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CLIENT ALERT

The Month in International Trade – March 2021

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This news bulletin is provided by the International Trade Group of Crowell & Moring. If you have questions or need assistance on trade law matters, please contact Jeff Snyder or any member of the International Trade Group.

Top Trade Developments

Crowell & Moring's Biden First 100 Days Series

The New Administration Begins

Join us for Biden First 100 Days, Crowell & Moring's series about the new administration. Our bipartisan team of government affairs advisors and lawyers will take you behind the curtain as we provide breaking updates and in-depth analyses on developments as they unfold.

We will dig into key issues, including COVID-19, health care, infrastructure, tax, trade, energy, environment, national security, labor & employment, subjects of congressional investigations, digital transformation, and more.

Please sign up to receive alerts, webinar invitations, breaking news analyses, and forward-looking insights.

Latest U.S. Trade Actions/Tariffs and Other Countries Retaliatory Measures

Please click here anytime for the latest actions, covered products rate increases, and effective dates.

For more information, contact: Dan Cannistra, Robert Holleyman, Bob LaFrankie, Spencer Toubia, Ru Xiao-Graham, Cherie Walterman, Sam Boone, Clayton Kaier

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Latest on Section 301 Product Exclusions

Please click here anytime for the latest actions regarding Section 301 Product Exclusions.

For more information, contact: Dan Cannistra, Robert Holleyman, Bob LaFrankie, Spencer Toubia, Ru Xiao-Graham, Cherie Walterman, Sam Boone, Clayton Kaier

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U.S. Court of Appeals for the Federal Circuit Asks Trade Attorneys to Simplify Briefs

During a recent panel at Georgetown Law's annual International Trade Update, two Federal Circuit judges urged trade attorneys to consider their audience and simplify their briefs. Although the U.S. Court of International Trade is specialized, Federal Circuit Judge Todd M. Hughes emphasized how the conversation must change when a trade matter is appealed to the Federal Circuit Court. U.S. Circuit Judge Jimmie V. Reyna also explained that the Federal Circuit receives fewer trade cases compared to other matters and thus requires more context for the judges.

Both stressed the need for background information before presenting arguments. "Explain the terminology, explain the process and the procedures," said Judge Reyna. As Judge Hughes noted, trade attorneys need to ensure his junior law clerks are able to follow the discussion of the issues. "They are critical to my decision-making process," Judge Hughes said of his clerks. "So if you write a brief that they can't understand, then you're doing yourselves a huge disservice."

For more information: Frances Hadfield, Laurel Saito

BIS Rule on Military Intelligence End User Restrictions Becomes Effective Despite White House Regulatory Review

On January 15, 2021, in the final days of the Trump Administration, BIS published an Interim Final Rule, Expansion of Certain End-Use and End-User Controls and Controls on Specific Activities of U.S. Persons, also referred to as the Military Intelligence End User rule ("MIEU Rule"). It was set to be effective March 16, 2021 but there were public indications from BIS that the rule might not go into effect as originally planned due to the 60-day "regulatory freeze,"[1] [1] which is common when there is an administration transition. However, on March 17 BIS announced a correction to the MIEU Rule, including that it became effective on March 16, 2021.

MIEU Rule Summary

The MIEU Rule implements the mandate in § 1753(a)(2) of the Export Control Reform Act (ECRA), which directs the President to impose controls on the activities of U.S. persons, wherever located, relating to foreign military intelligence services. To enact this, BIS amended the EAR to create a new section, § 744.22, entitled Restrictions on exports, reexports, and transfers (in-country) to certain military-intelligence end uses or end users.

- 744.22 includes a new list, definition, and prohibition on U.S. person activity, as summarized below:
- MIEU List. § 744.22 includes a new, non-exclusive list of military-intelligence end users as follows:
    i. *Cuba*. Directorate of Military Intelligence (DIM) and Directorate of Military Counterintelligence (CIM).
    ii. *People's Republic of China*. Intelligence Bureau of the Joint Staff Department.
    iii. *Iran*. Islamic Revolutionary Guard Corps Intelligence Organization (IRGC–IO) and Artesh Directorate for Intelligence (J2).
    iv. *North Korea*. Reconnaissance General Bureau (RGB).
    v. *Russia.* Main Intelligence Directorate (GRU).
    vi. *Syria.* Military Intelligence Service.
    vii. *Venezuela*. General Directorate of Military Counterintelligence (DGCIM).
- MIEU Definition. In § 744.22(b), MIEU is defined as "any intelligence or reconnaissance organization of the armed services (army, navy, marine, air force, or coast guard); or national guard."
- In addition to export license requirements, the new rule notably adds significant additional restrictions on "activities of U.S. persons" in § 744.6(b)(5), which states: *No "U.S. person"*[2] ***[2]*** *may, without a license from BIS, 'support' a 'military-*

intelligence end use' or a 'military-intelligence end user,' … in the People's Republic of China, Russia, or Venezuela; or a country listed in Country Groups E:1 or E:2.

