Developments in U.S. Export and Import Policy and Law

The Editor interviews ***J. David Park, Stephen S. Kho and Thomas James McCarthy****, Partners in the International Trade practice, Akin Gump Strauss Hauer & Feld LLP.*

Editor: Please describe the multiple agencies that control export rules. Should they be brought under one agency?

McCarthy: The three primary agencies are the Bureau of Industry and Security (BIS), the Directorate of Defense Trade Controls (DDTC), and the Office of Foreign Assets Control (OFAC). BIS controls dual-use items, DDTC controls USML (military) items and OFAC controls transactions with sanctioned countries – often also involving dual-use or military items. (The term "dual-use" refers to items that have commercial applicability but also are controlled for military, foreign policy or national security reasons, such as non-proliferation.) Additional agencies include Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), both part of the Department of Homeland Security (Homeland Security). They enforce export laws at the border and coordinate with BIS, DDTC and OFAC.

The Department of Defense (Defense) participates in agency decisions regarding jurisdiction, classification and licensing. Specialized agencies like the Nuclear Regulatory Commission (NRC) and the Department Of Energy (DOE) have jurisdiction over nuclear equipment and materials (NRC) and generally over commercial nuclear technology (DOE), although there is overlapping jurisdiction on nuclear items with BIS and DDTC.

The system is very complicated and cumbersome. Exporters deal with specific sets of regulations within multiple agencies, often in connection with a single transaction and without clear guidance as to which agency applies in any given situation. Movement toward the "four singles" – under the President's Export Reform Initiative – is a sensible development. By streamlining processes, simplifying rules and clarifying governmental points of contact so exporters understand their obligations, the approach has the potential to serve its primary mission of guarding items critical to U.S. national security and foreign policy while enhancing U.S. competitiveness.

Editor: What are the four singles?

McCarthy: After initiating an interagency review of export controls in August 2009, the President announced his export reform initiative in April 2010. The four pillars of this export reform movement are a single licensing agency, a single list of export controlled items, a single enforcement agency and a unified IT infrastructure.

The Executive Branch has taken various steps towards export reform over the past year. For example, in November 2010, the President issued an executive order establishing an export enforcement coordination office within the Department of Homeland Security, and in December BIS and DDTC solicited comments on revising their classification lists. The export coordination office's impact on other agencies and relationship to the four singles remains unclear. As with any large scale regulatory upheaval, some improvements are welcome by the agencies, while others create anxiety and bureaucratic resistance.

Editor: Is there overlap in the agency authority structure among the various export enforcement agencies?

McCarthy: There is some overlap. While

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Defense has no authority to issue licenses or conduct investigations on commercial exports, Defense plays an important advisory role within the interagency process of examining sensitive exports, licensing and determining jurisdiction, that is, which agency controls a particular item.

BIS is within the Department of Commerce (Commerce) and controls dual-use items. Commerce also has the Census Bureau, which collects export data, coordinates with Homeland Security and has enforcement and civil penalty authority. OFAC falls under the Department of the Treasury (Treasury), and Homeland Security has CBP and ICE.

Commerce, CBP, OFAC, Treasury and State all have independent authority to issue penalties to exporters that violate their rules. In some cases, a single export may involve various agencies weighing in on penalties, and that is purely from a civil and an administrative perspective. Separately, the Department of Justice gets involved in criminal cases, as required. In short, compliance is complicated given the many agencies regulating exporters and exports.

Editor: What factors should be included in a company's compliance program to protect it from running amok of the various export laws?

McCarthy: A company's compliance program must start with management commitment, infrastructure, resources and written policies and procedures that are tailored to the company's needs and risk profile. While a small, domestic company's considerations vastly differ from those of a large multinational aerospace company, all compliance is about identifying risks and requirements and then properly resourcing personnel and implementing systems to address those risks.

