



Prapahn Jampala

DESIGNATING CHANGE

In the first half of this year, relations between the U.S. and two old enemies, Cuba and Iran, appear to have undergone a radical change – auguring a possible thaw in trading relations with those countries. Inevitable complications, say sanctions lawyers, will require careful counsel.

2015 is shaking out to be quite a year for U.S. sanctions practitioners: not that 2014 wasn't – who knew, for example, that the U.S. and others would be slapping sanctions on Russia? But 2015 has seen milestones that have perhaps a greater resonance, still. In July, Cuba and the United States raised their flags in each

other's respective capitals, marking the restoration of diplomatic ties for the first time in 54 years, and shortly afterwards, the U.S. Department of Commerce formally rescinded Cuba's status as a State Sponsor of Terror.

Perhaps more remarkable still, given the added international complexities of the conundrum, has

been the emergence, on 14 July, of a 128-page agreement between P5+1 and the Islamic Republic of Iran regarding the latter's nuclear programme, the Joint Comprehensive Plan of Action ('JCPOA'). As at writing time, the removal of U.S. sanctions is still some way off and indeed, at a political level, the agreement isn't out of the woods,

Secretary of State John Kerry yet to convince the U.S. Congress that the deal is a 'good deal', and not, as some in the U.S. and elsewhere have decried it, a historic mistake.

The chessboard is less active elsewhere: Kerry may have partnered successfully with his Russian

(speaking to *WorldECR* in mid-June) that the Vienna talks would over-run, but that there were 'reasonable grounds for optimism that [the parties] would come out with something', as indeed they have.

Estimates vary hugely as to how much the Islamic Republic will be

are going to become more complicated still – especially around the issue of secondary sanctions. You're going to see non-U.S. companies in bed with Iran and interacting with U.S. companies – and that's going to raise some very interesting issues.'

Lauren Wilk, Director of Trade Facilitation Policy at the National Association of Manufacturers ('NAM'), says of the Iran developments: 'There's likely to be pretty limited impact in the near term – but thawing could have long-term positive effects – and U.S. business will be very competitive. But there are a lot of risks from both the compliance and the reputational standpoints.' Some companies, she says, will be 'nervous' about being perceived as early entrants into Iran: 'There's usually tension between business development and compliance, and compliance always wins.' But, she adds, 'Ultimately, we want to make sure that any restrictions/openings are equal and that U.S. companies are not unfairly disadvantaged.'

This is certainly an irony of sorts, says Trade Pacific law firm partner Corey Norton, given the leadership role that the U.S. State Department played in the negotiations. 'It looks like the impact is going to be disproportionate,' says Norton. 'Six countries negotiating, but ultimately there'll be more opportunities for the non-U.S. companies. The unravelling is going to be complex.'

Kay Georgi of Arent Fox has also been mulling over what opportunities lie in store for her clients post-Vienna: 'The three primary sanctions that the U.S. is looking at relaxing are those



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Alan Gourley, Crowell & Moring

counterpart Sergey Lavrov in their dealings with Tehran, but it's looking like stalemate in their own relations – Moscow isn't relaxing its grip on Crimea or its role in Eastern Ukraine, so the sanctions stay in situ: not quite Cold War, but no warm friends either. Still, things change fast, said one lawyer advising on sanctions matters: 'Clearly the United States is looking to realign its foreign policy priorities, take stock of existing threats, and seek closure on attitudes which, depending on your perspective, may need revising. Our clients are constantly evaluating risks and opportunities around that scenario.'

Talking to Tehran

As the Brookings Institute noted in a paper on U.S.-Iranian relations, 'since the seizure of the American embassy in Tehran more than 34 years ago, economic sanctions have been at the heart of Washington's strategy for dealing with Iran,' and, unsurprising, the accretion of layers of legislation will be hard to undo.

