

WEBINAR: **This Year in Trade – Fall Update**

October 8, 2015

The webinar will begin shortly, please stand by. The materials and a recording will be sent to you after the event.

Agenda

- Economic Sanctions
- Anti-money Laundering and Foreign Corrupt Practices Act
- Export Controls
- Free Trade Agreements
- Antidumping
- Customs
- Cross-border Issues in Government Contracting
- EU Trade Issues

Economic Sanctions

James (J.J.) Saulino, Associate

Economic Sanctions

- Iran
 - **July 14, 2015:** agreement on Joint Comprehensive Plan of Action (JCPOA) announced (“Finalization Day”)
 - Required approvals have been obtained
 - “Adoption Day” will occur on October 18, 2015
 - No sanctions lifted until “Implementation Day”
 - “Implementation Day” expected in first half of 2016
 - U.S. to lift secondary sanctions; EU to lift most primary sanctions
 - U.S. primary sanctions will remain in place
 - General Licenses are expected (e.g., for activities involving foreign subsidiaries consistent with JCPOA); **but** OFAC has reiterated that it will continue to enforce facilitation rules
 - OFAC to issue further guidance leading up to Implementation Day

Economic Sanctions

- Cuba
 - **September 22, 2015:** OFAC and BIS each publish new amendments to Cuba regulations
 - **Summary of OFAC changes:**
 - Travel and related services
 - Telecommunications and internet-based services
 - Maintaining a physical presence in Cuba
 - Remittances
 - Cuban nationals in third countries

Economic Sanctions

- Venezuela
 - **March 8, 2015:** E.O. 13692 implemented new list-based sanctions on Venezuela
 - Seven individuals have been designated as SDNs, all affiliated with Venezuelan government
- Crimea
 - **July 30, 2015:** OFAC issues “Advisory” on Crimea sanctions compliance
 - Warns of evasive practices that include the omission or obfuscation of references to locations within Crimea in payment instructions and shipping documentation

Anti-money Laundering (AML) and Foreign Corrupt Practices Act

Dalal Hasan, Associate

AML Trends for 2015

- US
 - Greater Enforcement Role for FinCEN
 - Impact for non-financial institutions
 - More Geographic Targeting Orders
 - Final Customer Due Diligence Rule from FinCEN
 - On-going Tension Between Data Privacy and Transparency – Particularly Cross-border
- EU
 - ECJ Safe Harbor Ruling
 - Fourth Anti-Money Laundering Directive

EU AML Reform

- **May 2015:** Fourth AML Directive passed by the European Parliament (substituting Directive 2005/60/EC)
- **Main changes brought by the Fourth AML Directive:**
 - Strengthening of the role of the Commission in identifying AML and terrorist financing risks and **enhanced coordination efforts** among EU Member states and **reporting requirements** to competent authorities of suspicious activities
 - Additional guidance to covered persons and Member states on **Customer Due Diligence**, through non-exhaustive lists of factors indicating potentially lower or higher AML risks
 - **Criteria to exclude certain entities** from AML legislation based on a list of factors indicating potentially lower AML or terrorist financing risks
 - **Beneficial ownership information** – EU Member states are obliged to keep **central registers** of information on the ultimate beneficial owners of corporate entities and trusts. The registers will be accessible to both the authorities and to people with a legitimate interest (including journalists)
- EU Member states must amend their national legislation by June 26, 2017

Anticorruption (FCPA)

- 2015 Enforcement
 - Dominated by SEC
 - 7 corporate enforcement actions, including record setting \$25 million penalty against BHP Hilton
 - 2 individual settlements
 - DOJ
 - 2 corporate settlements, \$24 million in penalties (compared to record-setting \$1.25 billion over 7 enforcement actions in 2014)
- Focus on Individual Prosecution (Yates Memo)
- DOJ Compliance Counsel

Export Controls

Jana del-Cerro, Associate
Lindsay Denault, Associate

Export Control Reform Update

- No new final rules revising USML/CCL Categories
- Proposed revisions to Categories XIV & XVIII
- Proposed harmonization of definitions in the ITAR & EAR, and new definition of “defense services”
 - Anticipated final rule late 2015/early 2016

“Intrusion Software” Proposed Rule

- BIS published proposed rule on **May 20, 2015**, implementing Dec. 2013 Wassenaar Arrangement Agreement that:
 - Introduces definition of “intrusion software”
 - Adds ECCNs 4A005 and 4D004, modifies 4D001, 4E001, and 5A001
- BIS received over 250 comments (compared to approximately 100 comments to the proposed rule on harmonization of definitions) – continues to evaluate how to implement WA agreement without overly regulating legitimate cybersecurity tools