An internal training program is a key factor in ensuring that everybody engaged with international transactions or non-U.S. personnel understands the rules and potential penalties for non-compliance. For example, an export can occur via a simple email attachment of sensitive documents to a foreign national. Access to information by foreign persons in today's complex IT environment is one of the most complex and challenging export issues facing companies today. For example, there is concern about how technology intersects with export reform for companies with global supply chains, facilities and customers, specifically pertaining to how they exchange information and whether that information is subject to U.S. export controls.

Editor: Has President Obama issued any recommendations?

McCarthy: The President's initial recommendations were established in April 2010 and, as noted earlier, center around the notion of the "four singles" (IT system, licensing agency, enforcement agency, and list). Those recommendations are intended to be executed in three phases. The first phase covers enhancements within the existing statutory and regulatory framework; the second phase involves more significant changes, such as the creation of similar lists; the third phase covers consolidation of agencies, lists, and IT systems.

Coordinated by the Secretary of Commerce, the President's Export Council (the Council) – comprising industry members and government representatives – has also been pushing along multiple tracks to implement the President's national and economic policy goals to expand America's exports.

Export reform is one plank of that vision. The Council met in March and issued six letters of recommendation on export reform to help American competitiveness – including, for example, updating infrastructure and simplifying U.S. business visa requirements.

Overall, these efforts seem in sync with the idea of the four singles. For example, the Council is coordinating with the agencies to create a "single window" for export and import processing. This concept involves an IT/agency window intended to streamline the processing of exports and imports – for example, in obtaining governmental authorization prior to shipping..

Editor: The current restrictions would seem to stymie efforts to engage in exports. Are there many hurdles to overcome?

McCarthy: Yes. Even companies that make best-faith efforts to comply still have trouble navigating complex export laws within myriad agencies; thus, modernizing the system is a major goal. Tempering progress is the U.S. government's fundamental interest to protect sensitive, perhaps military, technologies, from the standpoints of national security and foreign policy. Effective reform must include sensible determination of which technologies are critical to U.S. interests and therefore warrant careful protection.

Under current export laws, there are multiple lists of controlled items managed by various agencies. Reform efforts seek to consolidate these into a single list – one of the "four singles" mentioned above – and then prioritize it through assigning items to one of three tiers based on certain factors. Representatives from key industries are currently working with the agencies to develop categories of items in furtherance of this goal.

Editor: Are there items precluded from export to specific, forbidden countries? This must complicate the situation further.

McCarthy: Yes, there are country-specific rules and policies that change depending on the nature of the item itself, its use, the destination country and the individual recipient. Exporters must consider these four primary factors, each of which can implicate multiple agencies.

Editor: Will the President's recommendations be rolled into one piece of legislation?

McCarthy: Agencies are taking steps already within their purview, such as consolidating IT systems, to look for ways to modify export processes without the need for revised legislation. Other proposed reforms are considered to require implementing legislation, such as the consolidation of agencies and export lists.

While complete reform may require revisions to relevant statutes such as the Arms Export Control Act (AECA) and other legislative action – demanding time and a level of focus and attention that this year's Congress simply may not have, and the Executive Branch may not be prepared to pursue yet – agencies are pushing reform through alternative initiatives.

Editor: What does the recent Middle East turmoil mean for economic sanction rules in that region? What impact might this have on multi-national companies operating there?

McCarthy: The government has issued new sanctions on the Libyan regime, causing companies to stop and examine their potential ties to Libya. Obviously, commercial risks have increased due to political factors in Libya and volatility in the region. Further, if the U.S. Government, the UN and the EU consider similar action with other countries, there could be broader ramifications for U.S. companies and their subsidiaries, supply chains and business partners.

Editor: Do sanctions extend to oil exports by Libyan rebels? How are governmental agencies managing this issue?