'We've had serious sanctions on Iran for 20 years that have blocked virtually every possible transaction involving U.S. persons and U.S. origin goods or services,' says Alan Gourley, a partner at Crowell & Moring. 'In the short term, there's no significant change. But Iranian companies have been very active in reaching out to western companies in anticipation of a deal. And it creates some pressure on them. They're being asked, "You want to be the first in the door?"'

'Iran is a very hot topic,' says Latham & Watkins partner Les Carnegie, who correctly predicted

enriched (pun unintended) by sanctions relief, as they do as to what Iran will spend the money on. But Iran possesses a population of 80 million people hungry for consumer goods, services and infrastructure, the world's fourth-largest oil reserves and, unlike many of its neighbours, a sophisticated industrial base.

'Many U.S. companies are animated about the prospect of a new market,' says Carnegie. 'Exporters of general consumer goods are very interested, and already there are opportunities for the sale of certain consumer communication devices as well as agricultural products, medicines and medical supplies and devices. But we're counselling our U.S. clients to temper their excitement or at least be realistic.' Carnegie notes that even if everything goes as planned, U.S. companies will be less likely to benefit than their EU partners.



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Rich Matheny, Goodwin Procter

This is because the European Union is set to roll back sanctions more quickly than the U.S. government. As Rich Matheny of Goodwin Procter notes: 'Most restrictions on U.S. persons won't be lifted as a result of the deal. My sense is that it's not what people were expecting. In fact, things

that relate to civil aviation, selected imports such as pistachios, caviar and carpets, and the activities of non-U.S. subsidiaries of U.S. parents, where they're consistent with the terms of the JCPOA – but it's never simple. It would be simple, for example, if OFAC were to issue a general licence authorising

applies on the enforcement front: 'Since entering private practice, I've done about a dozen internal investigations – but only once advised a disclosure because the other investigations did not identify a violation. Often it's debatable as to whether a violation did or didn't take place – and where it has, it is usually low-grade violations and not a major issue. Of course, companies want to be in compliance but a policy of disclosing everything – particularly

be complete: 'It really can't be until you know what it actually means to "export" or what constitutes "defense services".' Comments on these are due in early August.

Carmen Fellows, Senior Director of Global Trade Compliance at Finnmeccanica North America & DRS Technologies, says that not all companies are keeping up to speed with the myriad changes – and that that is causing problems: 'Yes, once a part or

are still struggling with so much shifting product classification and it may be some time before they realise the benefits. But others have already seen that the process has been worth it. Certain companies are realising that they are no longer regulated under ITAR and their entire product line is regulated under the EAR. And that's easier for them. They no longer need to register annually with the DDTTC.'

Crowell & Moring's Alan Gourley has been witnessing changes in the export control regime since 1981 when, he says, 'compliance people were essentially clerical staff – the State Department treated known exporters much less formally, even allowing shipment before State had issued the licence!' It was, says Gourley, 'after a succession of huge fines in the 1990s that all the major aerospace and defence companies began – facilitated by State's policy of having settling companies use a portion of their fines to enhance internal compliance – to invest in their compliance programmes. So the threat of fines, combined with extra spend, meant that the majors began to educate their people, and to push their subsidiaries to do the same. The result has been a massive professionalisation of compliance in the last 15 years.'

Change creates hurdles even for the highly skilled, he says: 'The challenge lies in the transition issues, identifying where a company's products have ended up, using some of the exemptions – such as the Strategic Trade Authorization (STA) in the EAR, and classification. There are issues because whereas once people in the defence industry where so familiar with



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even where no actual violation took place – can work against you.'

Keeping pace

While some lawyers are confident that Commerce and State will be able to have final rules by the end of 2016, Stagg isn't so sure: 'There's a lot of confusion about the proposed rules – and it's amazing how many rules have been proposed in such a short span. I think we're going to see a final rule on Category XVIII of the USML [directed energy weapons] before we see final rules on Category XII (fire control, range finder, optical and guidance and control equipment) – where there'll be a second proposed rule mid-2016, or Category XIV (which deals with toxicological agents, including chemical agents, biological agents, and associated equipment).' The effort to harmonise definitions, he predicts, might not be complete before the end of 2017.

