

## International Trade & Regulatory ADVISORY

December 15, 2009

### Trends in International Trade Legal Issues

The following are some of the trends in international trade from a U.S. perspective that we see going into 2010.

#### Trade Actions

- Globally, initiations of antidumping investigations rose 52.6 percent in the third quarter of 2009 compared to the same period in 2008. Year-to-date data indicate a 30 percent rise in antidumping investigation requests by domestic industries in 2009 over the comparable period in 2008. Initiations of safeguard investigations are on a similar pace for 2009, which will rank as the second-busiest year for safeguard cases since the remedy was formally adopted by the WTO in 1995.<sup>1</sup>
- On the other hand, while U.S. companies continue to file trade remedy cases, the overwhelming majority are against imports from China. Typically, Chinese producers and exporters have not marshaled the same resources in fighting dumping charges as producers and exporters in market economy countries. This has resulted in a change in the practice in the United States.

#### Imports

- Countries, particularly the United States, continue to push for new enforcement and regulatory initiatives for imports prior to them reaching their borders. Beginning in January 2010, the United States will begin to enforce the requirements of the Importer Security Filing, otherwise known as the “10+2” filing requirement. This new requirement will increase the information required before a good is exported to the United States and will also increase the potential for penalties and liquidated damages being assessed against importers. Overall, the burden and cost of importing into the United States will increase.

#### Trade Policy

- *Anticipate both trade and investment policy to proceed in fits and starts over the next year, as the looming 2010 elections will elicit caution from the administration and Congress alike.*
- Trade policy in the Obama administration continues to suffer from paralysis. Core Democratic constituencies, including organized labor and environmental NGOs, have taken a lead role in a prolonged “review” of U.S. trade policy seeking to reorient the market access and regulatory objectives of U.S. trade negotiations.

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<sup>1</sup> [http://people.brandeis.edu/~cbown/global\\_ad/monitoring/Bown-World-Bank-Global-Antidumping-Database-Oct-2009-Executive-Summary.pdf](http://people.brandeis.edu/~cbown/global_ad/monitoring/Bown-World-Bank-Global-Antidumping-Database-Oct-2009-Executive-Summary.pdf)

The Democratic 111th Congress, too, heavily influenced by “fair trade” members, has sought to claw back congressional authority over trade, adding a degree of complexity to trade policy formulation. The review, coupled with congressional objectives and the administration’s packed domestic agenda of health care, climate change and financial re-regulation, has drastically limited the ability of the U.S. Trade Representative to engage with trade partners. Tentative attempts at trade diplomacy through the WTO Doha Round and the nascent Trans-Pacific Partnership have been met with serious skepticism by foreign governments who doubt the administration’s commitment to trade liberalization. The White House will likely continue in this holding pattern for the indefinite future.

- U.S. investment policy, too, remains under review, as the administration has convened public and private sector interests to redesign the U.S. Model Bilateral Investment Treaty (BIT). Advisors remain deadlocked over differences on key policy areas, such as expropriation, sovereign regulatory independence and investor-state dispute settlement. Here, too, labor and environmental interest groups have taken a lead role in seeking fundamental policy changes. The debate has had a stultifying effect on the ability of the administration to pursue already-launched BIT negotiations with India and China, and has prevented the initiation of new treaty talks with economies such as Brazil.
- Most major world economies—the EU, China, Japan, India and Brazil—continue to vigorously negotiate bilateral and regional free trade agreements. In contrast, in 2009, the United States has refused to undertake meaningful new negotiations or to ratify concluded agreements. This inactivity by the United States is already yielding changes in global market access that harm the export and investment opportunities for U.S.-based companies, farmers, ranchers and investors.

## Export Controls

- The United States is vigorously enforcing its export controls. The active involvement of the National Security Division within the U.S. Department of Justice will likely result in increased criminal prosecutions in the export control area. U.S. attorneys’ offices throughout the country have received export control training, and reports indicate higher degrees of cooperation among export regulation enforcement personnel at the Departments of State and Commerce and investigation and prosecution personnel within the Department of Justice.
- From a regional perspective, the enforcement emphasis remains on detecting and punishing unauthorized exports of products and technology to China and Iran.
- The prospects for Congress enacting new sanctions legislation directed at Iran appear good at this stage.
- Export agencies are continuing to migrate to electronic systems for processing licenses and other types of filings. Export licenses for dual-use items must be submitted to the U.S. Department of Commerce electronically, with few exceptions. Most types of licenses for defense article and defense service exports must be submitted electronically to the U.S. Department of State, which is also seeking public comment on several other types of filings that the department intends to permanently migrate to electronic formats.
- The Obama administration has initiated a broad review of current U.S. export control laws and regulations aimed at achieving a substantial makeover of both the dual-use and defense trade control regimes. The review is significant in that it would be the first official effort to reassess the structure and content of U.S. export controls on an across-the-board basis that addresses separate regimes under differing statutory authorities administered by the Department of Commerce’s Bureau of Industry and Security (BIS) and the

Department of State's Directorate of Defense Trade Control (DDTC). National Economic Council (NEC) Chairman Larry Summers and National Security Advisor Jim Jones are orchestrating the White House review, while Defense Secretary Robert Gates is also taking a very active role. In a separate but related development, Congress is developing legislation to reform dual-use export controls administered by BIS, although the scope of such reform is far from clear at this early stage. It is possible that the administration will initiate some measures under existing regulatory authority without waiting for new legislation.

- In an early suggestion of what might emerge from this review, Secretary of Commerce Gary Locke this fall hinted at easing or removing license requirements for dual-use exports to "allies and partner nations," presumably the countries who participate in multilateral control regimes with the United States.

## Conclusion

In 2010, the United States is likely to remain on the sidelines in the trade policy area; nonetheless, trade policy activity will continue internationally and take the lead away from the United States. Companies will be required to consider and work on trade policy initiatives outside the United States. Imports will face increased regulatory burdens for security purposes, while exports will be scrutinized for compliance and more export violations prosecutions will occur.

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