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in this issue

U.S.-Cuba Related Sanctions Update and Overview *by Alan M. Dunn & Sahar J. Hafeez* P. 1
EAPA Regulations Empower CBP To Prosecute ADD-CVD Evasion *by Dharmendra N. Choudhary* P. 6
The Role of Colombia's Customs Office in the Application of the United States *by Gabriel Ibarra Pardo* P. 9
Global Trade Has Finally Gotten A New Ally In France's Sapin 2 *by Marcia B. Moulon-Atherley* P. 12

Welcome

Welcome to the ABA International Trade Committee quarterly newsletter. The newsletter is intended to assist Committee members stay up-to-date on current international trade issues and Committee activities. The newsletter also provides a forum to discuss international trade ideas and opinions.*

The Committee's website contains additional information about and resources from the activities of the Committee, like notices of upcoming events, past publications, and materials from previous programs. These materials are updated regularly. To visit the Trade Committee's website, click here [http://apps.americanbar.org/dch/committee.cfm?com=IC776000].

The Committee is now also on LinkedIn and you can join the group here [https://www.linkedin.com/groups/ABA-International-International-Trade-Committee-3707319/about]. Members of the Committee are encouraged to become involved, and we look forward to hearing from you.

U.S.-Cuba Related Sanctions Update and Overview: Obama Administration Further Eases Cuba Sanctions Against the Backdrop of Strict Statutory Restrictions

By Alan M. Dunn & Sahar J. Hafeez[1]

On October 14, 2016, the Departments of Treasury and Commerce announced amendments to the Cuban Assets Control Regulations ("CACR") and the Export Administration Regulations ("EAR") in furtherance of the Obama Administration's policy goals with respect to Cuba. Both amendments became effective upon publication October 17, 2016.[2] These changes cover transactions related to

1 The authors are attorneys at Stewart and Stewart LLP in Washington, DC.
2 *Cuban Assets Control Regulations,* 81 Fed. Reg. 71,372 (Dep't of Treasury October 17, 2016); *Cuba: Revisions to License Exceptions,* 81 Fed. Reg. 71,365 (Dep't of Commerce October 17, 2016).

Cuban-origin pharmaceuticals and joint medical research, trade and commerce, civil aviation safety-related services, travel, grants and humanitarian-related services to benefit the Cuban people, and eligibility for license exceptions for Cuban government officials.[3]

The Obama Administration has amended its Cuba sanctions regulations and issued new guidelines on numerous occasions since President Obama announced the policy to "normalize relations" between the U.S. and Cuba and to "further engage with and empower the Cuban people."[4] While these amendments have eased the sanctions and export control restrictions, as described below, the statutory underpinnings of the U.S.-Cuba sanctions (and the CACR) contain significant restrictions and the embargo that was first imposed in 1961 remains codified in legislation. The various restrictions in the authorizing statutes and the relaxations provided in the series of regulatory amendments have resulted in a complex web of restrictions. As a consequence, careful interpretation is required to apply the regulations to specific transactions, and anyone engaging in transactions with Cuba must analyze all applicable restrictions.

This article provides a brief summary of some of the notable provisions pertaining to Cuba in the relevant statutes and the regulations pertaining to: travel and related transactions, trade in agricultural products, trade in medical devices and medical research, and telecommunications.

I. Statutory Underpinnings of the U.S.-Cuba Sanctions

The U.S.-Cuba sanctions are authorized under the following statutes: the Trading with the Enemy Act of 1917 ("TWEA"),[5] Cuban Democracy Act of 1992,[6] Helms-Burton Act of 1996,[7] and Trade Sanctions and Export Enhancement Act of 2000.[8] Some of the notable provisions pertaining to Cuba in each statute are discussed in turn.

- **TWEA**
  TWEA authorizes the President with the power to "investigate, regulate, or prohibit" transactions between the U.S. and its enemies during times of war.[9] At the time the embargo was first imposed, TWEA was the main statutory authority underpinning U.S. economic sanctions. However, as of this writing, the authorities of TWEA apply with respect to sanctions against Cuba only.[10] Violations of TWEA can trigger criminal penalties, including up to 10 years of imprisonment and/or up to $1,000,000 in fines on any person who willfully "any of the provisions" of TWEA or "any license, rule, or regulation" issued under the Act, and civil penalties of up to $50,000 on any person who "violates any {such} license, order, rule, or regulation."[11]
- **Cuban Democracy Act of 1992**
  This Act authorizes exports of medicines and medical supplies, provided that it can be determined, through onsite verification, that particular circumstances do not apply;[12] permits telecommunication services between