Given the scale of the task, that's arguably not bad going. All lawyers *WorldECR* spoke to for this article have expressed admiration for the energies expended by the Assistant Secretary of Commerce for Export Administration at the Bureau of Industry and Security:

'Kevin Wolf has done so much in the last five years – some of the issues that are coming up now are things that BIS has been struggling with before they appointed him as assistant secretary – they go back several directors past,' says Arent Fox's Kay Georgi. But she adds that until the major definitions are finalised, Export Control Reform won't

component is out of the ITAR there are definitely advantages, and it can improve the flow of parts and goods for the supply chain. The difficulty for foreign companies that have always procured parts that have traditionally been under ITAR is that the classification by U.S. suppliers is not being done quickly enough. Many suppliers have thousands of components to classify and they don't have the capacity. Where U.S. companies are not prepared, that's affecting foreign companies.'

Fellows believes that things will get better. 'In the long run, the benefits will become apparent,' she says. 'But for the moment, export control reform hasn't made compliance any easier. Now it's become necessary to put in place additional training, to rewrite



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Les Carnegie, Latham & Watkins

procedures, bring on board additional manpower, create modifications to tracking systems and other IT processes.'

Latham & Watkins' Les Carnegie adds his weight to the consensus that there's still some pain to come – but says that some businesses are feeling the upside already: 'Some companies

ITAR, now they're more likely to miss something – with the result being a whole lot of little voluntary self-disclosures!'

Miller Canfield principal, Joseph Gustavus adds: 'As to export control reform, some companies have only ever operated under the ITAR compliance requirements so they do not have the



THE DIGITAL REVOLUTION

Can compliance keep pace with rapidly developing technology and the challenges it brings? *WorldECR* gets to grip with the fiddly subject of intangibles.

With every passing year, the importance of the digital economy appears to further displace the world of the tangible. In step with that exponential expansion, the online space, for all the opportunities it creates and vistas it opens, possesses challenges in abundance – exfiltration of data, use of the cloud, intrusion and surveillance tools, 3-D printing. These are complex and quickly changing areas of technology (and to a lesser extent law and policy) that fall squarely within the remit of the sanctions and export

control practitioner – and in sometimes surprising ways.

In line online

From the perspective of the sanctions practitioner, it's looking as though sanctions based on physical geography will start to look old hat in the next few years. Against the backdrop of headline-hitting hacking attempts, sensitive data theft, and internet espionage, it's no surprise that cyberspace is looking like the next chapter. In April this year, President Obama issued an executive order

which would target any person determined, 'to be responsible for or complicit in, or to have engaged in, directly or indirectly, cyber-enabled activities originating from, or directed by persons located, in whole or in substantial part, outside the United States that are reasonably likely to result in, or have materially contributed to, a significant threat to the national security, foreign policy, or economic health or financial stability of the United States.'

As yet, (and despite the recent theft of data pertaining to 21 million



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conductors, and include, among others, Genzyme, Honeywell International and Stratasys.

Among recent work, the firm

- Has served as lead counsel to Schlumberger, the Fortune 50 multinational company, in a global investigation and resolution of a criminal case involving alleged violations of U.S. sanctions laws. The case involved multiple grand jury criminal proceedings, parallel SEC, OFAC and other administrative investigations, and enforcement actions and internal compliance reviews, focusing on potential violations of U.S. sanctions against Iran, Sudan, Cuba and Syria.
- Advised Siemens AG, a German multinational company, in its strategic acquisition of Dresser-Rand Group, a supplier of custom-engineered rotating equipment solutions. As part of its representation, the firm successfully obtained CFIUS approval for the transaction.
- Represented Avago Technologies Limited, a Singaporean semiconductor company, in its successful efforts to obtain CFIUS approval in connection with its acquisition of Broadcom, a major manufacturer of telecommunications and networking equipment.