In § 744.6(b)(6) 'Support' is defined as:

i. Shipping or transmitting from one foreign country to another foreign country any item not subject to the EAR you know will be used in or by any of the end uses or end users described in paragraphs (b)(1) through (5) of this section, including the sending or taking of such item to or from foreign countries in any manner;
ii. Transferring (in-country) any item not subject to the EAR you know will be used in or by any of the end uses or end users described in paragraphs (b)(1) through (5) of this section;
iii. Facilitating such shipment, transmission, or transfer (in-country); or
iv. Performing any contract, service, or employment you know may assist or benefit any of the end uses or end users described in paragraphs (b)(1) through (5) of this section, including, but not limited to: Ordering, buying, removing, concealing, storing, using, selling, loaning, disposing, servicing, financing, transporting, freight forwarding, or conducting negotiations in furtherance of.

In summary, the U.S. person restrictions prohibit a wide array of activities that BIS might consider to be "support" of an MIEU regardless of whether any items "subject to the EAR" are involved.

MIEU Rule Differs from the MEU Rule

Notable aspects of the new MIEU rule are (1) that *support* is not limited to items subject to the EAR; it applies to "U.S. person" activities wherever located. This expanded scope is distinct from the MEU Rule, which applies only to certain items listed on Supplement No. 2 to Part 744. (2) Additionally, unlike the MEU Rule that is geographically limited to end-users and end-uses in China, Russia, Venezuela, and now Burma (Myanmar) (see our prior alert here discussing Burma), the MIEU Rule applies to China, Russia, Venezuela, and the E:1 E:2 countries– currently Cuba, Iran, North Korea, and Syria.

Continued Compliance Challenges

This rule comes on the heels of further restrictions on exports to certain end-users or uses identified by different U.S. government agencies, including the Department of Defense's list of Communist Chinese Military Companies that prohibits U.S. persons from engaging in transactions in publicly traded securities with these entities. Collectively, these lists create a complex web of restrictions on a variety of entities and increase potential exposure for those transacting in any of the countries identified above. Exporters should ensure appropriate screening and compliance procedures are in place to identify possibly higher risk transactions with entities on these expanding lists.

For more information: Jeff Snyder, Chandler Leonard, Brian McGrath

UPDATE: Export Control Agencies Coordinated Response Target Russia for Prohibited Chemical Weapon Activities

In an update to our prior post published on March 8, the Bureau of Industry and Security (BIS) and State Department published additional actions against Russia in response to the poisoning of Aleksey Navalny on March 18. The new sanctions and export controls are summarized below.

Bureau of Industry and Security

The Secretary of State determined, pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (CBW Act), that Russia used chemical or biological weapons in violation of international law or lethal chemical or biological weapons against its own nationals.

- The sanctions imposed on Russia prohibit the export of national security-controlled goods and technology subject to the Export Administration Regulations (EAR). BIS already maintains controls on exports and reexports of national security-controlled items to Russia that are subject to the EAR, which include commodities, software and technology.
- Certain license exceptions will be suspended for national security-controlled items destined for Russia and most license applications for exports or reexports of national security-controlled items to Russia will be reviewed under a presumption of denial.

State Department

The Department of State amended the International Traffic in Arms Regulations (ITAR) to include Russia on the list of countries that the U.S. denies licenses and other approvals for exports and/or imports of defense articles and defense services.

The Secretary of State determined it is in the national security interest of the U.S. to partially waive the application of the sanctions required under the CBW Act with respect to foreign assistance, licenses for the export of items on the U.S. Munitions List (USML), and the licensing of national security-sensitive goods and technology. This provides notice of sanctions that will be imposed.

For more information: Jeff Snyder, Laurel Saito, Edward Goetz

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EU Export Controls on COVID-19 Vaccines – Trade Tensions Persist Despite Joint EU/UK Statement

On 24 March, the European Commission and the UK issued a short joint statement intended to ease the growing tensions around the supply of vaccines. But what does the statement really mean against the backdrop of recent developments?

In January, the Commission adopted an export control regime to curb EU exports of COVID-19 vaccines (see Implementing Regulation 2021/111 of 29 January 2021). This manifestation of the EU's new "protectionist" approach drew sharp criticism from policy makers, industry stakeholders and trade experts, who warned against unwanted consequences and the risk of retaliation (see, for instance, here, here, and here). Nonetheless, the EU executive has since maintained its stance. In early March, the

Commission backed Italy's decision to block the export of around 250,000 AstraZeneca COVID-19 vaccine doses to Australia. On 11 March, the Commission extended the new export regime until the end of June.

