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CLIENT ALERT

This Month in International Trade - March 2015

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In this issue:

TOP TRADE DEVELOPMENTS

Russia Update: One Year Anniversary of Crimea Annexation; Australia Introduces Sectoral Sanctions and More

One year after the Crimean parliament declared independence and formally applied to join Russia, the worldwide sanctions regime remains in place and shows no signs of weakening. Within the last month, both the U.S. and EU have reaffirmed their support for sanctions to continue so long as Russia occupies Crimea and supports the separatists in eastern Ukraine, while Russia has reasserted its intent to maintain its hold on the peninsula.

Speaking at a rally outside the Kremlin on March 18, 2015, President Putin said, "A year ago today, Russia and the Russian people demonstrated an amazing focus and amazing patriotism by helping the people of Crimea and Sevastopol to return to their home shores."

Meanwhile, the U.S. State Department issued a press release on the one year anniversary of the Crimean occupation, saying, "This week, as Russia attempts to validate its cynical and calculated "liberation" of Crimea, we reaffirm that sanctions related to Crimea will remain in place as long as the occupation continues. The U.S. continues to support Ukraine's sovereignty, territorial

integrity, and right to self-determination." Earlier in March, the U.S. added 14 rebels and two entities, the Russian National Community Bank and a pro-Russia separatist group, to its blacklist.

Despite some public debate about their efficacy, particularly from the new Greek government, the EU similarly agreed on March 18, 2015, to maintain its economic sanctions against Russia until the Minsk agreements are fully implemented and fighting in eastern Ukraine ends. The second Minsk agreement was signed on February 11, and the subsequent cease-fire has held, although tenuously at times.

Australia published its new sectoral sanctions and broader export controls against Russia, first announced in September 2014. On March 26, 2015, Australia revealed the scope of the new restrictions in the "Autonomous Sanctions Amendment (Russia, Crimea, and Sevastopol)" and then on March 31, 2015, it listed the sanctioned entities and prohibited exports in the "Autonomous Sanctions (Russia, Crimea, and Sevastopol)" Specification 2015.

Australia's sanctions closely parallel those implemented by the EU and are similar to those imposed by the U.S. and Canada. With respect to sectoral sanctions, Australia prohibited financial dealings and loan instruments with a maturity exceeding 30 days for certain financial, defense, and oil companies.

Also announced was a broad swath of trade-related restrictions, including arms and military-related export and import controls with respect to Russia, as well as a broad export, import, oil services, and investment embargo on Crimea.

Russian military behavior continues to be highly confrontational. On March 22, Russia's ambassador to Denmark said that Danish warships will be a target for Russian nuclear weapons if the country joins NATO's missile defense program. Two days later, Swedish fighters intercepted four Russian planes flying in international airspace with their transponders turned off. These developments came on top of a Russian Arctic military exercise held in mid-March that involved almost 80,000 troops, 100 ships, and 200 aircraft.

In Washington on March 23, the House of Representatives overwhelmingly approved a resolution to send lethal aid to Ukraine. To date, the U.S. has refrained from providing lethal aid to Ukraine in line with the position taken by German Chancellor Angela Merkel.

Crowell will continue to closely monitor legal developments and alert clients to any new sanctions or export control measures against Russia.

For more information, contact: Salomé Cisnal De Ugarte, Cari Stinebower, Dj Wolff

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Cuba Update: Discussions on Restarting Bilateral Relations Cut Short; Sanctions Lifted on 45 Cuban persons

What was planned as an open-ended, multi-day meeting in Havana between Assistant U.S. Secretary of State Roberta Jacobson and Josefina Vida, Cuba's chief of U.S. affairs, ended after only one day on March 16. The Cuban Foreign Ministry issued a statement saying only, "At the end of the meeting, which took place in a professional climate, the two delegations agreed to maintain communication in the future as part of this process."

