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CLIENT ALERT

This Month in International Trade - July 2014

Aug.08.2014

THIS MONTH'S TOP TRADE DEVELOPMENTS

1) Ukraine: New U.S and EU Economic Sanctions and Export Restrictions

The tragic shoot-down of Malaysia Airlines Flight MH17 and increased evidence of Russian support for the separatists in eastern Ukraine brought increased Western sanctions against Moscow in July, to include the first-ever use of sectoral sanctions imposed in a relatively coordinated fashion by the U.S., EU, and Canada.

Generally speaking, the sectoral sanctions imposed by the three jurisdictions to date are more targeted than typical "blocking" sanctions and are focused on limiting access to capital markets by particular entities in the targeted industries (financial and energy, thus far). The net effect is to preclude long-term debt and equity financing by the targeted entities while allowing other types of transactions to continue.

Crowell issued a Client Alert on July 17th detailing the new U.S. sectoral sanctions on Russian financial institutions and energy companies. U.S. action was followed a week later by Canada (see updated paragraphs 2 and 3), which introduced sectoral sanctions against three of the four companies the U.S. had. After the U.S. added three additional banks to its list on July 29th, the EU published its first sectoral sanctions on July 31st (see Articles 2a and 2b), targeting the five largest banks in Russia.

In addition to the new sectoral sanctions, both the U.S. and EU announced new export restrictions on certain items to Russia. On July 29th, the U.S. Department of Commerce instituted a policy denying export, re-export or foreign transfer of certain items for use in Russia's energy sector that may be used for exploration or production from deep water, Arctic offshore, or shale projects that have the potential to produce oil.

On July 31st, the EU imposed similar restrictions on the same items (see Article 12). Further, the EU prohibited the sale or procurement of Russian arms and related material and instituted a prohibition on the new sale of dual-use items to military end-users (see Articles 10 and 11).

Crowell's attorneys are available to answer any questions clients may have on this dynamic situation and how the new decisions and regulations may affect your business.

For more information, contact: Cari Stinebower, Salomé Cisnal de Ugarte, Alan Gourley, Chris Monahan, Dj Wolff, Edward Goetz

2) CBP Proposes Additional Burdens to First Sale Rule

On July 9th, CBP released a revised draft Informed Compliance Publication (ICP), "Bona Fide Sales & Sales for Exportation to the United States," reflecting proposed edits to the use of first sale for export and seeking public comment regarding certain administrative tasks.

Under multi-tiered sales transactions, importers may use an earlier sale as the basis for customs transaction value – e.g., the sales price between the manufacturer and the middleman rather than the sales price between the middleman and U.S. importer. This allows importers to reduce duties and is commonly known as first sale rule. This appraisement methodology has long been a preferred method for importers, particularly those whose goods are subject to higher tariffs. CBP has slowly tried to discourage the use of the first sale rule through increased administrative burdens, culminating in the recent revised ICP. The proposed revisions to the ICP appear to impose additional requirements to substantiate the use of the first sale value as the basis for transaction value. Notably the ICP states that extensive financial records, transfer pricing policies, general ledgers, and other financial documents should readily be available for all parties to the first sale transaction, whether or not related to each other, to support the use of the first sale rule. CBP also included in the draft ICP a detailed checklist of documents that CBP may request from an importer when reviewing the first sale transaction. While these documents are not listed as mandatory, an importer is now on notice that CBP will likely request any or all of these documents when reviewing a first sale transaction. Moreover, an importer should review the checklist and confirm the eligibility or availability of any document listed in support of its first sale transactions.

CBP distributed the draft ICP as a discussion draft and requested written comments from importers by August 4, 2014. CBP is likely to revise the draft after receiving comments as the proposed changes are controversial.