Upcoming Events

2017 Spring Meeting in Washington, DC
April 25 - 28, 2017
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3 *Id.* See Attachment 1 to this article for a summary of these changes.
4 White House, *Statement by the President on Cuba Policy Changes,* December 17, 2014, available at https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes; Department of Treasury, FACT SHEET: *Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions*, January 15, 2015, available at https://www.treasury.gov/press-center/press-releases/Pages/jl9740.aspx.
5 *Trading With the Enemy Act of 1917,* 50 U.S.C. App §§ 5, 16.
6 *Cuban Democracy Act of 1992,* 22 U.S.C. §§ 6001-6010.
7 *The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996* (Helms–Burton Act), 22 U.S.C. §§ 6021–6091.
8 22 U.S.C. §§ 7201-7211.
9 *Trading With the Enemy Act of 1917*, 50 U.S.C. App § 5(b).
10 North Korea was the most recent country to have restrictions lifted under the TWEA. (*See* Proclamation 8271 - Termination of the Exercise of Authorities Under the Trading With the Enemy Act With Respect to North Korea, June 26, 2008). All other sanctions regimes are operated and enforced, at least in part, under the International Emergency Economic Powers Act ("IEEPA"). The TWEA is more expansive than the IEEPA in that the former provides the President with certain wartime economic powers that are not available under the latter. These include the power to "vest" (i.e. expropriate) property in which foreign states or their nationals have an interest; the power to regulate purely domestic transactions; the power to regulate gold or silver coin or bullion; the power to seize records. *(See Trading With the Enemy Act of 1917*, 50 U.S.C. App § 5(b)).
11 *Trading With the Enemy Act of 1917,* 50 U.S.C. App § 16.
12 *Cuban Democracy Act of 1992,* 22 U.S.C. §§ 6004(c), (d).

the U.S. and Cuba; and prohibits investment by any U.S. person in the "domestic telecommunications network within Cuba."[13]

- **Helms-Burton Act of 1996**
  This Act prohibits the importation of and dealings outside the United States in Cuban products;[14] authorizes the President to establish and implement an exchange of news bureaus between the United States and Cuba under certain conditions;[15] and codifies the CACR as in effect on March 1, 1996.[16] The Act also provides that the Cuban embargo will remain in effect until particular political requirements are met.[17]

13 *Id.* at 6004(e).

14 *The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996* (Helms–Burton Act), 22 U.S.C. §§ 6021–6091. In particular, 22 U.S. Code § 6040(a) prohibits the entry of, and dealings outside the United States, in merchandise that—(1) is of Cuban origin; (2) is or has been located in or transported through Cuba; or (3) is made or derived in whole or in part of any article which is the growth, produce or manufacture of Cuba."

15 *Id.* at § 6044(a). These include the following conditions:
(1) The exchange is fully reciprocal.
(2) The Cuban Government agrees not to interfere with the establishment of news bureaus or with the movement in Cuba of journalists of any United States-based news organizations, including Radio Marti and Television Marti.
(3) The Cuban Government agrees not to interfere with decisions of United States-based news organizations with respect to individuals assigned to work as journalists in their news bureaus in Cuba.
(4) The Department of the Treasury is able to ensure that only accredited journalists regularly employed with a news gathering organization travel to Cuba under this subsection.
(5) The Cuban Government agrees not to interfere with the transmission of telecommunications signals of news bureaus or with the distribution within Cuba of publications of any United States-based news organization that has a news bureau in Cuba.

16 *Id.* at § 6032(h).

17 *Id.* at § 6065. The statute requires a transition government in Cuba to meet the following requirements: (1) legalize all political activity; (2) release all political prisoners and allow for investigations of Cuban prisons by appropriate international human rights organizations; (3) dissolve the then-present Department of State Security in the Cuban Ministry of the Interior, including the Committees for the Defense of the Revolution and the Rapid Response Brigades; and (4) make public commitments to organizing free and fair elections for a new government; (5) cease any interference with Radio Marti or Television Marti broadcasts; (6) make public commitments to and be in the process of making demonstrable progress in—(A) establishing an independent judiciary; (B) respecting internationally recognized human rights and basic freedoms as set forth in the Universal Declaration of Human Rights, to which Cuba is a signatory nation; (C) allowing the establishment of independent trade unions as set forth in conventions 87 and 98 of the International Labor Organization, and allowing the establishment of independent social, economic, and political associations; (7) not include Fidel Castro or Raul Castro; and (8) give adequate assurances that it will allow the speedy and efficient distribution of assistance to the Cuban people.