Besides Cuba's insistence on being removed from the State Department's list of state sponsors of terrorism (the State Department's internal review of that designation remains ongoing), March saw increased friction as a result of the deterioration of U.S.-Venezuela relations. On March 9, the U.S. implemented a new sanctions program targeting Venezuela.

Venezuela is Cuba's top trading partner and the countries have close ties. After Venezuela's President Nicolas Maduro condemned the U.S. action, Fidel Castro issued a brief statement of "unconditional" support to Venezuela, praising President Maduro's speech "in the face of the brutal plans by the United States government." Fidel's brother Raul, the current Cuban President, issued no public statements about the actions.

Crowell will continue to closely monitor both legal developments and legislative action to remove the embargo and alert clients of any important changes.

For more information, contact: Cari Stinebower, Dj Wolff, Jana del-Cerro

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Corporate Officer Liability Possible in $17 Million Duty-Free Fraud Case

Last fall in *U.S. v. Trek Leather, Inc. and Harish Shadadpurir,* the Court of Appeals for the Federal Circuit upheld U.S. Customs and Border Protection's (CBP) claims to impose personal liability upon corporate officers for violations of customs laws. A recent penalty case filed at the U.S. Court of International Trade (CIT) indicates that the government may be taking advantage of this recent precedent.

The complaint alleges that between September 2005 and March 2007, China Tire—with the help of its broker—made over 150 entries of new tires under the duty-free provision for used tires, thereby avoiding a four percent import duty. The complaint goes on to allege that when CBP brought the error to China Tire's attention in March of 2007, the company "immediately began entering the same merchandise under different duty free provisions," notably the provision for agricultural & forestry vehicle tires. CBP alleges that between March 2007 and January 2008, China Tire made over 100 additional entries of dutiable new tires under duty-free provisions.

CBP contends that China Tire's misclassifications rise to the level of fraud because the company knowingly misrepresented the nature of the imported tires. As a result, the complaint seeks (1) over $16.8 million in civil fraud penalties (*i.e.*,an amount equal to the domestic value of the tires); (2) $242,028 in unpaid duties; and (3) prejudgment interest on the unpaid duties. The complaint also specifies lesser amounts in the event that the court should decide that the misclassification resulted from gross or simple negligence rather than commercial fraud.

In the complaint, the government states that, while CBP issued penalty notices in 2011 against two officers of the company, the U.S. "[is] not currently initiating an action against the corporate officers but may do so should sufficient evidence warranting personal liability come to light." The complaint indicates that officers of the company may have made false statements to CBP and may have directed its broker to intentionally misclassify its imported tires.

For more information, contact: John Brew, Alex Schaefer, Aaron Marx

Crowell & Moring Secures $100 Million Arbitration Award

On March 2, 2015, Crowell & Moring secured a major victory for its client, Khan Resources Inc., a Canadian company, in its arbitration claim against the Government of Mongolia.

The award is an example of the role Investor-State Dispute Settlement (ISDS) provisions can play in protecting the rights of foreign investors, who often have limited recourse in national courts in some jurisdictions. For investors seeking access to new markets, the Khan award serves as a reminder that arbitrating against states can be a long and costly process, but it can provide an effective forum for the resolution of disputes.

Khan Resources, and its predecessor companies, had been involved in uranium exploration in Mongolia since 1995. In particular, Khan had a 68 percent share in a uranium project in Dornod, a province in the east of the country. In March 2009, Khan published a Definitive Feasibility Study demonstrating that the Dornod Project would be a profitable venture.

Shortly thereafter, the Government of Mongolia publicly announced its intention to develop the Dornod Project with Russia. A Russian state-owned company, ARMZ, then initiated a hostile takeover of Khan. In February 2010, Khan's board recommended the shareholders accept an approach for a takeover made by a Chinese state-owned enterprise. Thereafter, the Mongolian government sought to exclude Khan from any role with the Dornod project and, in April 2010, Khan announced that it had received notice that its mining and exploration licenses had been invalidated. In November 2010, Mongolia informed Khan that it would not reinstate its licenses.

