Client Alert

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Investigation Initiated Into Use of First Sale Rule for Customs Valuation of US Imports

Areas of Interest

Global Trade

United States

The US International Trade Commission (ITC) has requested written comments from interested parties as part of a Congressionally mandated review regarding use of the "first sale rule" for valuing US imports upon entry into the United States. While no public hearings will be held, the received statements may be used as part of a report that the ITC will prepare on the issue, as required by the Food, Conservation, and Energy Act of 2008 (the "Farm Bill"). Statements must be received by the Secretary of the ITC by April 30, 2009, and conform with the provisions of section 201.8 of the ITC's *Rules of Practice and Procedure*. The report is projected to be released in February of 2010.

The first sale rule is a method of determining the transaction value of imported goods, which is typically used as a basis for calculating customs duties and other fees upon entry into the United States. "Transaction value" is defined under US law as "the price actually paid or payable for merchandise when sold for exportation to the United States." Items that are imported into the United States may have been subject to a series of sales during the importation process — e.g., from the non-US manufacturer, to an intermediary, to a US importer, and finally to the US customer.

Until recently, the US Customs and Border Protection (CBP) took the position that the US importer could value an imported good based on the price paid in the first sale so long as the sale was made at arm's length and the merchandise was clearly destined for the United States. However, in January of 2008, CBP proposed a technical change to its interpretation of tariff rules to abandon the first sale rule in favor of using the price paid in the last sale occurring prior to introduction of the goods into the United States (for more information, see our Client Alert "The First Shall Be Last: US Customs Proposal Would Broadly Increase Tariffs on US Imports"). Such a change could drastically increase the amount of customs duties and other fees paid by US importers.

In May of 2008, the Congress enacted the Farm Bill, which, in part, expressed its sense that CBP should maintain the first sale rule at least until January 1, 2011. (On August 25, 2008, CBP published in the Federal Register its decision to comply with Congress' request.) The Congress also required the ITC to submit a report to the House Committee on Ways and Means and the Senate Committee on Finance. The report must contain the following information:

- The aggregate number of importers that declare the transaction value of the imported merchandise using the first sale rule;
- The tariff classification of such imported merchandise under the Harmonized Tariff Schedule of the United States on an aggregate basis, including analysis by sector;
- The aggregate transaction value of such merchandise; and
- The aggregate transaction value of all merchandise imported into the United States during the specified period required by law.

This report will be used by CBP when considering any future changes to the first sale rule, as well as by the Congress to assess the validity of any future CBP action.

For assistance in submitting comments to the ITC or for more information about this investigation, please contact Sydney H. Mintzer (smintzer@mayerbrown.com) in our Washington office, Paulette Vander Schueren (pvanderschueren@mayerbrown.com) in our Brussels office, or Matthew McConkey (matthew.mcconkey@mayerbrownjsm.com) in our Beijing office.

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