For more information, contact: John Brew, Jini Koh, Julia Rieper

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3) Extension of the JPOA: Four More Months for Iranian Nuclear Negotiations – Talks Resume in September

On July 18th, the P5+1 (U.S., Russia, China, the UK, France, and Germany) and Iran agreed to extend the current suspension of certain sanctions for an additional four months to continue negotiations. Specifically, the parties extended the period of the Joint Plan of Action (JPOA) until November 24th, exactly one year after signing the initial agreement in Geneva. The Major Powers agreed to continue the suspension of the same sanctions in line with those from the original JPOA period and will allow Iran access to a further $2.8 billion in restricted oil assets. The sectors with continued sanctions relief for non-U.S. persons are petrochemical exports, gold and precious metals, Iran's auto industry, and safety of flight spare parts for Iran civil aviation (which also extends to U.S. persons with a license). All of these areas include relief on associated services. Consistent with the initial JPOA relief, sanctions prohibitions applicable to U.S. persons remain in place but U.S. enforcement provisions targeting non-U.S. persons engaged in the specified sectors remains suspended through November 24.

In addition to the issues on the table (e.g., number of centrifuges, design of the Arak Heavy Water Reactor, length of agreement), the International Atomic Energy Association (IAEA) has voiced concern over Iran's lack of engagement in the IAEA's investigation of possible military dimensions to Iran's nuclear program. In a pact signed last year between the IAEA and Iran's

Atomic Energy Agency, Iran agreed to implement five nuclear transparency measures by August 25th and there seems to be little movement on Iran's part to make this a reality. How this may impact the negotiations is unknown.

Clients should not hesitate to contact Crowell with any questions regarding this complex negotiation.

For more information, contact: Cari Stinebower, Dj Wolff, Edward Goetz

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4) Opportunity for Elimination or Reduction in Duties with WTO Environmental Goods Agreement (EGA) Negotiations

On January 24, 2014, the United States and 13 other WTO Members (Australia, Canada, China, Costa Rica, the European Union, Hong Kong, Japan, New Zealand, Norway, Singapore, South Korea, Switzerland, and Taiwan) announced their intention to negotiate a multilateral EGA under the auspices of the WTO. The first round of negotiations took place on July 8-11 in Geneva.

The purpose of the EGA is to seek duty elimination on "environmental goods" to help promote trade in these items, thus promoting sustainability and greener growth. The economies participating in the negotiations have indicated that they will negotiate and build from a list of 54 products, on which member economies of the Asia-Pacific Economic Cooperation (APEC) forum agreed in September 2012 to lower duties. On April 2, 2014, the Obama Administration issued a substantially expanded list of products as to which it might seek the elimination of tariffs in the negotiations, suggesting that the U.S. will be setting a higher bar of ambition for the talks.

Given the open-ended nature of the process and the lack of a clear definition of "environmental good," companies across sectors have important opportunities through the EGA to seek the reduction or elimination of duties on the goods they use as inputs into their production processes or sell as finished products to consumers.

For its part, the U.S. government has expressed interest in hearing from companies regarding (a) what products should be included (companies should be prepared to make the environmental case for the product's inclusion) and (b) how the companies' supply chains work, so that negotiators have a better understanding of the potential benefits of including certain products.

Crowell stands ready to answer any questions clients may have on this initiative and how it can aid their competitiveness in the global marketplace.

For more information, contact: Jonathan (Josh) Kallmer, Dj Wolff, Edward Goetz

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5) Market Opportunities in China with Energized U.S – China Bilateral Investment Treaty Negotiations

The Sixth Meeting of the U.S.-China Strategic and Economic Dialogue was held in Beijing on July 9th and 10th. One of the key outcomes of the two days of talks was a commitment from both sides to "intensify" U.S.-China Bilateral Treaty (BIT) negotiations, which started in 2008. There had been only limited progress until last summer when China took the significant step

of agreeing to negotiate guarantees of market access for U.S. investors in potentially all sectors, on the basis of a "negative list" of narrowly tailored exceptions.

Since 2013, the two sides have held increasingly successful negotiating sessions, reaching substantial agreement on many key provisions in the agreement. The hardest work remaining concerns the length and content of China's "negative list" (*i.e.*, the list of specific parts of specific sectors it wishes to exclude from the BIT). Negotiations on the "negative list" are expected to begin in earnest in early 2015.