In January 2011, Khan initiated arbitration proceedings under the UN Commission on International Trade Law (UNCITRAL) arbitration rules, claiming that the cancellation of its licenses without compensation constituted an illegal expropriation of its asset.

The arbitration tribunal found that Mongolia had breached its obligations towards Khan by failing to comply with its own Foreign Investment Law. Mongolia was also found in breach of the Energy Charter Treaty, which it had ratified in July 1999. The tribunal ordered Mongolia to pay damages based on its assessment of the value of the enterprise, along with interest and the full amount of Khan's legal fees and costs, which resulted in an award of approximately $100 million.

For more information, contact: Gordon McAllister, James (JJ) Saulino

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Federal Circuit Affirms Application of U.S. Anti-Subsidy Law to Non-Market Economies Constitutional

On March 13, the U.S. Court of Appeals for the Federal Circuit rejected Chinese tire companies' Constitutional challenge to a controversial 2012 U.S. trade law, which explicitly authorizes the Department of Commerce to apply countervailing duty (CVD) law to non-market economies (NME), such as China, retroactively to 2006. CVD is also known as an anti-subsidy duty. In a unanimous opinion, the panel ruled that the law did not violate the Constitution's Due Process Clause.

This is the second challenge the new law has survived at the Federal Circuit in the last year. Last March, the court ruled the measure was in compliance with the Fifth Amendment's Ex Post Facto Clause.

The new law was sparked by a decision handed down by the U.S. Court of Appeals for the Federal Circuit in December 2011 (*GPX v. United States*), which prohibited the application of CVDs to merchandise from nonmarket economies. This prompted an immediate response from Congress to pass a new, bipartisan bill bolstering the Tariff Act of 1930. According to a joint statement issued by 2012 House Ways and Means Committee Chairman Dave Camp (R.-Mich.), "This legislation overturns the decision of the Court of Appeals for the Federal Circuit in *GPX v. United States* and preserves the validity of the CVD proceedings against imports from China and Vietnam, beginning in 2006."

At issue in both Constitutional challenges was the retroactive application of the new law to CVD investigations initiated six years earlier. In the March 2015 decision, the Federal Circuit used factors articulated by the U.S. Supreme Court in ruling that retroactive application of the CVD law to China was permissible because:

- the legislation was not a "wholly new" law, but rather one that "simply extended Commerce's ability to impose CVD to a new group of importers;"
- the new law was enacted to resolve uncertainty as to whether the CVD law could be applied to NME;
- Chinese tire companies had notice as early as 2006 of the potential change in policy since Commerce published a "Notice of Opportunity to Comment" on whether the current economic situation in China warranted the application of the U.S. CVD law to a NME; and
- the law is directed to the remedial administration of CVD law, providing relief to domestic tire producers.

If the Federal Circuit overturned GPX and held that the new law violated the Due Process Clause of the Constitution, CVD orders issued between November 20, 2006, and March 13, 2012, would have been terminated.

Barring an appeal to the Supreme Court, CVD orders issued during this period remain secure and final under U.S. law.

For more information, contact: Daniel Cannistra, Ru Xiao-Graham

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ITC Rejects Challenge to Mexican Sugar Deals; Fight Returns to Commerce

On March 19, the U.S. International Trade Commission (ITC) ruled against Imperial Sugar Co. and AmCane Sugar LLC, finding that the trade remedy suspension agreements recently implemented with Mexico completely eliminate the injurious effect of Mexican sugar imports on the U.S. domestic sugar industry. Only the results of the vote were released; the full report on the decision will be available on April 24.

The ruling shifts the focus back to the Department of Commerce, where the two companies have requested that the original anti-dumping (AD) and countervailing duty (CVD) investigations be restarted. However, the American Sugar Coalition, the original petitioner to bring AD/CVD challenges against imports of Mexican sugar, sent a memorandum to Commerce saying that Imperial and AmCane lack standing under trade remedy laws to revive the challenges because they only took part in the agency's process for creating the suspension agreements, a separate statutory process from the cases themselves.