McCarthy: Current sanctions in Libya are confined to parties related to Libya's regime, and I am not aware of any plan to impose similar sanctions on the rebels or some subset thereof. The U.S. government is trying to identify and understand the groups and people involved in a situation that remains very dynamic. I think it is too early to predict actions with respect to rebel groups or similar groups in other countries, although it's safe to say that right now the United States is doing a lot to support the Benghazi government generally in Libya, so a move to impose sanctions on those groups in the near term would be surprising without some significant change in facts or circumstances on the ground there.

This highlights the need, first, to exercise caution when operating in those countries – think through political, economic and commercial realities in a volatile situation – and, second, to keep compliance programs updated to make sure that you are not tripping up any new or updated rules because they are rolling out those rules and updating relevant restricted party lists with heavy frequency right now.

Editor: The Commerce Department has recently proposed tightening enforcement of antidumping and countervailing duty tariffs. Has there been any enforcement of this regulation since it was open for public comment in January? (The rules would result in increased tariffs on goods from non-market economies.)

Park: In August of 2010, Commerce announced fourteen proposed changes to its administration and enforcement of U.S. antidumping and countervailing duty laws. Commerce began implementing some of these proposals in November of 2010, starting with three measures that it simply adopted through the issuance of policy bulletins. Since then, Commerce has also solicited public comments on seven other measures, which are all under various stages of review and finalization by Commerce. For some of these measures, the proposed effective dates are clear, while for others, the effective dates are subject to consider-

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able debate. In this regard, the key issue for some of these measures is whether the new changes will be applied to ongoing proceedings or only to new proceedings that are initiated after the final measures are adopted.

Overall, in one way or another, I anticipate that Commerce will have acted on all fourteen of its proposed measures by the end of this year.

Editor: And what is the most controversial issue right now?

Park: Two of the more controversial measures pertain to Commerce's proposed elimination of individual company revocation from an antidumping or countervailing duty order, and Commerce's proposed selection of mandatory respondents based on a sampling methodology. With respect to the first of these measures, individual companies are currently eligible for revocation from an existing antidumping or countervailing duty order based on the absence of dumping or countervailable subsidies for a period of three years or five years, respectively. Commerce has proposed eliminating this rule. For the second measure, Commerce currently selects companies for individual review based on their relative shipments to the U.S. during the relevant period of investigation. Commerce has proposed selecting companies based on a sampling methodology.

Editor: The Senate has also discussed the Enforce Act of 2010 (to avoid evasion and circumvention of antidumping). Has it ever come to the floor for a House vote? What is the likelihood of its passage?

Park: This bill was first introduced in the Senate in August of 2010, and a companion bill was introduced in the House in December of 2010. No action was taken on either of these bills. Recently, one of the original sponsors of the Senate bill, Senator Wyden, announced that he would reintroduce the bill in the Senate this session. The bill seeks to strengthen and speed up the process through which Commerce and Customs and Border Protection investigate potential evasion and circumvention of antidumping and countervailing duties. Even if the bill is reintroduced this year, it is unclear whether it will be a high priority for Congress.

Editor: For our readers' benefit, would you please define "zeroing"?

Park: Perhaps the easiest way to explain zeroing is through an example. Assume that a company sells two types of products, both of which are covered by the same antidumping duty order. Assume further that the company made one sale of each type of product in equal quantities to the U.S., and that the total dumping duties calculated for the first product was $20 on sales of $100 (i.e, +20%), while the total dumping duties calculated for the second product was -$20 on sales of $100 (i.e., -20%). When zeroing, the -$20 of dumping duties is converted to $0. Therefore, when calculating the company's overall dumping margin, Commerce would calculate total dumping duties of +$20 (i.e., +$20 for the first product and $0 for the second product) and a combined sales value of $200 for the two products to come up with a rate of 10 percent for the company as a whole.

When zeroing is eliminated, the full effect of the negative dumping rate is taken into account. Therefore, using the same example, Commerce would calculate total dumping duties of $0 (i.e., +$20 for the first product and -$20 for the second product) to come up with a rate of 0 percent for the company as a whole. As the example illustrates, in most instances, the elimination of zeroing would benefit the foreign respondent companies.

