect of the imported goods), the importer will be granted an opportunity to release the goods into free circulation against bond for the duration of the appeal period (currently in Ukraine such procedure exists only for disputes related to customs valuation and tariff classification).



Ukraine would also have to reform its system of penalties for violations of customs regulations (which currently amount to up to 200% of the goods' value or 300% of overpaid tax), to ensure that such penalties are proportionate and nondiscriminatory, and penalty enforcement does not unfairly delay release of the goods.

After the AA comes into force, Ukraine is expected to implement the concept of authorized economic operators (AEO) eligible for a number of simplifications during customs control and customs clearance of their goods. There is hope that in the future, EU customs authorities will recognize AEO certificates issued to Ukrainian entities.

Ukraine and the EU will create a common transit procedure for the goods moved across their borders. Implementation of a single transit document for transportation of the goods would be a significant benefit for Ukrainian logistic operators, and will help customs authorities to improve control over transit transportations.

The AA will enable joint customs control carried out by Ukrainian and European customs officers at border crossing points. This will significantly reduce the time required for the goods to cross the border.

Another important aspect of the AA concerns the relationship between customs authorities and the business community. In particular, Ukrainian authorities will always seek input from stakeholders when drafting new customs legislation, as well as discuss any other customs issues with the business community. Similarly, customs authorities and importers will be encouraged to exchange information to help facilitate international trade and timely customs clearance of the goods.

All these innovations will make Ukraine a much more attractive investment and trade destination.

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Gabon

Special import restrictions for secondhand vehicles



Just over one year ago, new restrictions were placed on the import and reception of secondhand vehicles into Gabon pursuant to Order no. 002707 MPITPTHTAT/MEEDD (27 September 2013) in order to address the influx of secondhand vehicles into the country. With recent reports of fraudulent practices to import secondhand vehicles, increased enforcement of these restrictions is expected.

Affected vehicles and importers

The vehicles targeted by the order are those pertaining to the categories B, C, D, E and F as defined by the Highway Code, namely:

- ▶ Vehicles of less than 10 seats and a chargeable total weight not exceeding 3.5 metric tons
- ▶ Vehicles transporting goods weighing over 3.5 metric tons
- ▶ Public transportation vehicles of more than nine seats
- ▶ Categorized B, C or D vehicles coupled to a tow truck weighing more than 750 kg
- ▶ Categorized B vehicles specially fit out

Basically, all secondhand vehicles are affected, defined as those in use for more than six months. Vehicles that have been in use for more than three years are forbidden for import.

Regarding legal entities, the import of secondhand vehicles is admitted exclusively when it is for the benefit of economic operators residing in Gabon. Indeed, the Order highlights the fact that importers buying secondhand vehicles abroad to sell back in Gabon must be registered to the Trade Register of their business activity, as well as the Tax Register. In addition, they must hold an approval delivered by the technical services of the Minister in charge of Transportation, stating that there is an appropriate storage space. However, individuals can import secondhand vehicles for their own use, without any restriction, but subject to the administrative formalities.

Administrative formalities

The importer of secondhand vehicles, be it an individual or a business, must provide during customs clearance originals of the following documents:

- ▶ Invoice
- ▶ Freight invoice
- ▶ Bill of lading
- ▶ Registration certificate (original registration document)
- ▶ Inspection certificate delivered by an authorized body of the exporter country
- ▶ Proof of payment
- ▶ Electronic identification (ID) for traceability of cargo
- ▶ Interpol control document
- ▶ Tax return certificate of less than three months
- ▶ Tax compliance certificate (only for legal entities)

The importer will only be delivered a Gabonese registration certificate (*carte grise*) of a secondhand vehicle after obtaining the technical visit certificate, issued by a technical control center authorized to run such activities in Gabon.

The Order insists on the fact that imported secondhand vehicles, in violation of provisions regarding the delivery of aforementioned registration certificate, will be destroyed. Costs of such destruction will be borne by the importer.

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Zambia

2015 National Budget: key proposed customs changes



On 10 October 2014, the Minister of Finance presented the national budget for 2015. In the budget address, proposed tax changes include some important customs changes.

1. *The introduction of a penalty of 5,000 penalty units (K1,000, USD160) for submission of multiple declarations for the same transaction by declarants and provision for de-registration after the third offence*

This measure introduces a penalty of 5,000 units for any duplicate entries in the Automated System for Customs Data (ASYCUDA). There are cases where declarants create a duplicate entry to evade taxes and to avoid responding to a query raised by Customs. The penalty is intended to curb this illegal practice.

2. *Amendment of the Customs and Excise Act to distinguish among the various value addition services offered by mobile phone service providers*

This measure is intended to separate tariff codes for various services offered by mobile phone service providers, such as voice, data and SMS. Currently, there is only one tariff code that covers all the various services offered by mobile phone service providers. By classifying these services into respective tariff codes and applicable statistical quantities, services will be appropriately valued for excise duty purposes.

3. *An increase in the ASYCUDA processing fee to 415 fee units (K83.00, USD14) from 278 fee units (K55.60, USD9)*

This measure is intended to increase the ASYCUDA processing fee to better reflect today's costs, as the fee has not been revised since 2007. The ASYCUDA processing fee is meant for the maintenance, replacement and expansion of automated customs services, including the provision of internet connectivity for enhanced real-time communication. This measure will increase revenue for the government.

The above proposed changes take effect from 1 January 2015.

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ED None

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