Free Trade Agreements

Paul Davies, Director (C&M
International)

Trade in 2015 – Checklist Update

- Trade Promotion Authority – PASSED ✓
- Trans-Pacific Partnership – CONCLUDED ✓
- Transatlantic Trade and Investment Partnership (TTIP) – DRIFTING 😐

Two Views of TPP

This week, Atlanta *



*not actually this week in Atlanta

Two Views of TPP

Next week, Congress



Key Features of TPP (1)

- **Market access** – comprehensive tariff elimination in some new markets (Vietnam, Malaysia); 98% elimination in Japan (2% of agriculture not eliminating tariffs). Many details still TBA
- **Customs** – expedited processing; transparency and due process improvements; regional cumulation; many sector specific deals on rules of origin complicating tariff benefits
- **Services and investment** – major reductions in impediments to cross border services, establishment; liberalization of temporary entry
- **Government Procurement** – opening Japan, Vietnam, Malaysia with some reservations

Key Features of TPP (2)

- **Intellectual property** – upgrade patent/trademark/copyright protection in Japan/Malaysia/Vietnam to standards in other FTAs; trade secret protection; enforcement cooperation
- **State owned enterprises** – constraints on favorable treatment for commercial activities of SOEs
- **E-commerce** – rights to move data across borders; restrictions on localization of data processing; privacy safeguards
- **Labor and environment** – increase standards of protection in developing TPP markets and binding dispute settlement

Next Steps

- President notification to Congress – countdown to publication
- Signature likely before end of 2015
- Congressional consideration spring 2016
- Other parties to ratify in overlapping timeframe
- Entry into force – the next big unknown

TTIP – State of Play

- “Drift” through TPP endgame
- Divergences on all fundamental issues
- “Re-energized” after Froman-Malmstrom stocktake in September
- Two more rounds in 2015
- Push for endgame/“boundaries” in 2016

Antidumping

Alex Schaefer, Counsel
Benjamin Caryl, Associate

New Trade Cases Filed Since Fall 2014

- 18 countries and well over 50 AD/CVD cases total
- **Steel pipe and tube:** heavy walled rectangular welded carbon steel pipe and tubes, welded stainless pressure pipe
- **Steel flat products:** corrosion-resistant, hot-rolled, cold-rolled
- **Raw materials for steel production:** silicomanganese
- **Chemicals:** PET resin, melamine, refrigerant
- **Paper:** uncoated paper, supercalendered paper

New U.S. Trade Laws Passed in June

- **Trade Promotion Authority:** Negotiating Objectives, Fast Track for TPP and T-TIP FTAs
- **Trade Preferences and Extension Act of 2015:**
 - Extensions of AGOA, GSP, HOPE II, and TAA
 - **American Trade Enforcement Effectiveness Act (aka Level the Playing Field Act)**

Modifies ITC Definition of “Injury”

- ITC shall not vote negative merely because industry is profitable or has improved performance
- Additional factors to consider: gross and net profits, ability to service debt, and return on assets
- The above two *slightly* increase chance of an affirmative vote
- Revises “captive production” test: if U.S. producers internally transfer/consume and sell in the merchant market significant production of the domestic like product for production of downstream products, and the domestic like product is the predominant material in the downstream products, the ITC focuses on the merchant market

Changes to AD/CVD Law at Commerce

- **Adverse Facts Available (AFA):** The U.S. Department of Commerce (DOC) may apply the highest AD/CVD rate from the proceeding, without corroboration or estimating what the rate would have been if the party participated
- **Particular Market Situation:** DOC may use third country prices and costs to calculate “normal value” when a foreign producer’s home market prices or costs are distorted
- **Non-Market Economy Prices and Costs:** DOC will automatically investigate “below-cost sales” and may disregard prices and costs distorted by dumping or subsidies
- **Voluntary Respondents:** DOC may decline to investigate voluntary respondents if it would be “unduly burdensome”

Customs

Frances Hadfield, Counsel
Aaron Marx, Associate

Nexus Between Imports and Safety

- **April 2015:** The DOJ brought suit on behalf of the CPSC seeking civil penalties against an importer – Michaels Stores Inc. in the Northern District of Texas. The Complaint alleged that the importer sold glass vases that were too thin to withstand normal handling and prone to shattering in consumers' hands
- CPSC's Office of Import Surveillance (EXIS) works closely with U.S. Customs and Border Protection (CBP) to identify and examine imported shipments of consumer products
- EXIS co-locates investigators to work side-by-side with CBP staff
- **August 2015:** The CPSC voted to initiate an e-filing pilot program to be conducted with CBP. The pilot program will launch in **July 2016.**