Among suspicions that the EU policy is covertly directed against AstraZeneca and the UK, Boris Johnson called on EU leaders ahead of the recent EU Summit to ease the export control action and, in particular, to refrain from blocking exports of the active ingredient of AstraZeneca's vaccine to the UK from the Halix site in the Netherlands. While European Council President Michel presented a united front in response, some countries, such as the Netherlands and Belgium, voiced concerns about the risk of disruption to global supply chains. (The UK has previously supplied raw materials to the EU for the BioNTech/Pfizer mRNA vaccine).

On 24 March, Commission's President von der Leyen also announced a toughening of the export control regime, referring to the "reciprocity" and "proportionality" criteria aimed at blocking exports to countries which themselves block exports or have an advanced vaccination status. And so it appears that the joint statement could be nothing more than a holding solution, with the EU executive maintaining its previous position.

For more information: Elena Klonitskaya, Vassilis Akritidis

Customs CAATSA Ruling: Apparel Protest Denied Over Forced Labor Concerns

On March 5, 2021, U.S. Customs and Border Protection (CBP) denied Dandong Huayang's protest, which asserted that North Korean nationals did not produce garments that were imported under two separate entries. CBP determined that the materials submitted by the protestant did not establish clear and convincing evidence that Dandong Huayang did not use North Korean forced labor in the manufacture of the excluded garments.

Background and Analysis

On December 23, 2020, CBP detained two entries at the Port of Newark, New Jersey, on the basis that the merchandise was subject to the Countering America's Adversaries Through Sanctions Act (CAATSA), which prohibits goods mined, produced, or manufactured, in whole or in part, by North Korean nationals or North Korean citizens is prohibited under 19 USC 1307 and cannot be entered at any ports of the United States. 22 U.S.C. § 9241a(a).

An importer who wishes to import merchandise that is subject to the rebuttable presumption under CAATSA Section 321 carries the burden to overcome the presumption by providing information that meets the clear and convincing standard. Clear and convincing evidence is a higher standard of proof than a preponderance of the evidence, and generally means that a claim or contention is highly probable. *See e.g.*, Colorado v. New Mexico, 467 U.S. 310 (1984) (holding that complainant did not meet "clear and convincing" burden of proof because it failed to show that the evidence is highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable).

Dandong Huayang cited a Worldwide Responsible Accredited Production (WRAP) report ,which determined that the manufacturer uses Chinese nationals and produced photocopies of employees' Chinese (national) Resident Identity Cards. However, CBP noted inconsistencies among other evidence, such as a photograph labeled "Production process: Packing" that

depicts Dandong Huayang workers next to a stack of boxes of personal protective equipment (PPE), specifically disposable clothing. Notably, the boxes of PPE were identical to images of PPE boxes featured in The Guardian's November 2020 exposé of North Korean forced labor used in Dandong Province factories in the production of PPE coveralls. The three-month investigation found evidence that protective coveralls ordered for the UK Department of Health and Social Care (DHSC) originated from Dandong factories, including Dandong Huayang, using North Korean forced labor.

The full CBP ruling is available here.

For more information: John Brew, Jeff Snyder, Frances Hadfield, Clayton Kaier

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CBP Finds Disposable Gloves Made in Malaysia Are Manufactured with Forced Labor

On March 29, 2021, U.S. Customs and Border Protection (CBP) is scheduled to publish a Notice of Finding that certain disposable gloves produced by Top Glove Corporation Bhd (Top Glove) in Malaysia are made with forced labor. Section 307 of the Tariff Act of 1930 prohibits the importation of goods "mined, produced, or manufactured wholly or in part…by convict labor or/and forced labor."

On July 15, 2020, CBP issued a withhold release order (WRO) on disposable gloves manufactured by Top Glove based on evidence that reasonably indicated the company was using forced labor. A subsequent CBP investigation found sufficient evidence to support the claim.

The finding grants port officials the authority to seize gloves under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 3926.20.1020, 4015.11.0150, 4015.19.0510, 4015.19.0550, 4015.19.1010, 4015.19.1050, and 4015.19.5000 made in whole or in part by Top Glove. CBP may initiate forfeiture proceedings for the covered merchandise, unless the importer can establish the gloves at issue were not produced with forced labor.

For more information: John Brew, Jeff Snyder, Frances Hadfield, Laurel Saito

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Trouble for Importers on the "First Sale" Horizon?

On March 1, 2021, the U.S. Court of International Trade ("CIT") issued an opinion that could signal a coming sea-change in whether goods imported into the United States from non-market economies (e.g., the People's Republic of China) are properly eligible for "first sale" appraisement.

CIT Senior Judge Thomas Aquilino, in *Meyer Corporation, U.S. v. United States*, Slip Op. 21-26 (Ct. Int'l Trade Mar. 1, 2021), explicitly stated that the court "has doubts over the extent to which, if any, the 'first sale' test of *Nissho Iwai* was intended to be applied to transactions involving non-market economy participants or inputs." *Meyer Corp.*, in which the court considered the proper customs valuation of 125 imported sets of cookware (pots and pans), essentially puts into question whether transactions involving Chinese parties, products or parts may benefit from first sale appraisement.