The two companies disagree, citing themselves as interested parties in the dispute, which would allow them to request continuations under the law.

Commerce is expected to rule soon on the matter.

For more information, contact: John Brew, Daniel Cannistra, Jini Koh

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BIS Reduces Documentation Requirements, Exporters Celebrate

Effective March 13, 2015, the Bureau of Industry and Security (BIS) finalized changes that reduce the burden on exporters by limiting the instances in which exporters must include certain support documents with their license applications. The simplification effort was part of BIS's retrospective regulatory review pursuant to Executive Order 13563, which requires every agency to review periodically its regulations to determine whether they should be streamlined or otherwise altered to further the agency's goals.

In its effort to streamline the support documentation requirements, BIS amended Part 748 of the Export Administration Regulations to remove the obligation to obtain International Import Certificates (ICs) and Delivery Verification Certificate (DVs) for applications. The rule also limits the requirement to obtain a Statement by Ultimate Consignee and Purchaser to exports, reexports, and in-country transfers of "600 Series Major Defense Equipment." BIS made these changes in part based on recommendations from commenters who noted that the existing requirements (and even the proposed changes) were more stringent than those of the International Traffic in Arms Regulations. BIS agreed and scaled the requirements down in an effort to more closely mirror the agency's focus on the types of items to be exported instead of other aspects, such as value.

Although these changes will reduce the burden on most BIS license applications, some exporters will face different and still onerous requirements when applying for licenses under the new rule. Crowell & Moring's International Trade Group is available to answer any questions you may have regarding these changes.

For more information, contact: Chris Monahan, Alejandra del-Cerro, Jane Bentrott

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GOP Senator Backs President Obama's Proposal to Merge Trade Agencies

President Obama's proposal to combine six different trade-related agencies gained a rare endorsement in March. Senator Dan Coats of Indiana, a Republican, endorsed President Obama's plan to consolidate six international trade related agencies into one. On the Senate floor Senator Coats said, while discussing the president's budget proposal, "[w]e can start with six programs to consolidate that—programs that primarily do business and trade—affect business and trade agencies as well as related programs."

As some may remember, President Obama originally proposed this idea in 2011 and formally presented it in 2012. When he originally presented this proposal it was met with some strong opposition. Then Senator Max Baucus (now U.S. Ambassador to

China) and then Representative Dave Camp issued a joint statement outlining concerns about including the Office of the United States Trade Representative (USTR) in the consolidation and potentially limiting its independence. In addition, in January 2012, U.S. business groups wrote a letter to President Obama regarding their concerns. The letter highlighted similar concerns to those of Senator Baucus and Representative Camp—that eliminating the USTR had the potential to negatively impact US trade policy and trade negotiation. However, the business groups did say that they value proposals streamlining government agencies, but they continue to question whether the USTR should be included in this reorganization.

In order for the President's merger to move forward, Congress must grant him permission to reorganize the executive branch, which is why this proposal has been stalled for so long. Specifically, President Obama's proposal would merge the trade functions of the following agencies into one entity: Department of Commerce, USTR, the Export-Import Bank of the U.S., the U.S. Small Business Administration, the Overseas Private-Investment Corp., and the US Trade and Development Agency. According to critics of the proposal, the USTR is regarded as one of the leanest and most efficient agencies, which is why many question whether it should be included in the President's proposal. The proposal is resurfacing now, three years later, because President Obama included it in his 2016 budget proposal to Congress.