- **Trade Sanctions and Export Enhancement Act of 2000**
  This Act provides that the export of "agricultural commodities, medicine, or medical devices to Cuba" is licensable;[18] and restricts travel to Cuba for tourist activities.[19]

II. Certain Regulatory Amendments Under the Obama Administration

The U.S.-Cuba sanctions are currently administered by the Treasury Department's Office of Foreign Assets Control ("OFAC") and the Commerce Department's Bureau of Industry and Security ("BIS"). The OFAC sanctions regulate the conduct of persons, and the BIS restrictions apply to the export, reexport or foreign transfer of U.S.-origin items (including items in the possession of foreign persons outside of the United States). The following provides a summary of the regulations pertaining to: travel and related transactions, trade in agriculture, trade in medical devices and medical research, and telecommunications.

- **Travel and Related Transactions**
  As stated above, travel for tourism purposes is statutorily prohibited. Under the OFAC regulations, travel-related transactions (including, for example, opening and maintaining bank accounts and using credit and debit cards) for travel under 12 categories are authorized by either a general or a specific license, depending on the type of transaction. The 12 categories include:
  1. family visits;
  2. official business of the U.S. government, foreign governments, and certain intergovernmental organizations;
  3. journalistic activity;
  4. professional research and professional meetings;
  5. educational activity;
  6. religious activities;
  7. public performances, clinics, workshops, athletics, other competitions, and exhibitions;
  8. support for the Cuban people;
  9. humanitarian projects;
  10. activities of private foundations or research or educational institutes;

18 22 U.S.C. § 7205.

19 *Id.* at § 7209(b).

11. exportation, importation, or transmission of information or information materials; and
12. certain authorized export transactions that "may be considered for authorization" under BIS policies.[20]

In the case of transactions or travel meeting the criteria and conditions of a general license, no application for a specific license authorizing the transaction or the travel is required. In the case of other transactions (ones that are subject to a specific license requirement), travelers must submit an application and a determination is made on a case-by-case basis.[21] In either case, travelers are required to certify that the travel falls within one of the twelve categories, and travelers, as well as airlines, vessel operators, and travel service providers, are required to maintain documentation related to the travel for five years.[22] Notably, the October 17, 2016 amendments ease the recordkeeping requirements by clarifying that travel or carrier service providers may collect and retain a copy of the traveler's specific license or simply collect the number of the traveler's specific license.[23] Authorized U.S. travelers are allowed to import merchandise acquired in Cuba, as accompanied baggage, for personal use only.[24] Importantly, the October 17, 2016 amendments lifted the $100 maximum amount that had been in place as a ceiling on the value of such Cuban merchandise imported as accompanied baggage and the OFAC fact sheet accompanying the release of these amendments specifically noted that the lifting of the $100 maximum value applies to Cuban cigars and liquor.[25]

- **Trade in Agriculture**

  The Trade Sanctions and Export Enhancement Act of 2000 authorized the export of "agricultural commodities" under a specific license and in the case of certain listed agricultural goods, under a general license. Under the implementing Department of Commerce's BIS regulations,[26] a license is required to export or reexport to Cuba all items subject to the EAR, with certain narrow exceptions.[27]

  The export and reexport of U.S. origin agricultural commodities is permitted under the License Exception Agricultural Commodities ("AGR"). This exception applies if the transaction in question is not restricted[28] and meets all of the following criteria: the commodity meets the definition of "agricultural commodities", as defined in 772 of the EAR; the commodity falls under EAR99 (the lowest level of control under the EAR); the export of reexport is made pursuant to a written contract, unless the exception to the contract requirement is applicable; and the export or reexport is made within 12 months of signing the contract (if applicable).[29] It should be noted that the definition of the agricultural products eligible for export under general license is controlled under the EAR,[30] which is administered by the Department of Commerce's BIS, but the general license authority for such exports is set forth in CACR, which is administered by the Department of Treasury's OFAC. For such exports and reexports of agricultural commodities, only the following payment and financing terms may be used: payment of cash in advance, or financing by a banking institution located in a third country, subject to certain restrictions.[31] In the past, OFAC required that U.S. exporters must have a valid classification decision by BIS, rather than self-classify agricultural commodities being exported under the Trade Sanctions Reform Act.

