

# CLIENT ALERT

## This Month in International Trade - January 2013

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### THIS MONTH'S TOP FIVE DEVELOPMENTS

#### 1) U.S., EU Continue To Scope Likely Comprehensive Trade Negotiation

U.S. and EU trade officials continue to wrangle over a final report of the High Level Working Group (HLWG) on Jobs and Growth, an initiative considered likely to recommend the launch of comprehensive trade negotiations between the two trading giants. Despite some expectations that the final HLWG report would be released before the end of 2012, officials are reported to be working through a number of outstanding details regarding how a new trade negotiation would be characterized (as a "free trade agreement," or some other formulation), the scope of negotiations, and the need for "confidence building" steps in areas such as agricultural trade. EU officials, led notably by the current Irish Presidency of the union, are pushing hard for a clear signal to launch negotiations by early February, while their U.S. counterparts appear more inclined to obtain as many assurances as possible that an eventual negotiation can be scoped in a manner that will produce a successful outcome. It is likely that these issues will continue to be hashed out on the margins of the annual World Economic Forum gathering in Davos, Switzerland, where senior officials from both sides will participate.

We remain confident that the HLWG will produce a recommendation launching a major trade negotiation in the early part of 2013, making the early months of the year an important time for companies to identify their particular interests and objectives in this initiative.

#### 2) European Commission Communication on Customs Risk Management and the Security of the Supply Chain

On January 8, 2013, the European Commission adopted the Communication on Customs Risk Management and Security of the Supply Chain, COM (2012) 793, setting out a strategy to enable customs to better tackle risks associated with goods being traded in the international supply chain.

Over the last few years the role of customs in the supply chain has expanded from revenue collector to guardian of the internal market and other areas such as public health, consumer protection, environment, agriculture and, especially after the terrorist attacks of September 2001, supply chain security.

In order to reinforce customs risk management by improving data quality, supply chain modelling and certain aspects of the methodology applied, the European Commission proposes a number of key actions:

- Having traders make quality data available at the right time, in the right place, for effective risk management;
- Having deeper engagement with companies moving goods across borders, including a broader recognition of Authorized Economic Operator (AEO) status;

- Ensuring homogeneous implementation of risk management throughout the external EU borders; considering the creation of a risk management capacity at EU level to complement Member State efforts;
- Having a more structured and systematic cooperation between customs and other authorities;
- Increasing international cooperation with the EU's main trading partners, to expand knowledge and information and spread knowledge of risk management methods and techniques internationally.

The European Commission intends to propose further legislative and other actions based on the principles contained in the Communication.

### 3) Export Control Reform – Next Steps in 2013

Obama Administration officials have outlined the priorities for export reform in 2013, including a common government IT system and a rebuilt list structure with harmonized definitions across both the United States Munitions List (USML) and the Commerce Control List (CCL). A decision about whether to go further and propose a draft bill to consolidate all export control responsibilities, including licensing and enforcement coordination, into a single agency has yet to be made.

Next steps will include moving the first two USML category rewrites into final form, which, under Section 38(f) of the Arms Export Control Act, will require a formal notification to Congress followed by a waiting period before publication of any final rule. Once the rule is published in final form, companies will have another 180 days to adjust their processes before the rule becomes effective. The first two categories to be moved to final form are USML Category VIII (Aircraft) and Category XIX (Gas Turbine Engines). The Federal Register notices announcing proposed rewrites for each of these categories can be found [here](#) and [here](#). In addition, the final rule will include the new definition of "specially designed," a term which is undefined under current regulations.

### 4) The International Services Agreement: Off and Running

In an [October 15 client alert](#), we welcomed the growing momentum among a group of developed and developing economies to negotiate an International Services Agreement (ISA). A high-standard ISA, we noted, could create important new opportunities for companies in all services sectors (*e.g.*, telecommunications, audiovisual, financial, energy, and construction, among others) to sell to and invest in other markets. If structured effectively, it could also attract economies with large services markets that are not currently at the table, such as Brazil, China, India, and Indonesia.