“Made in U.S.A.”: Labels, Litigation, and Proposed Legislation

- The FTC requires that if a business chooses to make a “Made in USA” claim - “all or virtually all” of the product has been made in America
- **April 2015:** California’s federal district court held that federal law on designation of origin does not preempt California law.* Plaintiffs in these cases argued that they had been deceived by the “Made in U.S.A.” labels on the denim jeans they purchased because the jeans contained some foreign components
- **June 2015:** A bipartisan bill was introduced in the U.S. Senate aiming to unify the “Made in America” labeling standard. The Reinforcing American-Made Products Act of 2015 would give the federal government control over country-of-origin labels and preempt conflicting state standards

*Paz v. AG Adriano Goldschmied, Inc. and Clark v. Citizens of Humanity, LLC et al.

Customs

- Tariff Reduction Programs
 - Recent changes to the Generalized System of Preferences (GSP)
 - Expansion of the Information Technology Agreement (ITA II)
 - Environmental Goods Agreement (EGA)
- Legislation and Regulation
 - Customs Reauthorization Bill
 - Trade Facilitation Agreement
 - Final Rule on Disclosure of Certain Information for Certain Intellectual Property Rights Enforced at the Border
 - ACE Implementation

Cross-border Issues in Government Contracting

Addie Cliffe, Counsel

Foreign Military Financing (FMF): Revised Guidelines

- Defense Security Cooperation Agency (DSCA) has informally circulated proposed revisions to its August 2009 FMF guidelines governing acquisitions by foreign countries using FMF under direct commercial contracts (DCC)
 - Substantial changes elaborating on and changing policies with respect to disclosure and financing of U.S., non-U.S., and “host country” content

EU Trade Issues

Charles De Jager, Counsel

EU Economic Sanctions

- Latest update on EU sanctions against Russia
- Latest update on EU sanctions against Iran
- Reform of the UK HM Treasury sanctions function, with the establishment of the Office of Financial Sanctions Implementation as of April 1, 2016
 - More staff is envisaged for license processing
 - Increased awareness-raising and engagement with exporters is foreseen, including more sanctions alerts and outreach programs
- Intersection of data privacy and economic sanctions

EU Export Controls

- The EU export control policy review is ongoing:
 - Results of the public consultation are likely to be published in the first half of 2016
 - The Commission also initiated an impact assessment to ensure comprehensive analysis of economic, social (including security and human rights), and environmental impacts of the various review options
- Efforts and activities of the Dual-Use Coordination Group continue, including consultations on implementation issues, technical support and capacity building, exchange of information between competent authorities, transparency, and dialogue
- Increased attention, especially in the UK, on cyber products not subject to export controls and not developed under classified defense or security contracts; Companies must perform appropriate due diligence and refer questions to the authorities when in doubt

EU Trade Policy and FTAs

- The Commission proposal for the establishment of a new Investment Court System has been presented to try to overcome an impasse within the EU regarding investor-state dispute settlement (ISDS) mechanisms in ongoing and future EU trade and investment negotiations, including TTIP
- Progress in key EU FTA negotiations, including the conclusion of negotiations with Vietnam as a model new agreement for EU FTAs with emerging economies
- The European Commission's updated trade strategy for the next five years places an emphasis on delivering results through bilateral FTAs and is characterized by increasingly closer coordination with foreign policy and EU values (including sustainable development and humanitarian goals)

EU Trade Remedies

- EU still to decide on whether to grant market economy status (MES) to China
- European Commission's and European Parliament's legal services are of the opinion that WTO law requires that MES be granted
- Commissioner Malmström: China is "*obviously not a market economy*" – some EU Member States are of the same opinion
- Possible impact of ECJ's judgment in C-21/14 *Rusal Armenal*: EU can maintain NME methodology for imports from countries considered NMEs under the EU Basic AD Regulation, but not under WTO rules
- Approach adopted on MES by the EU's main trading partners will be an element for final decision, as well as risk of retaliation
- Decision on MES by the end of 2015?

EU Customs Law

- Union Customs Code to enter into force on May 1, 2016
- Adoption of Delegated and Implementing Acts still pending
- Main proposed changes:
 - All communications between customs and economic operators will become electronic
 - Clarifications on the issuance and use of customs rulings (BTIs/BOIs)
 - Possible elimination of *first sale* method for valuation: *last sale rule* only, but likely transitional period

Speakers – Q&A



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