U.S. companies seeking to invest or that have already invested in China may face many of the kinds of market access and regulatory restrictions that could be addressed in this BIT negotiation. For example, companies may be subject to foreign equity caps or joint venture requirements in establishing their businesses, or be required to purchase or use domestically produced goods or technologies in producing final products. Furthermore, many companies face pressure to disclose proprietary business methods or other trade secrets as a condition for doing business in China.

Whatever the challenges they face operating their businesses in China, companies in all economic sectors should carefully consider how a BIT could improve their business position and actively engage the U.S. government in ensuring the conclusion of a strong and effective treaty that achieves these objectives.

Clients with questions on how to best capitalize on this unique opportunity should not hesitate to contact Crowell.

For more information, contact: Jonathan (Josh) Kallmer, Dj Wolff, Edward Goetz

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THIS MONTH IN TRADE – OTHER NEWS

Agency Enforcement Actions

Bureau of Industry and Security (BIS)

BIS denied export privileges for a period of six years to one individual convicted of violating the Arms Export Control Act (AECA).

BIS renewed a Temporary Denial Order (TDO) for three companies to prevent the re-export of two aircraft engines located in Turkey without U.S. Government approval.

As part of a series of sanctions by the U.S. on July 16th, BIS added 11 parties to its Entity List in response to Russia's continued action in Ukraine. On July 29th, one additional entity was added, as well.

Office of Foreign Assets Control (OFAC)

Tofasco of America, Inc. (Tofasco), of La Verne, California, has remitted payment of $21,375 to settle potential civil liability for an alleged violation of the Weapons of Mass Destruction Proliferators Sanctions Regulations (the "WMDPSR"). On or about April 16, 2009, Tofasco appears to have violated §§ 544.201(a) and 544.205 of the WMDPSR when it dealt in blocked property by engaging a bank to process a blocked letter of credit transaction representing payment for a shipment of recreational chairs with

a substitute bill of lading omitting reference to the Islamic Republic of Iran Shipping Lines (IRISL), an entity whose property and interests in property are blocked pursuant to the WMDPSR.

Bank of America, N.A. (Bank of America) settled potential liability for apparent violations of the Foreign Narcotics Kingpin Sanctions Regulations, 31 C.F.R. part 598; the Narcotics Trafficking Sanctions Regulations, 31 C.F.R. part 536; and the Reporting, Procedures and Penalties Regulations, 31 C.F.R. part 501. The $16.5 million settlement resolves OFAC's investigation into transactions that OFAC alleges Bank of America processed and accounts Bank of America maintained on behalf of individuals with multiple or multi-part last names on the List of Specially Designated Nationals and Blocked Persons (SDN List).

Procesadora Campofresco, Inc. of San Juan, Puerto Rico settled potential civil liability for apparent violations of the Narcotics Trafficking Sanctions Regulations. The company, known as Campo Gardens, Inc., agreed to pay $27,000 for six apparent violations of the Narcotics Trafficking Sanctions Regulations, 31 C.F.R. part 536.

Epsilon Electronics Inc. (Epsilon) of Montbello, California was assessed a Penalty of $4 million for violating the Iranian Transactions and Sanctions Regulations. Epsilon, also doing business as Power Acoustik Electronics, Sound Stream, Kole Audio, and Precision Audio, shipped products to a company that re-exports most, if not all, of its products to Iran. Epsilon knew or had reason to know that such goods were intended specifically for supply, transshipment, or re-exportation, directly or indirectly to Iran.

Securities and Exchange Commission (SEC)

The SEC charged Smith & Wesson Holding Corporation with violating the Foreign Corrupt Practices Act (FCPA) when employees and representatives of the U.S.-based parent company authorized and made improper payments to foreign officials while trying to win contracts to supply firearm products to military and law enforcement overseas. The company agreed to pay $107,852 in disgorgement, $21,040 in prejudgment interest, and a $1.906 million penalty.

For more information, contact: Michael Appel, Edward Goetz

ITC Rules in Favor of United Steelworkers Union on Chinese Tire Case; Commerce Investigation Continues

On July 22nd, the U.S. International Trade Commission (ITC) determined "there is a reasonable indication that a U.S. industry was materially injured or threatened with material injury by reason of imports of certain passenger vehicle and light truck tires from China that are allegedly subsidized and sold in the U.S. at less than fair value."