Please [click here](#) to continue reading our prior client alert.

### 5) FTC Relaxes Its Enforcement Policy On Product Labels

On January 3, the Federal Trade Commission (FTC) released an Enforcement Policy Statement concerning treatment of certain retailers that directly import textile, wool, and fur products. According to the Policy Statement, the FTC will not initiate an enforcement action for falsely marketing a textile, wool, or fur product if the retailer: (1) cannot legally obtain a continuing or separate guaranty; (2) does not embellish or misrepresent claims the manufacturer provides; and (3) does not market the

product as a private label product. If the retailer knew or should have known that a marketing claim was false, the new policy does not apply – the retailer must show it reasonably relied on the representations of the third-party supplier.

The Textile Fiber Products Identification Act, Wool Products Labeling Act and the Fur Products Labeling Act provide that retailer can avoid liability for mislabeling or false advertising if the retailer obtains a guarantee in good faith from a "person residing in the United States" or U.S. supplier that certifies that products the supplier provides are not misbranded, falsely invoiced, or falsely advertised. The Policy Statement, consistent with certain consent decrees and settlement orders regarding the mislabeling of rayon articles as bamboo, gives retailers more leeway to reasonably rely on foreign supplier representations even if they cannot obtain a good faith guaranty for products imported directly from the foreign suppliers. Retailers directly importing products without a guaranty from the foreign supplier should ensure they do not embellish manufacturer claims or market the products as their own.

## THIS MONTH IN TRADE – OTHER NEWS

### Agency Enforcement Actions

#### **Bureau of Industry and Security (BIS)**

- Singapore Nationals Extradited in Connection with [Plot to Illegally Export Military Antennas](#)
- Pennsylvania Man Sentenced to 3.5 Years in Prison for [Violations of International Emergency Economic Powers Act \(IEEPA\)](#)
- Individual Sentenced to Year in Prison and \$100,000 Fine for [Conspiracy to Illegally Export Goods for Use in Nuclear Reactor in Pakistan](#)
- Iranian Corporation, Officers [Accused of Illegally Exporting \\$30 Million in Goods](#) to Iran, Face Up to 25 Years in Prison
- [International Veneer Company](#), a Virginia based exporter of wood veneers, allegedly failed to report receipt of seven separate prohibited antiboycott requests in the context of its business in Lebanon during in 2007 and 2008, and the company settled for \$12,600.
- Taiwanese National Pleads Guilty to Attempting to [Illegally Export Aerospace-Grade Carbon Fiber](#), Faces Up to 20 Years in Prison
- Manhattan U.S. Attorney Announces Arrest of Queens Resident for the [Export of Military-Use Items to Taiwan And Attempting to Export Them to China](#), Faces Up to 45 Years in Prison
- Four Individuals Charged in the Southern District of New York With [Exporting Various Goods From the United States to Iran and China](#), Face Up to 60 Years in Prison
- Manager of South Carolina-Based Firm Pleads Guilty in Connection with [Illegal Exports to Iran](#), Faces Up to 30 Years in Prison
- People's Republic of China Corporate Entity Enters Guilty Plea to [Conspiracy and Felony Export Violations](#) Stemming from the Illegal Export of High-Performance Coatings to a Nuclear Reactor in Pakistan, Must Pay \$3 Million in Fines

#### **Customs and Border Protection (CBP)**

- Japanese Bank and U.S. Affiliates [Settle False Claims Allegation](#) for Knowingly Evading Import Duties for \$45 Million.

- Customs and Border Protection announced that it imposed over 50 penalties for an amount of \$24.2 million as a result of antidumping and countervailing duty enforcement actions over the course of 2012.