First sale treatment represents an opportunity for importers to save on duty spend where they order and purchase goods in multitiered transactions. While Customs presumes that transaction value is based on the price actually paid or payable by the importer for the goods, a viable first sale program permits the importer to declare the manufacturer's price (which, in multi-tiered transactions, is paid by a middleman or trading company), instead of the middleman/trading company's price paid by the importer. The implementation of a first sale program effectively reduces the dutiable value of imported goods.

To claim the first sale price, the importer must demonstrate that the transaction meets the standard set forth in the 1992 case at the Court of Appeals for the Federal Circuit, *Nissho Iwai American Corporation v. United States*, 982 F.2d 505 (Fed. Cir. 1992). Based on *Nissho Iwai*, a first sale claim requires (1) *bona fide* sales that (2) are clearly destined for the United States and that (3) are transacted at arm's length, absent any distortive non-market influences that affect the legitimacy of the sales price. In *Meyer Corp.*, the CIT essentially rearticulates the rule to require (1) *bona fide* sales that (2) are clearly destined for the United States, which (3) are transacted at arm's length; however, because the goods were produced in China, which is a non-market economy, the court questioned whether and how the importer could establish the manufacturer's price could be absent any distortive nonmarket influences. Historically, U.S. Customs & Border Protection ("CBP") and the courts have applied the statutory tests for transaction value (e.g., circumstances of sale) to determine if a product sold by a Chinese manufacturer is at arm's length, and have not examined potential distortive non-market factors. For example, if an importer buys a product directly from an unrelated Chinese producer, the price paid by the importer is presumed to be the appropriate customs value under the transaction value method, and CBP need not consider China's status as a non-market economy. *Meyer Corp.* casts doubt on how to determine transaction value when buying product from a Chinese entity.

In *Meyer Corp.*, the court stated that, given China's status as a non-market economy, the real costs of inputs were suspect. The court identified concerns regarding market-distortive influences based on, e.g., the lack of financial statements, without which "the court has no concept of the extent to which the finances of the Meyer group units are truly independent 'silos' of one another, or the extent to which there might have been state influence or assistance to some degree." While the plaintiff, as a subsidiary to its parent corporation, could claim an inability to obtain financial information from the Meyer parent, the court surmised that given that the parent has an interest in a favorable resolution to such matters and is presumed to be forthcoming to provide whatever CBP requires to assist in this resolution, "the fact that in that regard there has apparently been considerable 'resistance' throughout this case to that not-unreasonable discovery request and the 'assistance' that the parent could have provided its subsidiary to address necessary questions with respect to concerns over non-market influences, speaks volumes." The court ultimately ruled that it had doubts as to whether the true value of the price paid or payable at the first sale level had been demonstrated in this case.

Further, the *Meyer Corp.* court noted that China is a non-market economy and proposed a standard by which companies can establish the absence of non-market influence, for purposes of first sale, by applying tests developed by the U.S. Department of Commerce in the context of antidumping duties ("AD") cases. Specifically, the court proposed the factors used for establishing AD rates for specific entities within a non-market economy, i.e., the non-country-wide AD rates. According to the CIT in *Meyer Corp.*, such entities must satisfy the following *de jure* and *de facto* factors to obtain a separate rate in the AD context:

The *de jure* factors are (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses, (2) any legislative enactments decentralizing control of companies, and (3) other formal measures by the government decentralizing control of companies. Typically considered *de facto* factors include (1) the ability to set export prices independently of the government and without the approval of a government authority, (2) the authority to negotiate and sign

contracts and other agreements, (3) the possession of autonomy from the government regarding the 'selection' of management, and (4) the ability to retain the proceeds from sales and make independent decisions regarding the disposition of profits or financing of losses.

Notably, while the court proposes the application of these factors as part of the first sale appraisement analysis, these factors are not specifically provided within the customs valuation statute, 19 U.S.C. § 1401a.

The potential impact of *Meyer* on the importing community is, as of yet, unclear. Judge Aquilino stated that the appellate court "could provide clarification" as to the nexus between first sale appraisement and non-market economies. Importers should carefully monitor not only whether this case is appealed and other court cases in this space, but also future determinations by U.S. Customs and Border Protection regarding the eligibility and standard applied for first sale appraisements involving transactions with ties to non-market economies.