With this affirmation, the U.S. Department of Commerce will continue its investigation on the tire imports and make a preliminary countervailing duty (CV) determination in late August and antidumping (AD) decision in November.

The United Steelworkers Union (USW) had petitioned the ITC for relief this past June. Commerce initiated their investigation after a poll of domestic companies involved in the manufacture of passenger vehicle and light truck tire imports from China found that the USW had official legal standing to bring AD/CV charges against the Chinese importers.

The union was granted relief in this same type of case in 2009, when President Obama approved first-year tariffs of 39 percent against Chinese passenger and light truck tire imports. After reverting back to the normal 4 percent in September 2012, the USW claims Chinese tire imports again took off, jumping from 24.5 million in 2011 to 50.8 million in 2013. USW local presidents testified in a hearing to the ITC that layoffs and production cuts were directly related to the increase in Chinese imports.

Crowell will continue to monitor this case and its implication for industry. Clients should not hesitate to contact Crowell with any questions they might have on antidumping or countervailing duties.

For more information, contact: John Brew, Dan Cannistra, Pierce Lee, Nicholas DeLong

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FinCEN Designates FBME Bank as a Facilitator of Illicit Activity

The Financial Crimes Enforcement Network (FinCEN), on July 17, 2014, identified the FBME Bank Ltd. (formerly known as the Federal Bank of the Middle East) as a foreign financial institution of primary money laundering concern pursuant to Section 311 of the USA PATRIOT Act. According to the finding, the bank is well-known for its willingness to evade Anti-Money Laundering (AML) regulations and is said to be favored by high-risk customers. Moreover, the finding states that FBME facilitated a substantial volume of money laundering through the Bank for many years. Specifically, FinCEN alleged that FBME is used by its customers to facilitate money laundering, terrorist financing, transnational organized crime, fraud, sanctions evasion, and other illicit activity through the U.S. financial system.

FinCEN's finding announced that FBME has changed its country of incorporation numerous times and is now nominally based in Tanzania; however, 90 percent of its transactions flow through branches in Cyprus, where the bank has taken active steps to evade Cypriot regulatory authorities. The financial institution was established in 1982 in Cyprus as the Federal Bank of the Middle East Ltd., a subsidiary of the private Lebanese bank, Federal Bank of Lebanon. According to FinCEN's finding, FBME's headquarters is widely regarded as the largest bank in Tanzania based on its $2 billion asset size, but maintains four branches.

FinCEN has delivered this finding to the Federal Register, along with a notice of proposed rulemaking. FinCEN is proposing instituting the fifth special measure which would prohibit U.S. financial institutions from opening or maintaining correspondent accounts (including payable through accounts) for FBME. According to FinCEN's notice, only one U.S. financial institution currently maintain such an account for FBME.

Clients should contact Crowell with any questions they might have on ensuring their compliance programs are properly structured to identify and avoid dealing with such high-risk entities.

For more information, contact: Cari Stinebower, Edward Goetz

Even with TTIP at Tough Political Crossroads, Industry Should Press Priorities

In the space of just over a year, there have been six rounds of Transatlantic Trade and Investment Partnership (TTIP) negotiations. Predictably, these negotiations have been fairly general and, on most topics, have not yet been distilled into concrete texts. The sixth round of negotiations was held during the week of July 14-18 in Brussels and the seventh round is now expected for DC in late September.

During last week's round of discussions, the two sides covered the full range of "market access" issues, including trade in goods, trade in services, investment, and government procurement. On the issue of services, the U.S. pressed the Europeans to move more quickly and decisively to open up their services sectors, while both sides emphasized the importance of openings in each other's government procurement markets. Discussions towards greater regulatory cooperation, widely considered to be the greatest value of the TTIP talks, plodded forward last week. Negotiators made modest progress in talks regarding several product sectors, including textiles and apparel (where they focused on labeling and safety issues), chemicals (where they discuss broad opportunities for cooperation), and automobiles (where talks advanced in areas like equivalence of technical regulations).