### Office of Foreign Assets Control (OFAC)

- Bank of Tokyo-Mitsubishi UFJ agreed to pay \$8.5 million in a settlement with OFAC for violations of sanctions regimes against Burma, Iran, Sudan, and Cuba, as well as for violation of Executive Order 13382 on *Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters*.
- Standard Charter Bank (SCB) paid \$132 million in penalties in a settlement with OFAC for violations of sanctions programs against Iran, Sudan, Burma, and Libya, as well as violations of the Foreign Narcotics Kingpin Sanctions Regulations.
- As part of its settlement agreement with the DOJ, HSBC Bank paid a fine of \$500 million for its willful failure to establish and maintain an effective anti-money laundering program, to conduct due diligence on some foreign accounts, and to report evidence of money laundering.
- Dal-Tech Devices, Inc. agreed to pay \$10,000 in a settlement for allegedly making an unlicensed sale and export of radio frequency measurement devices with knowledge that the items were intended for transshipment to Iran.
- Ellman International, Inc. agreed to pay \$191,700 as part of a settlement agreement for Ellman's alleged exportation of medical equipment to Iran and engagement of the services of a physician in Iran, both of which violate the Iranian Transaction Regulations.

### Securities and Exchange Commission (SEC)

- The SEC charged Eli Lilly and Company with making improper payments to officials in Russia, Brazil, China, and Poland in violation of the Foreign Corrupt Practices Act (FCPA), and Eli Lilly settled the charges for just under \$30 million.
- Germany-based Allianz SE agreed to pay more than \$12.3 million to settle charges by the SEC that it made improper payments to employees of state-owned entities in Indonesia in violation of the FCPA.

### CBP Moves to Online Posting of Seizure Notices

On January 29, U.S. Customs and Border Protection (CBP) published in the Federal Register a final rule amending 19 CFR Part 162 regarding publication of notices of seizure and sale on a government website. The rule amends § 162.45 allowing CBP to publish such notices, regardless of value, for a least 30 consecutive days on "an official Government forfeiture Web site," in this case the U.S. Department of Justice's forfeiture web site. Online posting would replace the previous statutory requirement of a 3-week print publication for seizure notices.

CBP would still be required to post notices at the customhouse location nearest the seizure for property appraised at \$5,000 or less; for seizures over \$5,000, notices would be published in a print medium, for three weeks, at CBP's sole discretion. In addition to the amendments originally proposed in February 2012, CBP will post the DOJ's forfeiture web site address "in a conspicuous places available to the public at all customhouse and sector offices." The final rule takes effect on February 28.

## EU-Singapore Trade Deal

In December 2012 the EU and Singapore completed final negotiations on a free trade agreement (FTA) and draft agreement will be probably initialled in spring 2013. In the wake of the EU-Korea FTA, which has been in effect since July 2011, the EU-Singapore FTA will create new opportunities in many services sectors such as banking, insurance and other financial services industries as well as in public tendering. It will also facilitate the access of EU industrial and agricultural products to an important export market through greater recognition of EU standards. As one of the most comprehensive FTAs the EU has ever negotiated, the EU-Singapore FTA is considered a key FTA to unlock the gateway to the ASEAN region. FTA negotiations with Malaysia and Vietnam are already underway, whereas preparatory talks continue with other ASEAN nations.

## Kerry the Next Secretary of State; Kirk Leaving USTR

On January 29, by a vote of 94 to 3, the U.S. Senate approved Sen. John F. Kerry (D-Mass.) to succeed Secretary of State Hillary Rodham Clinton as the top U.S. diplomat. Kerry's recent experience includes four years as leader of the Senate Foreign Relations Committee and diplomatic envoy to Afghanistan and Pakistan for the Obama Administration.

On January 22, ambassador Ron Kirk announced his intention to step down from his post as U.S. Trade Representative (USTR). Some highlights of Kirk's tenure since March 2009 include the Korea, Colombia and Panama free trade agreements; the full application of the World Trade Organization (WTO) agreement between Russia and the United States after termination of the Jackson-Vanik amendment's application to Russia; and the Trans-Pacific Partnership (TPP) trade negotiations. Kirk plans to leave the position in late February.