Editor: Should the U.S. eliminate its current policy of zeroing to determine dumping violations, as is advocated by many of its trading partners?

Park: This is a very complex and controversial issue and pertains to the U.S.'s obligations as a member of the World Trade Organization (WTO). To date, there have been multiple WTO panel and appellate body decisions concluding that the U.S.'s practice of zeroing in both antidumping duty investigations and antidumping duty administrative reviews is not in compliance with its WTO obligations. The U.S. has already eliminated its practice of zeroing in antidumping duty investigations and has just recently proposed the elimination of zeroing in antidumping duty administrative reviews as well.

Editor: How do we draw the line between encouraging the free flow of people and products with protection of intellectual property (IP) and domestic security?

Park: This is a very interesting question. Obviously, we need both, and drawing this line requires that efforts to enforce and protect U.S. laws also recognize the need to cooperate with other countries and trade partners. Overall, while we need an aggressive enforcement policy, we need to be mindful of having an overly restrictive impact on the flow of people and products. One balanced option is to limit strict enforcement to situations in which actual violations or threats are identified.

Kho: Also, we should draw a distinction between IP and domestic security. IP protection is recognized by every country as an acceptable limited monopoly to encourage innovation, and, frankly, those who characterize IP as a barrier to free trade usually are trying to get something for free.

As countries become more developed, IP issues take on a different perspective. Right now, there are discussions at international organizations like the World Intellectual Property Organization on the subject of certain naturally existing products. They're talking about including biodiversity, folklore and traditional medicines as protected IP owned by the developing countries – likely the very same countries lodging complaints that the IP protections of other countries inhibit free trade. While this is a developing/developed country issue and has no real bearing on barriers to trade, it highlights general inequities in the international perception of these matters.

For countries – such as the U.S., China and the EU – that have critical infrastructure and bigger economies, there is greater focus on security issues, and these more developed countries also take different positions with respect to industrial policies. Governments generally have obligations on both ends of the trade spectrum. They want to encourage free trade – exporting is good for the economy and the creation of jobs – while maintaining focus on legitimate domestic concerns, for example, with respect to protecting infant industries or national security. Drawing a line that achieves the right balance requires consideration of a multitude of constituents and interests and, as such, is every government's nightmare.

Editor: Where do things stand with the three outstanding Free Trade Agreements (South Korea, Columbia and Panama) that are currently being negotiated?

Park: All three have been negotiated – South Korea's being furthest along in terms of agreement on specific language – and the remaining issues center on Congressional ratification, timing and whether the three FTAs will be bundled for passage. Certain people on the Hill want all three packaged and passed together, while others want to proceed separately and only with FTAs that are fully ready, such as South Korea's. This is an ongoing debate.

Columbia just concluded additional negotiations regarding labor and looks to be very close as well. In my opinion, it's really a matter of timing and looks to be months away – rather than longer estimates from one year ago. But there is still the political issue with respect to bundling, complicated further by the upcoming elections.

Kho: Just to be clear, all three FTA text negotiations are complete; however, there are further negotiations on the side to obtain additional obligations – not necessarily tied to trade issues – to enable Congress to move forward. Specifically, with South Korea, it was an auto deal; with Columbia, a labor deal and with Panama, a tax deal. Technically, trade negotiations are complete, but these are other informal discussions requested by Congress in response to specific concerns.

Editor: What is the tenor of negotiations within Congress?

Kho: Overall, the Democrats don't want the FTAs bundled because of concerns for their labor constituency, and the pro-trade Republicans have a lingering political issue regarding previous changes to Trade Promotion Authority (TPA) rules (or "fast track") by former House Speaker Pelosi. Specifically, when President Bush tried to send the Columbia FTA forward, the House suddenly changed the rules so that they did not have to react, as required by the TPA.