For more information: John Brew, Maria Vanikiotis

Unfair Import Investigations Rise at ITC – Particularly as to Trade Secrets

Last year saw a marked uptick in unfair import investigations at the International Trade Commission (ITC), with an especially strong close to the year: eight new complaints in December alone brought the year's total to 62 new complaints to the Commission, well above the ten-year average of 49. Complaints alleging trade secret misappropriation rose particularly, as the ITC becomes increasingly popular due to its speed, jurisdiction and unique remedies. While just five investigations solely of trade secrets were instituted in the five years of 2011-2015, fifteen such investigations were instituted in the next five years of 2016-2020, including five in 2020 alone.[1]

There are several factors to consider when deciding if the ITC may be a better forum that a U.S. federal district court for enforcing trade secrets.

The ITC is considerably faster than pursuing trade secret litigation in most U.S. federal district courts. Trade secret litigation in U.S. federal district court typically takes years to resolve. In contrast, ITC trade secret investigations are usually resolved within 18 months, even during COVID. If you are facing considerable financial or reputational damage as a result of a competitor's sales of imported products resulting from trade secret misappropriation, a quick import injunction from the ITC may be your best option for preventing significant harm to your sales or your brand.

In contrast to federal district court, the ITC allows companies to seek exclusion orders based on extraterritorial trade secret misappropriation, without showing evidence of an act in the U.S. in furtherance of the misappropriation. The Defend Trade Secrets Act (DTSA), enacted in 2016, creates a civil cause of action in U.S. federal district court for trade secret misappropriation, including misappropriation that occurred outside the U.S., and provides for remedies that include monetary damages and injunctive relief. Unlike claims brought under the DTSA, however, which require acts in the U.S. in furtherance of the misappropriation, the ITC can issue an exclusion order where there is evidence that the importation of the offending products will harm a domestic industry. If there is little to no evidence of acts performed in the U.S. in furtherance of misappropriation, the ITC may therefore be a better choice for preventing a competitor from profiting from their foreign misappropriation.

Additionally, the standard for injunctive relief at the ITC, causing domestic injury, is considered to be easier to meet than that of the traditional four-factor test used in federal district court. Where the four-factor test may be difficult to meet, or time is simply of the essence, the ITC may be the preferred forum.

And in contrast to federal district court, the ITC is not required to have personal jurisdiction over the parties; instead it has *in rem* jurisdiction over the offending products themselves. If there are questions about whether a foreign entity will be subject to personal jurisdiction in the U.S., the ITC may be the better forum.

When might the ITC not be the best forum? The ITC may not be the best choice if a company or a licensee has significant foreign, but not domestic, operations because the ITC requires a showing that a U.S. domestic industry will be substantially injured by the misappropriating party's acts. Additionally, monetary damages are not available at the ITC (although a parallel district court action is commonly brought for that reason). So where financial damages are the primary goal of a trade secret action, as opposed to quick injunctive relief, federal district court is often the better option.

The ITC's recent opinion in the *Matter of Botulinum Products* (Inv. No. 337-TA-1145), aka the "Botox Brawl," is the latest furthering trade secret enforcement at the ITC. While it remains to be seen whether the opinion will be upheld on appeal, companies seeking to enforce their trade secrets would be wise to consider the ITC as an alternative to federal district court, especially in circumstances where a speedy injunction against a foreign entity is the goal.

For more information: Pilar Stillwater, Josh Pond

Update: President Biden Imposes Sanctions & Export Controls on Myanmar in Response to Military Coup

In an update to our prior alert published last month, the Bureau of Industry and Security (BIS) has taken several additional actions further restricting Myanmar (Burma)'s access to items subject to the Export Administration Regulations (EAR). Last month, BIS publicly stated it was considering additional export control restrictions and as predicted, on March 4, 2021, announced the following actions in two separate rules (here and here):

1. **Military End User (MEU) Rule**: First, and most notably, BIS has expanded the MEU rule to include an additional country, Burma, that is now subject to the enhanced end-use and end-user controls subject of the MEU rule in § 744.21 of the EAR. This actions also opens up Burmese entities to be identified on the MEU List in Supplement No. 7 to Part 744 of the EAR. Previously, this rule was limited to only end-users and end-uses in China, Russia, and Venezuela.
2. **Entity List**: BIS added the following entities to the Entity List imposing a license requirement with a presumption of denial for all items subject to the EAR – the Burmese Ministries of Defence and Home Affairs, the Myanmar Economic Corporation, and the Myanmar Economic Holding Limited. In the Federal Register notice, BIS explained "this rule enhances the U.S. Government's efforts to ensure that items subject to the EAR are not available to Burma's Ministry of Defence and the Ministry of Home Affairs, the entities responsible for the coup, or the two commercial entities owned and operated by the Ministry of Defence, Myanmar Economic Corporation and Myanmar Economic Holdings Limited, which provide revenue for the Ministry of Defence."