As the European Union welcomes a new Commission this fall and the U.S. prepares for the November Congressional elections, the TTIP negotiations find themselves at an important political juncture. The next six months will be critical for determining whether the two sides can maintain realistic hopes for an ambitious market-opening and regulatory cost-lowering agreement.

As always, it is critical for companies and associations to make their voices heard with the negotiators, to ensure that their priorities for sector liberalization, regulatory cooperation, and increased transparency are taken into account. Crowell is actively working with many companies to ensure that their interests are fully advanced in the TTIP.

For more information, contact: Jonathan (Josh) Kallmer, Salomé Cisnal De Ugarte, Edward Goetz

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Commerce Reverses Ruling: S. Korean Oil Pipe Dumped in U.S.

On July 18th, the Department of Commerce published its final dumping determination on South Korean oil country tubular goods (OCTG), reversing a prior ruling. The dumping margins determined by Commerce are 15% for Hyundai HYSCO, 9.89% for Nexteel Co. Ltd. and 12.82% for all other South Korean companies. OCTG consists of steel pipe and tube products used in oil and gas industry, such as drill pipe, pipe casting, and oil pipes.

The investigation stemmed from a petition filed on July 2, 2013 by a group of U.S. steel manufacturers led by U.S. Steel Corp. The petition alleged dumping of OCTG by nine countries including South Korea, India, Saudi Arabia, Taiwan, Philippines, Thailand, Ukraine, Turkey, and Vietnam. At the preliminary phase of the dumping investigation, Commerce found sales at less than fair value for imports from all of the subject countries except for South Korea. Commerce has reversed the ruling with respect to South Korea at the final determination while upholding its prior rulings on the other eight countries.

The antidumping duties will be imposed once the U.S. International Trade Commission affirms its determination of material injury. The Korean government may file a complaint with the World Trade Organization over the ruling. It was also reported that

the lawyers for some Korean steel companies had said before the final determination that they would consider appealing if the decision went against them.

Clients should contact Crowell with any questions. Crowell will continue to keep tabs on any appeals and the impact they may have on industry.

For more information, contact: Alex Schaefer, Jini Koh, Brian Gatta, Pierce Lee

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President Obama Issues New Executive Order for the Democratic Republic of the Congo – Expands Activities Subject to Sanctions

The President signed a new Executive Order (EO) on July 8, 2014 taking additional steps to counter the ongoing conflict in the Democratic Republic of the Congo. The new EO amends EO 13413, issued on October 31st, 2006, to expand the universe of activities subject to sanctions. The new EO takes into account multiple resolutions from the United Nations, the most recent being Resolution 2136 of January 30th, 2014.

The new EO adds the following to the list of predicate actions that could render a person subject to sanctions: that threaten the peace, security, or stability of the Congo; that would undermine democratic processes or institutions; acts of violence against men, women, children, or any civilians that would constitute a serious abuse or violation of human rights; obstruction of humanitarian assistance; attacks on United Nations personnel; and supporting any such activity through the illicit trade in Congolese natural resources. Although supporting activity through the illicit trade in Congolese natural resources is a new category of activity that could lead to designation, it is consistent with the policy goals behind the conflict mineral reporting requirements maintained by the Securities and Exchange Commission.

The new EO does not affect the previous criteria for sanctions, codified in 31 CFR Part 547 (and identified by OFAC as "[DRCONGO]") including targeting foreign or Congolese armed groups impeding the disarmament, repatriation, resettlement, or reintegration of combatants; the use of children in combat or targeted for violence; and providing any assistance related to the activities listed or military activities.

The new EO did not designate any new persons, and it did not affect the 41 current DRCONGO designations.

Clients should contact Crowell with any questions they might have on this new Regulation.

For more information, contact: Cari Stinebower, Chris Monahan, Dj Wolff, Edward Goetz

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Both OFAC and EU Issue South Sudan Regulations

Both OFAC and the EU issued regulations this month to distinguish sanctions applicable to South Sudan from those imposed on Sudan.

