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INTERNATIONAL TRADE COMMITTEE NEWSLETTER
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WELCOME

Welcome to the ABA International Trade Committee Newsletter. We continue to make improvements in the newsletter as it gains momentum. The newsletter is intended to help the international trade committee members stay on top of international trade issues and committee activities.

ABA INTERNATIONAL TRADE COMMITTEE NEWS

The ABA International Trade Committee has remained busy in the past few months. After receiving comments from the ITC regarding its current interpretation of its Sunshine Act obligations, Matt Nicely and Matt Simpson continue to work on the Report & Recommendation. There is ongoing discussion within the ABA Committee on whether to suggest that the ITC utilize Exemption 10 under the Sunshine Act. Email Matt Nicely (mnicely@velaw.com) with comments or suggestions.

The Trade Agreements and Rule of Law Working Group continue to make progress and have reached the writing stage. The Live at Commerce and International Trade Oral History Working Groups are in the planning stages.

Look for emails and information regarding upcoming programs on Beef Trade, The Intersections of Government Contracting and Rules of Origin, and Trade Issues with China.

If you have any questions about these working groups or programs, wish to participate in them, or wish to propose other topics for Committee activity, email Co-Chairs Matt Dunne (matthewdunne@paulhastings.com) or Peggy Clarke (pclarke@pogolaw.com).

The next ABA International Trade Law Steering Committee Meeting is **Tuesday, February 13, 2007 at 12:15 pm.** The meeting location is Powell Goldstein LLP, 901 New York Avenue, NW Washington, DC 20001.

ARE YOUR CLIENTS FACING FOREIGN TRADE BARRIERS? THE UNITED STATES DEPARTMENT OF COMMERCE'S OFFICE OF MARKET ACCESS AND COMPLIANCE CAN HELP.

By Assistant Secretary of Commerce David Bohigian

When U.S. firms encounter unfair trade barriers to their business abroad, the Department's Office of Market Access and Compliance (MAC) is among the best resources the United States government can offer to address and resolve these problems. If you have clients encountering foreign trade barriers, you are encouraged to discuss the barrier with MAC, to alert your clients to the MAC's ability to assist, and to refer any complaints or inquiries to MAC's Trade Compliance Center for prompt action.

MAC is part of the Department's International Trade Administration, and coordinates its Trade Agreements Compliance program. This program was created to help American exporters resolve their foreign trade barrier problems and to open international markets to U.S. goods and services. MAC obtains access to foreign markets for American firms and workers and ensures foreign governments fully comply with trade agreements, including our bilateral free trade agreements and the WTO.

The Trade Agreements Compliance program provides access to a network of U.S. government resources designed to reduce or eliminate foreign trade barriers and improve market access for U.S. workers, exporters, and investors. Foreign trade barriers are measures imposed by foreign governments that impede investment in or exports to that country. Barriers can include customs duties and tariffs; unfair standards, labeling, testing or certification requirements; unfair government procurement regulations or practices; insufficient intellectual property rights (IPR) protection; and excessive licensing fees.

To counteract foreign trade barriers, MAC gathers together a case-management team of U.S. government experts to pursue claims by U.S. firms. These experts work with complaining companies and foreign governments to resolve problems faced by U.S. firms attempting to access a foreign market. The goal is to ensure that U.S. firms receive fair access to the market and the full benefits of all trade agreements signed by the United States and its trading partners.

Since 1999, MAC has addressed over 1,200 cases involving IPR issues, standards, and other foreign trade barriers. The two examples below from 2006 illustrate the beneficial results the Trade Agreements Compliance program has obtained on behalf of U.S. exporters.

China – Customs Misclassification: A Washington State exporter reported that its shipment of paper pulp had been detained and misclassified by China Customs, resulting in the assessment of a higher duty than the appropriate bound tariff rate. The General Agreement on Tariffs and Trade prohibits the imposition of duties in excess of a WTO Member's bound tariff rates. After receiving general guidance and information from the compliance team, the exporter negotiated the release of the detained shipment by filing a bond, a practice seldom used in China. The team then successfully worked with China Customs to have the product's classification corrected and the bond returned. As a result of these efforts, the company's exports now enter China under the correct tariff classification and the corresponding lower tariff rate.

European Union – Solid Wood Packaging Materials Regulation: The U.S. wood packaging and forest products industries were concerned about a proposed European Union (EU) wood packaging materials (WPM) rule that they claimed could affect nearly half of U.S. exports to the EU. This "debarking" rule was to go into effect March 1, 2006. The United States argued that the rule, which would require that all WPM entering the EU be manufactured from debarked wood, exceeded the international standard, was more trade restrictive than necessary, and was not supported by scientific evidence as required under WTO rules. The EU agreed to suspend its debarking requirement until 2009, allowing U.S. exports to continue entering the EU unimpeded. In the meantime, it will work through the relevant international standards setting body to assure scientific evidence is given appropriate consideration.

