

GLOBAL COMMERCE

Customs, CITA go to war against transshipments

IN A SERIES OF RECENT FEDERAL Register notices, the U.S. Customs Service and the Committee

for the Implementation of Textile Agreements (CITA) have virtually declared war on textile transshippers, especially those in Macau.

While the trade community no doubt applauds the government's crackdown on the importation of products whose country of origin is suspect, it must raise its collective brow in doing so.

the two agencies bend time-honored rules

These agencies have embarked on their newest crusade outside of the required and customary due process parameters, that is, providing adequate notice and requesting comment before inflicting potentially severe harm on business operations.

CITA and Customs



CUSTOMS UPDATE

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substituted a simple "heads up" for official notice. In late July, CITA issued two notices regarding the transshipment of textiles and textile products.

The first notice directed Customs to issue regulations permitting the agency to deny entry of certain textiles and textile products where the manufacturer is named in a CITA directive finding the company illegally transshipping, closed or unable to produce records to verify its production.

The second notice specifically directed Customs to deny entry to certain products exported on or after Sept. 1, 1999, and allegedly manufactured by 77 companies in Macau.

These notices were issued separate from, but related to, the constant updates to its lists of alleged transshippers in Hong Kong, Macau and Taiwan that Customs posts on its electronic bulletin board. Those lists generally include, however, companies convicted of transshipping-related violations in their home countries. The CITA list, by contrast, highlights those companies that were found to be transshipping based on U.S.

findings.

A month after CITA issued its notices, Customs issued final regulations allowing it to deny entry to textiles and textile products exported by companies named by CITA that are found to be illegally transshipping, closed or unable to produce records to verify production. In addition, under the regulation, Customs advises that it will not accept or consider additional information for use in determining the admissibility of cited textiles or textile products.

Procedure, not substance, cause tongues to talk

The most significant aspect of this regulation is not in its substance, but in its procedure. Customs noted that this regulation was issued as a final rule because it is "within the foreign affairs function of the United States." Therefore, prior public notice and normal administration procedures were deemed inapplicable.

However, even if the new restrictions are within the "foreign affairs function," there can be no question that they still greatly impact the economic

health of numerous importers.

As such, regardless of whether the government's action is cloaked in the "foreign affairs function," property was still protected by constitutional due process the last time we checked.

The one "bone" that the trade community was thrown in this new policy is that CITA will accept petitions from any party such as the importer, a listed company, etc., which believes that the agency should reconsider the inclusion of a party enumerated on the list of companies whose products are prohibited from importation. Such companies simply need to submit a petition to CITA with its name in English, full address and a list of the reasons why CITA should reconsider its determination.

Interestingly, though, CITA will also be considering the information it received from Customs in making its initial determination, as well as any relevant information from the authorities in the factories' home countries.

True to its word, though, effective Sept. 13, 1999, CITA did, in fact, direct Customs not

to deny entry to certain products exported from two companies who petitioned for removal from its list.

Importers should be aware, however, that Customs will likely require substantial proof of production and verification evidence of country of origin for these two companies, as well as any removed from CITA's list in the future.

Customs will also still apply heightened scrutiny to those companies who are removed from CITA's list but remain on its periodic lists of alleged transshippers from Hong Kong, Macau and Taiwan.

Such documentation could likely include original production records, original cutting reports, factory time cards and other extensive documentation which is often difficult to obtain subsequent to importation.

Campaign commendable, but problems still exist

Again, while this new campaign to fight transshipment is commendable, Customs, and now CITA, should be aware that

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there are flaws.

For example, Customs' lists of alleged transshippers in Hong Kong, Macau and Taiwan are based upon administrative records in those countries and include companies found to be guilty of certain transshipping violations in their home territory.

Nevertheless, we are not fully aware of the procedures used in those countries to determine such guilt. It is likely that their standards differ from ours. In fact, there is no indication that the companies on Customs' list have not simply plead guilty to certain minor violations to avoid extensive litigation with the government. In that case, these lists may be defective and do not serve their intended purpose to interdict goods of parties who are fraudulently transshipping.

Similarly, Customs' inability to secure an on-site visit with a company should not necessarily result in its inclusion on CI-TA's list. In addition, failure to

produce specified records which are "adequate" to verify country or origin should also not, in every case, result in a determination of "guilt."

The concern of the trade community is that if the cognizant agencies do not establish procedures that comport with due process and fairness now, such flaws will be continued in future programs. (As this article goes to press, a list of Taiwanese companies is being formulated.) This will hurt the program's legitimacy, as well as the interests of law abiding traders . . . and the damage suffered could be egregious.

Customs Update is a weekly column examining critical aspects of the relationship between customs agencies and importers. This column was prepared by Steven S. Weiser and Ari L. Kaplan, partner and associate, respectively, in the international law firm of Graham & James LLP, N.Y., and reflects the opinion of the writers. Please address any questions to Customs Update, Trade Desk, The Journal of Commerce, Two World Trade Center, Suite 2750, New York, N.Y. 10048.