For more information, contact: Dj Wolff, Michael Appel

AGENCY ENFORCEMENT ACTIONS

Department of Justice, Office of Foreign Assets Control, and the Federal Reserve

- Commerzbank AG, a global financial institution headquartered in Frankfurt, Germany, and its U.S. branch, Commerzbank AG New York, agreed to pay a combined fine of $1.45 billion to U.S. federal and state regulators and entered into a deferred prosecution agreement with the Justice Department for sanctions and Bank Secrecy Act (BSA) violations. The bank also entered into settlement agreements with the Office of Foreign Assets Control (OFAC) and the Board of Governors of the Federal Reserve System. Continuing recent trends with respect to enforcement actions against financial institutions, the New York State Department of Financial Services (DFS) was part of the investigation and will receive $610 million of the settlement.

Office of Foreign Assets Control (OFAC)

- OFAC announced that PayPal, Inc. (PayPal) has agreed to a $7,658,300 settlement to settle potential civil liability for 486 apparent violations of multiple sanctions programs. For several years up to and including 2013, PayPal allegedly failed to employ adequate screening technology and procedures to identify the potential involvement of U.S. sanctions targets in transactions that PayPal processed, in part because PayPal failed to screen "live" transactions while they were being processed to potentially prevent violations. Separately, between October 20, 2009 and April 1, 2013, PayPal processed 136 transactions totaling $7,091.77 to or from a PayPal account registered to an individual on OFAC's List of Specially Designated Nationals and Blocked Persons. PayPal's automated interdiction filter did not initially identify the account holder as a potential match to the SDN List, and when it did, PayPal Risk Operations Agents dismissed alerts on six separate occasions after failing to obtain or review documentation corroborating the identity of the SDN.

- Life for Relief and Development (LRD) has agreed to pay $780,000 to settle potential civil liability for apparent violations of the former Iraqi Sanctions Regulations. Between September 9, 2002, and March 19, 2003, LRD appeared to have violated the Regulations when it knowingly and willfully formed a conspiracy for the purpose of transferring funds from the United States to Iraq, by and through Amman, Jordan, and appeared to have made funds transfers pursuant to this conspiracy. The civil settlement with OFAC is an element of a settlement agreement between LRD and the U.S. Department of Justice.

Bureau of Industry and Security (BIS)

- Export privileges for Flider Electronics, LLC, et al have been temporarily denied because on or about April 6, 2013, U.S. Customs and Border Protection (CBP) detained a shipment at San Francisco International Airport. The manifest and the Automated Export System (AES) filing for the seized shipment described the items as "power supplies," but the shipment actually contained, among other items, 15 Xilinx field programmable gate array (FPGA) circuits that are controlled under Export Control Classification Number (ECCN) 3A001.a.2.c for national security reasons and generally require a license for Russia. The shipping documentation also listed Logilane Oy Ltd. in Finland (Logilane) as the ultimate consignee. Open source information confirmed that Logilane was a freight forwarder and thus unlikely to be the end user for the items contained in the shipment. When questioned about the shipment, Pavel Flider requested that the ultimate consignee be changed to Adimir OU (Adimir) in Estonia, which itself also proved to be a freight forwarder.

Financial Crimes Enforcement Network (FinCEN)

- FinCEN assessed a $75,000 civil money penalty against a Colorado money services business (MSB), Aurora Sunmart Inc., and its owner and general manager, Jamal Awad, for failing to implement adequate anti-money laundering (AML) controls. In addition to the civil money penalty, Aurora Sunmart and Mr. Awad may not conduct any money services business until remedial measures identified by FinCEN are met. These include re-registration as an MSB, developing and implementing an AML training program. An independent audit of the company's internal controls must also be conducted.
- FinCEN named Banca Privada d'Andorra (BPA) a foreign financial institution of primary money laundering concern pursuant to Section 311 of the USA PATRIOT Act. The bank is the 15th foreign financial institution to ever be designated, and is one of only eight currently subject to restrictions, under Section 311. The finding is based on information indicating that for several years, high–level managers at BPA have knowingly facilitated transactions on behalf of third–party money launderers acting on behalf of transnational criminal organizations.
- FinCEN imposed a $10 million civil money penalty against Trump Taj Mahal Casino Resort for willful and repeated violations of the Bank Secrecy Act (BSA). The casino, located in Atlantic City, New Jersey, admitted to several willful BSA violations, including violations of AML program requirements, reporting obligations, and recordkeeping requirements. Trump Taj Mahal has a long history of BSA violations cited by examiners dating back to 2003.