A rather subtle question has thus arisen as to whether, in fact, a new TPA is needed to pass the Columbia FTA. The old TPA rules allowed only one bite at the apple, and since the Columbia FTA already went up, it may not have another chance under existing rules. Conventional wisdom should resolve this in favor of not requiring new TPA legislation, but the issue nevertheless exists in theory.

Overall, there is good news about the Columbia labor deal (a predominant issue) and the Panama tax deal (an ancillary issue). While there may be concerns raised by non-governmental organizations and environmental groups, all three FTAs should go up sometime this year – though likely not at the same time.

Editor: Have fundamental conflicts – resulting from the Constitution's granting to Congress the power to regulate commerce and to the President the control of foreign policy – become impediments to advancing U.S. interests concerned with international trade? Is the U.S. at a disadvantage in negotiating trade agreements as compared with other nations?

Kho: This issue cuts two ways. First, requiring all deals to go back to Congress for ratification is an impediment; the U.S. cannot place a decision-maker at the negotiating table, which means that delays are imbedded in the process. To be fair, many other countries are in this situation – though their issue may not be constitutional – and also do not send decision-makers to international negotiations.

On the other hand, the Constitutional restriction can be useful in negotiations because a Congressional mandate inherently limits the negotiating scope and may relieve pressure to concede on certain items. While tough during the negotiations themselves, restrictions unequivocally establish a bottom line about specific non-starter positions. Given a limited scope, it's easier to find a solution; negotiations do not descend into a free-for-all and opponents simply know they cannot ask for too much.

Editor: Is there the possibility that "Fast-Track" (TPA) negotiating authority will once more be conferred on the President in this Congressional session?

Kho: With this current administration, including its many antitrade constituents, now is not the time to raise Fast-Track – and President Obama knows it. Further, the President went on the record about the need to address Doha Round and Trans-Pacific Partnership (TPP) negotiations. Asking Congress to pass them will be difficult, though the situation has slightly changed from last year to this year with the flip of the House.

In fact, at the beginning of this year, Senators Portman and Lieberman proposed a bill that includes renewing Fast-Track authority. So it's going to happen because there is no way the U.S. can negotiate anything without it. Some may argue that point, but the only way the U.S. can negotiate trade agreements without Fast-Track is if the FTAs are very narrow in scope and can somehow fit it into other existing authorities. More expansive trade negotiations such as in the TPP and Doha require Fast-Track; thus, despite its political aspects and the need to finesse the timing, it will be renewed sooner or later.

Editor: Would you clarify the status and purpose of the TPP and who are the negotiators?

Kho: There have been several rounds already, and new countries are clamoring to join these negotiations. The purpose is to broaden U.S. trade benefits with Pacific Rim countries. It's a likely precursor to an Asia Pacific Free Trade Agreement, which is a major, long-term goal.

Currently, the TPP involves Peru, Chile, the U.S., Australia, New Zealand, Vietnam, Singapore, Malaysia and Brunei. There have been discussions of Taiwan, Thailand and Japan possibly joining but you definitely have those nine currently. We have FTAs with many of these countries, we have it with Singapore, Peru, Australia and Chile, and this is just an expansion of that network.

Editor: What is needed to revive the Doha Round of trade talks?

Kho: My personal view is that they need to start again. As it currently stands, certain advanced developing countries have used the "developing country" moniker to gain an unfair advantage – to receive benefits without giving in return. While such advantages are OK for true developing countries, those countries – for example, India – with a high GDP and a lot of trading activity should not be able to hide behind this development concept.

Some have suggested a less ambitious Round. The concept of the WTO negotiating every two years to lower tariffs and lower trade barriers sounded all right back in 1995, but at this point, that is a lot to ask from these countries every two years. When countries feel they gave all they can during the last round, and then are asked to give more two years later, it is not surprising that the most recent Doha Round lasted ten years.

In short, they may have to rethink the whole multilateral negotiation, the concept of the WTO and this development round, focusing on a less ambitious way to structure the lowering of tariffs and other trade barriers.