The firm represents a number of leading life sciences companies as well as not-for-profit entities and foundations in connection with the development, implementation and enhancement of U.S. sanctions compliance programmes as well as the application and receipt of OFAC licensing.

Well-known and popular partner Jeff Snyder heads up the International Trade and Government Contracts groups at **Crowell & Moring**. The groups are home to four partners, two counsel, and seven associates, along with three trade professionals working from Washington, DC, Brussels, London, and California. Key team members include partners Alan Gourley and Cari Stinebower and counsel Christopher Monahan.

The team advises on a wide range of trade-related matters including anti-money laundering; anti-boycott legislation; CFIUS; customs law; export controls; global investment strategies; sanctions and embargoed countries; unfair trade investigations and litigation; WTO, FTAs and market access.

The groups' clients include well-known domestic and international organisations operating in aerospace and defence; the information technology sector, including encryption software; electronics manufacturers; financial institutions (banks, (re)insurance, broker-dealers, private equity); educational institutions; publishing companies; food and beverage; health care (including both medical devices and pharmaceuticals); shipping companies; and chemical and basic material manufacturers. A list of clients includes Alcoa, General Motors and Open Text.

Amongst recent client instructions, the team has:

- Successfully obtained a commodity jurisdiction determination that a laser diode acquired and tested to space specifications was not a defence article.
- Performed a multi-site compliance review of an aerospace company,

including all aspects of its export control compliance system, including marketing of defence products, performing defence services, implementing licence limitations (provisos), controlling access to facilities, hiring of foreign nationals, denied party and other screening, compliance with licences and agreements, and shipping and supplier management.

- Counselling a global auto parts manufacturer on the scope and application of U.S. and EU export controls and sanctions laws and regulations to numerous business dealings, including mergers and acquisitions, existing and potential contracts with suppliers.
- Advised a global publisher with regard to various U.S. and EU export control and sanctions compliance issues, especially in light of the continued expansion of the U.S. and EU sanctions regimes targeting Iran and Russia/Ukraine. This work also includes preparing monthly reports on developments on UN, EU, and U.S. sanctions.
- Advised a number of non-U.S.-headquartered global financial institutions on the development of effective risk-based global sanctions and anti-money laundering compliance programmes; engaging with regulators where appropriate; and conducting innovative training for financial crimes compliance personnel.

Steven Brotherton heads the Export Controls Practice Group at **Fragomen Worldwide** out of offices in Washington, DC and San Francisco. Brotherton is a member the U.S. Department of Commerce's



Rich Matheny,
Goodwin Procter



Cari Stinebower,
Crowell & Moring



Alan Gourley,
Crowell & Moring



Jeff Snyder,
Crowell & Moring

Regulations and Procedures Technical Advisory Committee ('RPTAC'), which advises the Department of Commerce on export control regulation and policy. He is also the Co-Chair of TechAmerica's Export Control Reform Subcommittee.

The group is solely focused on U.S. export control matters; services include

- Development and implementation of global export control management systems;
- On-site programme management and other outsourced export compliance staffing solutions;
- Deemed export licensing and compliance counselling;
- Preemptive compliance audits and internal reviews, as well as representation for government enforcement actions and investigations;
- Preparation of export licence applications for the U.S. Departments of Commerce and State and Office of Foreign Assets Control ('OFAC') licences;
- Advice on voluntary disclosures and mitigation plans;
- Evaluation and classification of products, technology, and technical data to determine applicable controls;
- Support for ITAR commodity jurisdiction requests;
- Assistance with preparing and filing encryption classification requests;
- Training on export controls requirements;
- Export control due diligence services for mergers and acquisitions.