3. **Country Group**: BIS downgraded Burma's country group status from Country Group B to the more restrictive Country Group D:1. This move drastically limits the use of license exceptions, including Shipments of Limited Value (LVS), Shipments to Group B Countries (GBS), and Technology and Software under Restriction (TSR) among others.
4. **Computer Tier 3:** Finally, Burma was reclassified from Computer Tier 1 to Computer Tier 3 under the License Exception Computers (APP).

For more information: Jeff Snyder, Jana del-Cerro, Chandler Leonard

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OFAC's First Enforcement Actions Against Digital Currency Service Providers

The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) recently announced settlements with two virtual currency service providers, Bit Pay, Inc. (Bit Pay) and BitGo, Inc. (BitGo), for alleged sanctions violations. Separately, Coinbase Global Inc., (Coinbase) the largest virtual currency exchange in the U.S., has disclosed that its services may have been used in violation of U.S. sanctions, and that the case remains pending under OFAC's review. The BitGo and Bit Pay settlements involved failures to use Internet Protocol (IP) location data to detect transactions with persons in sanctions jurisdictions (in addition to other alleged failures in the case of BitGo), and build on previous guidance that OFAC has provided to money transmitters (which includes many virtual currency businesses) about its expectation that they will use such services to aid compliance with sanctions. Together, these settlements and investigation suggest a concerted effort by OFAC to remind virtual currency businesses of their OFAC obligations and to encourage broader implementation of appropriate compliance programs.

Click here to read our alert on this OFAC enforcement activity and key takeaways.

For more information: Caroline Brown, Carlton Greene, Dj Wolff, Nicole Succar

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SFO Investigation Powers Over Foreign Companies Limited by U.K. Supreme Court Decision

On 5 February 2021, the U.K. Supreme Court unanimously ruled that the Serious Fraud Office (SFO) does not have the power to compel a foreign company that has no registered office or fixed place of business in the U.K. to produce documents held outside the U.K. under section 2(3) Criminal Justice Act 1987 (CJA). This means that where the parent of a U.K. company is a foreign company which has no presence in the U.K., the SFO will not be able to require it to produce documents held outside the U.K. even if those documents are sought in connection with an investigation relating to its U.K. subsidiary. The decision may act as a brake on the SFO's powers of investigation at a time when fraud is increasingly cross-border and the alternative routes for gathering evidence are slower and more cumbersome.

For more information, please click here.

For more information: Nimrod Aviad, Laurence Winston

U.S. Calls Out Foreign Trade Barriers: The Office of the U.S. Trade Representative Releases 2021 National Trade Estimate Report

On March 31, 2021, the Office of the U.S. Trade Representative (USTR), released the 2021 National Trade Estimate (NTE) Report. The report, which is the first issued under the Biden Administration, provides a detailed inventory of significant foreign barriers to U.S. exports of goods and services, investment, and digital trade.

The NTE Report, which by statute, must be issued on or before March 31 each year, has served as a vehicle for first collecting a list of the most significant barriers to market access for US-based companies and then attacking particular barriers. It has become a valuable tool in helping administrations target their trade enforcement resources.

The report classifies foreign trade barriers in eleven categories. These categories cover government-imposed measures and policies that restrict, prevent, or impede the international exchange of goods and services, unduly hamper U.S. foreign direct investment or U.S. electronic commerce. The categories covered include:

1. Import policies (e.g., tariffs and other import charges, quantitative restrictions, import licensing, preshipment inspection, customs barriers and shortcomings in trade facilitation or in valuation practices, and other market access barriers)
2. Technical barriers to trade (e.g., unnecessarily trade restrictive standards, conformity assessment procedures, labeling, or technical regulations, including unnecessary or discriminatory technical regulations or standards for telecommunications products)
3. Sanitary and phytosanitary measures (e.g., trade restrictions implemented through unwarranted measures not based on scientific evidence)
4. Subsidies, especially export subsidies (e.g., subsidies contingent upon export performance and agricultural export subsidies that displace U.S. exports in third country markets) and local content subsidies (e.g., subsidies contingent on the purchase or use of domestic rather than imported goods)
5. Government procurement (e.g., closed bidding and bidding processes that lack transparency)
6. Intellectual property protection (e.g., inadequate patent, copyright, and trademark regimes and inadequate enforcement of intellectual property rights)
7. Services barriers (e.g., prohibitions or restrictions on foreign participation in the market, discriminatory licensing requirements or regulatory standards, local-presence requirements, and unreasonable restrictions on what services may be offered)
8. Barriers to digital trade and electronic commerce (e.g., barriers to cross-border data flows, including data localization requirements, discriminatory practices affecting trade in digital products, restrictions on the provision of Internet-enabled services, and other restrictive technology requirements)
9. Investment barriers (e.g., limitations on foreign equity participation and on access to foreign government-funded research and development programs, local content requirements, technology transfer requirements and export performance requirements, and restrictions on repatriation of earnings, capital, fees and royalties)
10. Competition (e.g., government-tolerated anticompetitive conduct of state-owned or private firms that restricts the sale or purchase of U.S. goods or services in the foreign country's markets or abuse of competition laws to inhibit trade)
11. Other barriers (e.g., barriers that encompass more than one category, such as bribery and corruption).