  License applications for the export or reexport of agricultural commodities or items that are not eligible for the AGR exception or are outside the scope of

20 31 C.F.R. § 515.560(a). The referenced regulations provide the criteria and requirements for general and specific licenses for each of the 12 categories.
21 *Id.*
22 *Id.* at § 515.572(b).
23 *Cuban Assets Control Regulations,* 81 Fed. Reg. 71,372, 71,373 (Dep't of Treasury October 17, 2016).
24 31 C.F.R. § 515.560(b)(3); *Cuban Assets Control Regulations,* 81 Fed. Reg. 71,372, 71,373 (Dep't of Treasury October 17, 2016).
25 *Cuban Assets Control Regulations,* 81 Fed. Reg. 71,372, 71,373 (Dep't of Treasury October 17, 2016).
26 *Cuba Licensing Policy Revisions,* 81 Fed. Reg. 4,580, 4,582, (Dep't of Commerce January 27, 2016) (citing statutory authority for 15 C.F.R. § 746.
27 15 C.F.R. § 746.2(a).
28 *Id.* at § 740.18(b).
29 *Id.* at § 740.18(a).
30 *Id.*
31 Per OFAC Frequently Asked Questions #74, these limitations on financing are required by the Trade Sanctions Reform and Export Enhancement Act of 2000, 22 U.S.C. § 7207(b)(1), available at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf. *See* 31 CFR § 515.533(a)(4). Effective October 17, 2016, OFAC amended this provision so that it only applies to exports and reexports of "agricultural commodities," as defined in 15 CFR part 772, and not to exports or reexports of "agricultural items" authorized pursuant to 15 C.F.R. § 746.2(b)(2)(iv).

"agricultural commodities", are subject to a general policy of approval.[32] In addition, exports or reexports of items for the following broad purposes may be authorized on a case-by-case basis: agricultural production, food processing, and wholesale and retail distribution for domestic consumption by the Cuban people.[33]

- **Trade in Medical Devices and Medical Research**
  The Trade Sanctions and Export Enhancement Act of 2000 also authorizes the export of certain "medicine{ }or medical devices to Cuba" under either general license or a specific license, and the Cuban Democracy Act of 1992 authorizes exports of medicines and medical supplies, provided that it can be determined, through onsite verification, that particular circumstances do not apply. Under the implementing provisions of the EAR, license applications to export medicines and medical devices, as defined in part 772 of the EAR, are subject to a general policy of approval, except in the case of certain end-uses.[34] Additional new medical research activities have been authorized under the October 17, 2016 amendments to the CACR. Persons subject to U.S. jurisdiction are now authorized, under a general license, to engage in commercial and non-commercial joint medical research projects with Cuban nationals.[35] In addition, certain transactions incident to obtaining approval from the U.S. Food and Drug Administration of Cuban-origin pharmaceuticals are permitted under a general license.[36] Persons subject to U.S. jurisdiction that are engaging in the authorized activities also are permitted to open, maintain, and close bank accounts at Cuban financial institutions, provided that the accounts are solely used for the authorized activities.[37] In the context of such medical research, it should be noted that unless items being imported are authorized under the general license, a specific license is required for the importation of Cuban-origin commodities for bona-fide research purposes in sample quantities.[38]

- **Telecommunications**
  As stated above, the Helms-Burton Act of 1996 authorizes the President to establish and implement an exchange of news bureaus between the United States and Cuba under certain specified conditions.[39] Under the current implementing OFAC and BIS regulations, the Obama Administration has issued a series of amendments in furtherance of the goal of facilitating the free flow of information.[40]

  Under the BIS EAR, the Support for the Cuban People exception authorizes the export or reexport to Cuba of certain items intended to improve the free flow of information to, from, and among the Cuban people.[41] Exports or reexports under this exception must fall within a range of specified activities, and be designated as EAR99 or controlled only for anti-terrorism reasons on the Commerce Control List.[42] In addition, applications for licenses to export or reexport the following items are subject to a general policy of approval:

  - telecommunications items that would improve communications to, from, and among the Cuban people;
  - commodities and software to human rights organizations or to individuals and non-governmental organizations that promote independent activity intended to strengthen civil society in Cuba;
  - commodities and software to U.S. news bureaus in Cuba whose primary purpose is the gathering and dissemination of news to the general public are subject to a general policy of approval.[43]