To learn more about MAC and the TCC's services, please explore our web site at www.trade.gov/tcc. In addition to the site's centerpiece – an on-line trade complaint hotline for exporters to identify and report export problems – it also contains the full texts of over 270 international trade and related agreements as well as Exporter Guides with brief explanations of selected agreements. The site also provides WTO standards notifications via the Notify U.S. Web site, international government procurement notices, and the opportunity to subscribe to a weekly update service called "What's New" that contains the latest information regarding U.S. and foreign government practices, trade agreements, and other trade-related developments affecting access to foreign markets by U.S. firms.

Contact Joan Morgan in the Trade Compliance Center at (202) 482-1191 or via e-mail tcc@mail.doc.gov if you have any questions or would like further information about MAC's services for U.S. exporters.

JOINT EXPORT TRADE RECONSIDERED, AGAIN

By: John R. Magnus

The attention of numerous antitrust and trade mavens has recently returned, as occurs every five years or so, to the joint export trade (JET) provisions of U.S. antitrust law -- the Webb-Pomerene Act and the Export Trading Company Act. These laws promote U.S. exports by enabling exporters to coordinate their offshore sales and marketing efforts, collectively reaching foreign markets that they might not be able to access individually. The laws do this by providing "safe harbors" for joint sales, marketing and distribution of U.S. goods and services overseas, provided there is no restraint of trade within the United States or of the export trade of any domestic competitor. The underlying policy judgment is that when U.S. companies find effective ways to cooperate in export trade, with no adverse consequences for U.S. markets, they should enjoy clear guarantees against U.S. antitrust liability when acting within the scope of these exemptions.

The JET laws attracted some attention during 2006 from the Antitrust Modernization Commission (AMC), a blue-ribbon panel of antitrust experts charged with reviewing various aspects of the U.S. antitrust regime and developing recommendations for the Congress and the President. Displaying some strong initial skepticism about the JET provisions, the AMC at the outset of its investigation process voted to study – as part of its broader review of antitrust immunities and exemptions -- the prospects for repealing these provisions.

The AMC is expected to issue its Report in the Spring of 2007. To the extent the Report addresses the JET provisions, it should give them a clean bill of health. Some relevant policy points follow.[1]

The JET laws help dozens of important American industries compete successfully in world markets and make export opportunities available to many thousands of (mostly small and medium-size) U.S. firms that could not realize them individually. They do this by facilitating the realization of scale economies, cost- and risk-sharing, reduced transportation and warehousing costs through long-term contracts with volume-based discounts, and consolidation of market research and administrative costs. All of this makes U.S. suppliers more competitive with foreign suppliers who do not face the same transport costs and market barriers facing U.S. suppliers.

The U.S. economy benefits directly from roughly $20 billion per year in added export trade, counter-acting to some limited extent the United States' large merchandise trade deficit, and also from second-order effects such as greater inland transport of products destined for export and increased export financing activity for U.S. financial services companies. The net result is that the JET safe harbors benefit the economies and citizens of virtually every U.S. State, directly and indirectly supporting hundreds of thousands of U.S. jobs.

In policy terms, the JET provisions remove an unintended chilling effect which the antitrust laws would otherwise have on JET activities the government has many compelling reasons to avoid discouraging. To be clear, the JET laws do not shelter conduct that would otherwise be actionable; this is because the conduct benefiting from the safe harbors (1) consists of efficiency-enhancing behavior that should never trigger liability under the rule-of-reason approach used for joint ventures, and (2) should in any case be considered outside the subject matter jurisdiction of the U.S. antitrust laws. But this conduct could nonetheless attract lawsuits that, however unwarranted, would be costly to defend. As a result, far less joint export trade would occur without safe harbors. This was the primary

[1] Many of the following points were conveyed to theAMC by the Joint Export Trade Alliance (JETA), a coalition of agricultural, industrial, and service sector organizations that are users of, or otherwise knowledgeable about, the JET laws. These points were echoed by various U.S. Government agencies, including the Departments of Commerce and Agriculture, as well as several broad-based industry groups such as the National Association of Manufacturers and the Committee to Support US Trade Laws. The author served as a consultant to JETA. Links to all of the comments submitted to the AMC on this issue are available at www.amc.gov.

reason for the JET laws' enactment, and remains compelling today.

The JET provisions also provide transparency and oversight through prior registration, while usefully clarifying the limits on what the U.S. antitrust enforcement agencies are (and are not) responsible for regulating in the export trade context. The underlying policy – of relying on importing country competition laws and authorities in this context -- allocates enforcement responsibility in the most sensible manner, respects the sovereignty of foreign governments, aligns U.S. policy with that of virtually every other jurisdiction with an advanced antitrust regime, and avoids costly and unnecessary policing of exporters' offshore marketing behavior.

The overseas impact of the Webb and ETC provisions is also beneficial. Foreign consumers and economies benefit when U.S. exporters can organize on an efficient scale and expand their marketing reach.

In view of these many benefits, it is not surprising that the Bush Administration has, like its predecessors, articulated strong support for the JET provisions.

And these benefits are unalloyed by any costs. In principle, anyone promoting the repeal of a validly enacted law should bear the burden of demonstrating that the law's costs exceed its benefits. Critics of the Webb and ETC Acts (yes, there are some) have not only failed to make a "net cost" showing; they have failed to identify any costs at all.