Recent instructions have seen the group

- Performing a DDTC-mandated ITAR audit of a \$15 billion electronics company, reviewing over 25 key manufacturing locations in five countries.
- Successfully representing a Fortune 100 company in a BIS audit of the company's deemed export compliance programme.
- Conducting internal investigations and assisting in the preparation of a voluntary disclosure involving over 1,000 violations of the ITAR, resulting in the issuance of a warning letter in lieu of fines and penalties.
- Serving as lead counsel for a large computer company in an investigation and achieving a favourable resolution of a U.S. government enforcement action covering exports to sanctioned countries.
- Representing a major research university in obtaining a landmark advisory opinion from the U.S. Department of State on the application of the 'fundamental research' exemption in an academic setting.

Dallas-based, Elsa Manzanares and Michelle Schulz co-chair **Gardere Wynne Sewell's** International Trade Group. The multi-lingual team includes two other partners, three associates and a trade analyst. In addition to its office in Dallas, the firm has offices in Austin, Houston and Mexico City.

The International Trade Group offers clients expertise in a variety of substantive areas in global trade compliance, including, but not limited to: export process, licensing and

agreements; deemed exports and technology transfers; Office of Foreign Assets Control compliance and licensing; CFIUS filings; FCPA compliance and enforcement matters; compliance monitors and special compliance officer oversight; trade compliance training; international corporate transactions; and investigations.

The International Trade Group also calls on the firm's immigration team to partner on technology export matters involving foreign nationals employed by U.S. companies under various visa categories.

Clients come from a wide range of industry sectors, including, among others: aerospace; automotive; explosives; energy; firearms; chemicals and refining; military training and services; electronics; oil and gas; manufacturing; software and technology; maritime; food and beverage; research and development; retail; and banking.

Manzanares is a former in-house counsel for a multinational company and has particular insight into dealing with trade, corporate and litigation matters covering both Latin America and Canada, and an understanding of how trade and compliance matters can disrupt global business and operations.

Schulz serves on the President's Export Council Subcommittee for Export Administration ('PECSEA'), a senior-level advisory body to the U.S. Department of Commerce and, in particular, BIS. She also serves as an advisor to the U.S. Secretary of Commerce and the U.S. trade representative on the Industry Trade Advisory Committee for Aerospace. She holds secret level security clearance.

Crowell & Moring LLP

Crowell & Moring LLP is an international law firm with more than 500 lawyers in offices in the U.S., the EU and the Middle East. Our International Trade Group includes 30 practitioners, located mainly in Brussels and Washington, D.C., who advise clients ranging from local SMEs to the world's largest multinational corporations on all aspects of international trade, customs, and regulatory laws.

Our core practice areas are export controls and sanctions, WTO law, trade remedy procedures and litigation, customs and duty recovery, anti-corruption, investment and market access rules, and preferential trade agreements. Our clients are active in a wide range of industries, including aerospace & defence; information technology; financial services; automotive; semiconductor; construction; aluminium, iron and steel; consumer products; agriculture and food products; sports and leisure; chemicals; and pharmaceuticals.

The International Trade Group provides clients with a range of services, from straightforward licence applications and training programs to responding to government investigations and counselling on difficult commodity jurisdiction or regulatory compliance issues. We counsel traditional financial institutions and designated non-financial businesses and professionals on how to successfully navigate anti-money laundering laws and regulations.

Our U.S. and Brussels teams are consistently ranked among the world's leading practitioners by *Chambers USA* and *Chambers Global*, including for export controls and economic sanctions.

Our services include:

- Advising on licensing requirements and preparing licence and agreement applications
- Performing internal investigations and assisting with voluntary disclosures
- Performing compliance audits
- Designing and implementing compliance programs
- Performing jurisdictional assessments and preparing requests for commodity jurisdiction determinations
- Assisting in self-classification of products and preparing requests for commodity classification requests
- Performing export control/sanctions/anti-money laundering/anti-corruption/import due diligence reviews related to proposed mergers and acquisitions
- Representing clients in civil and criminal enforcement proceedings
- Training on export controls, anti-money laundering, sanctions, anti-corruption/anti-bribery, import procedures and requirements

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