The full report can be viewed here.

The release of the 2021 NTE Report follows the March 1, 2021 release of the 2021 President's Trade Agenda and 2020 Annual Report. USTR plans to release its annual Special 301 Report on the adequacy and effectiveness of trading partners' protection of intellectual property rights by April 30, 2021.

For more information: Robert Holleyman, John Brew, Jeff Snyder, Frances Hadfield, Clayton Kaier

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Update: Four-Month Suspension of Tariffs in Large Civilian Aircraft Dispute

On March 9, 2021, the European Union released the Implementing Regulation suspending retaliatory tariffs resulting from the large civilian aircraft dispute. This Regulation implements the EU-US agreement to suspend retaliatory tariffs imposed by Regulation 2020/1646. The announcement comes after the U.S. and UK released a joint statement last week outlining a four-month suspension of tariffs. *See March 4 Post here*.

On March 11, 2021, the U.S. Trade Representative (USTR) released the following notices:

EU–Notice of Modification of Section 301 Action: Enforcement of U.S. WTO Rights in the Large Civil Aircraft Dispute

UK–Notice of Modification of Section 301 Action: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute

For more information on the U.S.-EU aircraft subsidy dispute and related tariffs please contact **John Brew**, **Frances P. Hadfield**, **Edward Goetz** & **Clayton Kaier** or refer to our previous posts below:

U.S. and UK Announce Four-Month Suspension of Tariffs in Large Civilian Aircraft Dispute | International Trade Law (cmtradelaw.com)
Biden Decides Against Increased Tariffs in EU-U.S. Aircraft Subsidy Dispute | International Trade Law (cmtradelaw.com)
Large Civil Aircraft Dispute 2021 Update: Section 301 Tariffs on New EU Goods | International Trade Law (cmtradelaw.com)
US Allows Tariffs On $7.5B Of EU Goods | International Trade Law (cmtradelaw.com)
USTR Adds Supplemental List of $4B Worth of Products to EU Airbus Dispute | International Trade Law (cmtradelaw.com)
EU Retaliatory Tariffs: Preliminary List Proposed in Continuing Dispute with U.S. over Boeing/Airbus Subsidies. | International Trade Law (cmtradelaw.com)
Trump Administration Readies $11 Billion in Tariffs against EU and Schedules Section 301 Hearing in WTO Airbus Case | International Trade Law (cmtradelaw.com)

FinCEN Issues Notice Related to the Trade of Antiquities and Art

On March 9, 2021, the Financial Crimes Enforcement Network (FinCEN) published its first Notice related to one of the many changes made in the Anti-Money Laundering Act of 2020 (the AML Act), passed as part of the National Defense Authorization Act for Fiscal Year 2021, which we wrote about here. FinCEN's guidance informs financial institutions about the AML Act's provisions related to trade in antiquities and art, underscores that illicit activity related to antiquities and art may involve

financial institutions and trigger reporting requirements, and provides specific instructions for filing Suspicious Activity Reports (SARs) related to suspicious activity involving antiquities and art.

The AML Act broadened the definition of "financial institutions" in the Bank Secrecy Act (BSA) to include persons "engaged in the trade of antiquities" and requires FinCEN to propose rules to implement this provision 360 days after the date of enactment of the law (January 1, 2021). While it remains for the Director of FinCEN, in coordination with the Federal Bureau of Investigation (FBI), the Attorney General, and the Department of Homeland Security's (DHS) Homeland Security Investigations to clarify the scope of the rulemaking and determine whether any exemptions apply, those subject to the BSA's reporting and recordkeeping requirements could extend to intermediaries in the sale or purchase of antiquities, such as consultants and advisors, in addition to dealers.

According to FinCEN's Notice, illicit activity involving trade in antiquities and art might include looting, theft, illicit excavation of archaeological items, smuggling, the sale of stolen or counterfeit items, money laundering and sanctions violations. Those crimes may have links to transnational criminal networks, international terrorism, and persecution of individuals or groups on cultural grounds. Included in the Notice are specific instructions for filing SARs related to suspicious activity involving art and antiquities. FinCEN instructs financial institutions to reference "FIN-2021-NTC2" in SAR field 2 and provides a list of details to include in the narrative, if available. FinCEN also instructs financial institutions to select SAR field 36(z) (Money Laundering – other) as the suspicious activity type and to note whether the activity relates to antiquities, art, or both. Finally, with regard to stolen art or antiquities, FinCEN asks financial institutions to provide a detailed description of the item, indicate whether photographs are available, and provide information about the location where the reported individuals or entities are operating.