## The EU Regulation on Bilateral Investment Treaties: A Victory for Certainty

Few things complicate international business planning more than uncertainty regarding the legal protections that companies enjoy when they invest across borders. Along with a sound commercial basis for cross-border transactions, companies seek stable, predictable regulatory and political environments. It is for this reason that the December 12 decision by the European Union to ensure the legal security of Member States' bilateral investment treaties (BITs) with third countries is so important.

To continue reading, please [click here](#).

## Irish Delegation Visits Taiwan – Gateway to Asia?

A parliamentarian delegation from Ireland visited Taiwan in early January seeking to strengthen ties between the two nations, including establishing a permanent presence within the office of the European Union in Taiwan. In light of Taiwan's legislative efforts to protect intellectual property rights along with its trade pact with China, under which many products shipped from Taiwan to the mainland enjoy tariff-free treatment, Taiwan represents a gateway to Asia for Irish companies seeking new business opportunities in the region. In response to the Irish parliamentarians' interests in developing its trade relationship with Taiwan, the Taiwanese government expressed its intention of entering into a double taxation prevention agreement with Ireland to boost investment.

In the meantime, the Irish delegation's visit also highlights a new working holiday agreement between Ireland and Taiwan. The reciprocal program provides work visas allowing citizens from one country to work and travel in the other country, with the hope of increasing bilateral understanding, boosting future exchange, and enhancing trade and cultural interactions between Taiwan and Ireland.

#### Brazil and the "War of Ports"

As of January 1, 2013, Brazilian's Senate Resolution n. 13/2012 is in full force. The Senate enacted the resolution to resolve the so-called "War of Ports", by which some Brazilian States compete with each other by offering more favorable State tax rates over products imported through their ports. As a consequence of said "war," not only some ports would be operating well beyond their capacity, but also would be preferred by foreign companies even though other ports would make logistically much more sense.

By Resolution n. 13/2012, the bulk of Brazilian imports will pay an uniform intrastate tax rate of 4% over the goods imported into the country and then transported to a different State for sale. The flat rate applies to products not subject to any industrialization process after customs clearance, or if after industrialization the contents of the final product are composed by at least 40% of imported features. However, imported products with no similar substitutes within the Brazilian market are an exception to the flat rate, and the definition of which products fall into this category is defined by the Council of Ministers of the Brazilian Foreign Trade Chamber (CAMEX).

The new Senate Resolution will have a significant impact over the States of Espirito Santo, Santa Catarina and Goias – those that offered the lowest tax rate as an incentive for importers to use their ports. In response to the resolution, the State of Espirito Santo filed a lawsuit before the Supreme Court of Justice claiming that the new Senate Resolution is unconstitutional.

#### CROWELL AND MORING SPEAKS

**Cari N. Stinebower** spoke on "Doing Business in Burma/Myanmar: What You Can and CANNOT Do Under New, Eased Sanctions Restrictions," at [ACI's OFAC Boot Camp](#), in New York City, December 5-6, 2012.

**Addie Cliffe**, J.J. Saulino, and **Dj Wolff** presented a L2 Federal Resources webinar, "Export Controls, Economic and Trade Sanctions: The Challenges and Risks," on January 30, 2013.

**Jonathan S. ("Josh") Kallmer** will speak on "How Companies Can Use International Investment Agreements to Address Regulatory and Policy Concerns in India" at the New York City Bar's CLE program entitled "Doing Business in India" in New York City, March 1, 2013.

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#### RECAP OF TOP STORIES FROM 2012

- [Congress Passes New Countervailing Duty Legislation Resulting in the Continuation of Countervailing Duties Against China, But at Reduced Rates](#)

- [Attempted Country of Origin Engineering to Avoid Antidumping Duties Leads to False Claims Act Exposure](#)
- [CBP Expands Use of Transaction Value in Related Party Transactions Involving Transfer Price Adjustments](#)
- [OFAC Authorizes Exports of Financial Services to and New Investment in Burma](#)
- [Are You At Risk Under Dramatic Expansion of U.S. Sanctions Against Iran and Syria?](#)

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