For more information, contact: Cari Stinebower, Dj Wolff, JJ Saulino

OTHER AGENCY ACTIONS

Office of Foreign Assets Control (OFAC)

- On March 9, President Obama issued an Executive Order (E.O.) "Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela." The E.O. implements the Venezuela Defense of Human Rights and Civil Society Act of 2014 which was passed in December 2014. For more details, please see Crowell's comprehensive Client Alert on the E.O., as well as Crowell's summary of the legislation.

U.S. Customs and Border Protection (CBP)

- CBP has ruled that more than a software download is needed to effect a "substantial transformation" under the Trade Agreements Act (TAA). See Crowell's Client Alert for details and analysis of this final determination.

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

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CROWELL & MORING SPEAKS

For the third consecutive year, Crowell & Moring has produced the England & Wales and New York chapters of Getting the Deal Through: Arbitration. In these chapters, Crowell & Moring attorneys set out the key features of the relevant legal frameworks, as well as current trends in these two key jurisdictions for arbitration. The England & Wales chapter is available here, and the New York chapter is available here.

- Co-Authors were Adrian Jones, Gordon McAllister, and Ed Norman in London, and Jack Thomas and Arlen Pyenson in New York.

Dan Cannistra and John Brew spoke on Global Trade Recovery opportunities at **Crowell & Moring's First Annual In-House Affirmative Recovery Conference, held March 19 and 20 in Dana Point, CA.**

Frances Hadfield spoke on the possible perils and pitfalls for fashion and apparel importers on March 20 at the Federal Bar Association's annual Fashion Law Conference at the U.S. Court of International Trade. Frances was also one of the organizers of the event. The Huffington Post covered the event. You can read their article here.

Melissa Coyle was a panelist for a Young Trade Professionals event titled, "United States Trade Representative (USTR) Alumni: Reflections from the Negotiating Table" on March 31.

Dj Wolff will be presenting on the practice of international trade in D.C. at Stanford Law School on April 15, 2015.

Jeff Snyder and Chris Monahan will be presenting at the annual Spring Meeting of the American Bar Association (ABA) Business Law Section in San Francisco on April 16. The topic will be an update and overview of Export Controls and Economic Sanctions for corporate attorneys.

Jeff Snyder will be moderating a panel on trade agreements in Asia for the International Trade Committee of the Inter-Pacific Bar Association (IPBA) on May 7 in Hong Kong at the IPBA's 25th Annual Meeting and Conference.

CROWELL & MORING WELCOMES

We are pleased to welcome Frances P. Hadfield to the International Trade Group.

Frances Hadfield joins the firm as a counsel in Crowell & Moring's New York office. Her practice includes trial and appellate litigation before the U.S. Court of International Trade and U.S. Court of Appeals for the Federal Circuit. Prior to joining Crowell & Moring, she worked for 10 years at an International Trade boutique in NYC. She was also a law clerk for the Hon. Evan J. Wallach at the U.S. Court of International Trade. Frances is a licensed customs broker and regularly teaches courses on importing and Customs issues for fashion companies. She is co-chair of the Trial and Appellate Committee for the Customs and International Trade Bar Association (CITBA). Frances also is a member of the Rules Advisory Committee for the U.S. Court of International Trade.

Frances' joining reflects our ongoing commitment to deepen our trade group operation in NY. With an active docket at the CIT and extensive work with CBP, the group has traditionally held a strong presence in NY. With Frances, we now have world class litigation and customs experience on the ground in New York. We look forward to the opportunity for you to meet Frances and get to know her. Frances can be reached at 212.803.4040.

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