Though the definition of "financial institutions" does not yet extend to those engaged in the trade of art, the AML Act directs the Secretary of the Department of the Treasury, in coordination with the FBI Director, the Attorney General, and the Secretary of DHS, to perform a study of the facilitation of money laundering and the financing of terrorism through trade in works of art, which could be the harbinger of additional changes ahead.

The regulation of the art and antiquities markets in the United States is not without precedent. In 2018, the European Union's Fifth Money Laundering Directive extended anti-money laundering laws to art businesses, and directed EU member states to implement it into their national laws by early 2020. Separately, sanctions evasion through the sale and purchase of high-value art was the subject of a bipartisan congressional report released by the Senate's Permanent Subcommittee on Investigations last summer. Included in the report's recommendations was the amendment of the BSA to add businesses handling transactions involving high-value art.

FinCEN's guidance makes clear that the agency expects financial institutions to remain vigilant against illicit activity in the art and antiquities trade. Institutions should consider the sources of information addressing illicit activity in the art and antiquities trade identified by FinCEN, including an Interpol report, a U.S. State Department report, and a report by the UN Office on Drugs and Crime, in addition to their own experiences and other available information. This Notice also represents what is likely to be the first of several notices advising covered financial institutions of upcoming amendments to the BSA as a result of the AML Act. Financial institutions should continue to watch for additional guidance from FinCEN and other regulators.

In light of the AML Act's new provisions, persons and businesses involved in the sale and purchase of art and antiquities should conduct a risk assessment to evaluate any money laundering-related vulnerabilities of their business, assess existing AML programs and policies for their sufficiency, and consider implementing policies and procedures if none exist.

For more information: Caroline Brown, Carlton Greene, Paul Rosen, Brian McGrath

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Commerce Publishes ANPRM Seeking Comment on the Licensing Process for ICTS Transactions

In an Advance Notice of Proposed Rulemaking (ANPRM) published in the Federal Register on Monday, March 29, 2021, Commerce announced that it is soliciting public comment on a licensing process for companies seeking pre-clearance for information and communications technology and services (ICTS) transactions subject to Commerce's broad new authority to block or unwind such transactions, as implemented in the interim final rule, "Securing the Information and Communications Technology and Services Supply Chain." That interim final rule, which was published on January 19, 2021, became effective on Monday, March 22, 2021, and broadly defines transactions to include acquisition, importation, transfer, installation, dealing in or use of ICTS. We previously discussed that interim final rule here.

Commerce underscored in the ANPRM that it is only requesting comments on the licensing procedures, and is not re-opening the comment period for the Interim Final Rule nor is it extending the effective date of that rule. While Commerce had initially announced in the interim final rule that it would establish a licensing or pre-clearance process by May 19, 2021, the agency stated that it found it necessary to solicit additional public comment and, accordingly, would not meet that deadline.

For more on this, please click here.

For more information: Caroline Brown, Addie Cliffe, Jana del-Cerro, Alan W.H. Gourley, Kuba Wisniewski

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Customs Rulings of the Week

- March 5: Classification of Clear Rear Bidet
- March 12: Classification of Showerpik
- March 19: Classification of Jewelry Pieces
- March 23: Classification of In-Wash Scent Booster
- March 29: Classification of Water Bottles

For more information, contact: Frances Hadfield, Rebecca Toro Condori

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Crowell & Moring Welcomes

Simeon Yerokun is an associate in Crowell & Moring's International Trade Group and a resident in the firm's Washington, D.C. office. He joins Crowell after serving as a Trade and Finance attorney at the U.S. Customs and Border Protection Office of Chief Counsel. Previously, he served as counsel to Commissioner Irving A. Williamson at the U.S. International Trade Commission. At Crowell, Simeon's practice will focus on antidumping and countervailing duty cases before the U.S. Department of Commerce

and the U.S. International Trade Commission under the Tariff Act of 1930, import regulatory compliance, and various trade remedies matters.

Crowell & Moring Speaks

Robert Holleyman appeared on the NBR Asia Insight podcast episode titled "A Principal Return: The United States and Trade in the Indo-Pacific" on March 12, 2021.

Caroline Brown presented at the American Conference Institute's first-annual National Forum on Team Telecom on March 17, 2021. Her presentation was titled, "Team Telecom 2.0: Examining the New Team Telecom Environment in the Aftermath of Executive Order 13913 and A Deep Dive into the FCC's Recent Implementation Guidelines."

Elena Klonitskaya presented at the first Belarussian legal conference about sanctions on March 17, 2021.

John Brew spoke at the International Compliance Professionals Association (ICPA) Spring Conference on March 29, 2021. His talk was titled, "Forced Labor Enforcement by CBP: What We Know and What's Coming."

Robert Holleyman spoke at the National Bureau of Asian Research's Recent Progress and Persistent Challenges in IP event on March 29, 2021.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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