One does sometimes hear assertions that the Webb and ETC Acts cause problems for U.S. "antitrust diplomacy" or other aspects of the U.S. Government's outreach effort in the antitrust field. These claims, always anecdotal, are refuted by the assessments of U.S. antitrust officials, according to which no category of U.S. international antitrust objectives is being impeded by any cause. (The record they describe is one of uninterrupted success.) Moreover, the U.S. policy on JET reflects a broad international consensus; most foreign governments agree with and follow it themselves. The U.S. policy also acknowledges the primacy of local enforcement and respects foreign sensibilities regarding the extraterritorial application of U.S. law, while doing nothing to impede the enforcement of importing-country law against instances of anticompetitive export association behavior. Certainly, critics have never been able to identify specific U.S. objectives whose achievement is being frustrated, much less any evidence linking that result to the JET safe harbors.

Likewise unsupported is the suggestion that the JET provisions adversely affect competition in the U.S. market -- either by facilitating domestic collusion by JET participants or by making it harder to prosecute foreign cartels selling here. The notion of members of an export association – who must register with the antitrust agencies and thereafter operate in a fishbowl -- abusing the safe harbors to secretly fix prices or quantities domestically does not merit serious consideration. Nor do the safe harbors impede the U.S. government in prosecuting foreign or international cartels selling into the U.S. market; the JET laws are based, precisely, on the primacy of importing-country enforcement. As for obtaining foreign agencies' help in collecting information and pursuing prosecution in international cartel cases, the story as told by the U.S. enforcers themselves is one of unalloyed success.

Finally, there is no cost to trade diplomacy, which has also managed to proceed impressively with the JET safe harbors on the books. In fact, the ETC Act has greatly facilitated the agricultural market access discussions in various recent Free Trade Agreements by enabling U.S. suppliers of rice, sugar and other commodities to take advantage of the newly-negotiated market openings.

In sum, there is no evidence suggesting that the United States could get better cooperation in the antitrust field, in the trade field, or in any other area if we altered our JET laws. And the laws have many affirmative benefits which make their retention the only sensible option.

The AMC's view, if it chooses to express one, will surface in a couple of months.

You may email John R. Magnus at john.magnus@starpower.net with comments or questions about his article.

UPCOMING EVENTS

February 1-2, International Trade Update 2007, cosponsored by the ABA International Trade Committee and Georgetown CLE in Washington D.C. Designed for both, new practitioners and experienced trade and customs lawyers, International Trade Update 2007 provides you with critical knowledge, skills and practice development ideas. This is a unique opportunity for you to spend time with experienced lawyers and government officials exploring the up-to-the-minute developments in international trade and customs law. Not only will you receive practical tips on how to help your clients solve complex problems, but you will analyze the projected trends for the coming years through plenary and specialized break-out sessions. Visit: https://www.law.georgetown.edu/cle/calendar.cfm for more information.

February 7-13, ABA 2007 Midyear Meeting in Miami, FL. n addition to the House of Delegates convening at the Midyear Meeting to review recommendations submitted by various entities of the Association, some Section and Association committees also meet to review the business of their groups. The Midyear Meeting hosts the Nominating Committee of the House of Delegates, which nominates the Association's Officers and members of the Board of Governors. The Fellows of the American Bar Foundation hold their Annual Meeting during the ABA's Midyear Meeting. For more information visit http://www.abanet.org/midyear/2007/

February 9, Breakfast at the Bar with Demetrios J. Marantis in Washington D.C. Demetrios is Chief International Trade Counsel, Democratic Staff Senate Finance Committee. 8-9:30am at American Bar Association, 740 15th Street NW, Washington DC, 20005. Demetrios will discuss the Senate Finance Committee's agenda for 2007, the impact the Democratic Congress will have on the Bush Administration's trade agenda, and the interaction of trade and agricultural legislative initiatives.

February 13, Discussion on the 2007 Congressional Agenda, Sponsored by WITA in Washington DC. An off-the-record discussion of the trade agenda for Congress for the upcoming year. Speakers include Tim Reif, Staff Director, Trade Subcommittee, House Ways and Means Committee; Angela Ellard, Chief Trade Counsel (Republican), House Ways and Means Committee; Demetrios Marantis, Chief International Trade Counsel (Democrat), Senate Finance Committee; and Stephen Schaefer, International Trade Counsel (Republican), Senate Finance Committee. 8:30-10:00 am in the Amphitheater, Concourse Level, Ronald Reagan Building and International Trade Center 1300 Pennsylvania Ave. NW, Washington DC

May 1-5, ABA International Law Section Spring Meeting in Washington DC. Visit http://www.abanet.org/intlaw/spring07/home.html for more information.

FINALLY…

If you wish to submit an article for the International Trade Committee Newsletter, the deadline for the winter volume is April 20, 2007. All articles should be substantive in nature, under 1200 words, and relevant to current international trade events. Email ABA International Trade Committee Secretary Amy J. Stanley (amyjstanley@gmail.com) for more information.