On July 1st, 2014, OFAC issued the South Sudan Sanctions Regulations (SSSR) (new 31 C.F.R. Part 558) to implement Executive Order (EO 13664) of April 3rd, 2014), which imposed blocking sanctions on individuals threatening the peace and stability of South Sudan. Again, the SSSR are distinct from OFAC's long-standing sanctions on Sudan, implemented in 31 C.F.R. Part 538.

The EU followed on July 10th when the European Council adopted Decision 2014/449/CFSP separating the measures concerning South Sudan and integrating them into a single legal act and providing for restrictions on admission and the freezing of funds and economic resources of persons obstructing the political process in South Sudan, including by acts of violence or violations of ceasefire agreements, as well as persons responsible for serious violations of human rights in South Sudan.

Clients should contact Crowell with any questions they might have on these new Regulations.

For more information, contact: Cari Stinebower, Salomé Cisnal De Ugarte, Chris Monahan, Dj Wolff, Edward Goetz

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Ohio-based Charity Removed from OFAC's SDN List after Eight Year Fight

Two years after settling a six year dispute with Treasury's Office of Foreign Assets Control (OFAC), on July 11th, the charity KindHearts for Charitable Humanitarian Development, Inc. was finally removed from the Specially Designated Nationals and Blocked Persons Lists (SDN). KindHearts was placed on the SDN list as a "blocked pending investigation" (or BPI) and was never formally designated as a Specially Designated Global Terrorist. OFAC placed it on the list as a "BPI" on February 19, 2006 as "the progeny of the Holy Land Foundation and the Global Relief Foundation, which attempted to mask their support for terrorism behind the façade of charitable giving." See http://www.treasury.gov/press-center/press-releases/Pages/js4058.aspx.

The organization was effectively shut down in 2006 and its assets frozen when OFAC began its investigation of the charity. In 2009, a federal judge ruled that the government had violated KindHearts' constitutional rights when it was denied due process and subjected to the unlawful seizure of its property.

Litigation continued, with the parties finally reaching a settlement in February 2012, three months after the charity disbanded. OFAC agreed to pay KindHearts' legal fees and consented to the disbursement of the $1 million in assets frozen in 2006 to humanitarian causes. OFAC was not obligated to delist the organization until it was completely shut down, which was in May 2014.

For more information, contact: Cari Stinebower, Edward Goetz

Other July OFAC Actions:

Central African Republic

On July 7th, 2014, the Department of the Treasury's Office of Foreign Assets Control (OFAC) issued regulations to implement Executive Order 13667 (E.O. 13667) of May 12, 2014 ("Blocking Property of Certain Persons Contributing to the Conflict in the Central African Republic"). 31 CFR Part 553 (the "Regulations") contains a copy of E.O. 13667 at Appendix A to this part.

The Regulations were published in abbreviated form for the purpose of providing immediate guidance to the public. OFAC intends to supplement Part 553 with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance and additional general licenses and statements of licensing policy. The appendix to the Regulations will be removed when OFAC supplements this part with a more comprehensive set of regulations.

Zimbabwe

On July 10th, 2014, the Department of the Treasury's Office of Foreign Assets Control (OFAC) issued updated Zimbabwe Sanctions Regulations, 31 CFR Part 541, which amended the Regulations to implement Executive Order (EO 13391) of November 22nd, 2005 (Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe) and EO 13469 of July 25, 2008 (Blocking Property of Additional Persons Undermining Democratic Processes or Institutions in Zimbabwe.)

OFAC incorporated the prohibitions from both of the Zimbabwe EOs, including new designation criteria. A general license was added authorizing payments from outside the U.S. for the provision of certain legal services. Also added was a general license that was previously posted only on OFAC's website, which authorizes most transactions involving the Agricultural Development Bank of Zimbabwe and the Infrastructure Development Bank of Zimbabwe.

Clients should contact Crowell with any questions they might have on these new Regulations.

For more information, contact: Cari Stinebower, Slomé Cisnal De Ugarte, Chris Monahan, Dj Wolff, Edward Goetz

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CROWELL & MORING SPEAKS

Jonathan (Josh) Kallmer was a panelist for "U.S. BITs and FTA Investment Chapters: A Vital Tool or Outdated Relic?" at the Washington International Trade Association (June 18, 2014).

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