The version of the OFAC CACR prior to the October 17, 2016 amendments already provided a general license

32 *Id.* at § 746.2(b)(2).
33 *Id.* at § 746.2(b)(3).
34 *Id.* at § 746.2(b)(1).
35 31 C.F.R. § 515.547; *Cuban Assets Control Regulations,* 81 Fed. Reg. 71,372 (Dep't of Treasury October 17, 2016).
36 *Cuban Assets Control Regulations,* 81 Fed. Reg. 71,372 (Dep't of Treasury October 17, 2016). These include "discovery and development, pre-clinical research, clinical research, regulatory review, regulatory approval and licensing, regulatory post-market activities, and the importation into the U.S. of Cuban-origin pharmaceuticals."
37 *Id.*; 31 C.F.R. § 515.547
38 31 C.F.R. § 515.547.
39 *See supra* note 14.
40 White House, *Statement by the President on Cuba Policy Changes,* December 17, 2014, available at https://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes.
41 15 C.F.R. § 740.21(a).
42 *Id.* at § 740.21(d).
43 *Id.* at § 746.2(a)(2).

for U.S. persons to engage in all transactions incident to the provision of telecommunication services[44] related to the transmission or the receipt of telecommunications involving Cuba; enter into contracts or licensing agreements with telecommunications service providers in Cuba for authorized telecommunication services;[45] and transactions incident to the establishment of facilities, including subsidiaries, joint ventures, and other business relationships, to provide telecommunications services linking the United States or third countries with Cuba.[46] Prior to the most recent amendments, the CACR also included a general license with respect to certain internet-based services authorizing the exportation or reexportation from the United States or by a U.S. person of services incident to the exchange of communications over the internet is authorized, subject to exceptions.[47]

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44 Under 31 C.F.R. § 515.542(h), "telecommunications services" includes data, telephone, telegraph, internet connectivity, radio, television, news wire feeds, and similar services, regardless of the medium of transmission, including transmissions by satellite.

45 31 C.F.R. § 515.542. This authorization is subject to restrictions, including that the individuals in Cuba are not prohibited officials of the Government of Cuba, as defined in §515.337 of this part, or prohibited members of the Cuban Communist Party, as defined in §515.338 of this part.

46 31 C.F.R. § 515.542; Cuban Assets Control Regulations, 80 Fed. Reg. 56,915, 56,916, (Dep't of Treasury September 21, 2015).

47 31 C.F.R. § 515.578(a)(1).

EAPA Regulations Empower CBP To Prosecute ADD-CVD Evasion In An Adversarial Proceeding

By Dharmendra N. Choudhary[1]

On February 24, 2016, the U.S. government promulgated the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), which contains Title IV-Prevention of Evasion of Antidumping and Countervailing Duty Orders (short title "Enforce and Protect Act of 2015" or "EAPA"). The EAPA establishes a formal process for US Customs and Border Protection ("CBP") to investigate allegations of evasion of AD/CVD orders. Pursuant to Section 421 of the EAPA, on August 22, 2016, CBP published "interim" regulations, that went into effect immediately, detailing a new framework and legal procedures for investigating potential evasion of antidumping duty ("ADD") and countervailing duty ("CVD") liability. Interested parties had until December 20, 2016, to file comments. CBP is in the process of reviewing comments before issuing the final regulations.

Prelude to EAPA Regulations

CBP is responsible for the collection of cash deposits and final ADD/CVD on imports of subject merchandise. A recent US Government Accountability Office ("GAO") report noted that CBP was unable to collect $2.3 billion of ADD/CVD from 2001-2014. US domestic industries have often derided CBP as the weak link in enforcing US trade laws, for allegedly failing to collect the full amount of ADD/CVD owed. They also harbored concerns as to how CBP responded to allegations of ADD/CVD evasion. For instance, parties that provided CBP with information regarding evasion schemes were not allowed to participate in CBP's investigations and CBP had no obligation to notify such parties as to the outcome of CBP's review.

The new CBP regulations establish a formal process for how the agency will consider allegations of ADD/CVD evasion. These new regulations are intended to address complaints from US manufacturers and affected

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competing importers that CBP's investigations were neither transparent nor effective. While completely revamping CBP's oversight of entries potentially subject to ADD/CVD, the regulations also address transparency concerns and mandate specific timelines and deadlines in CBP investigations. Investigations under the EAPA will be conducted by CBP's Trade Remedy Law Enforcement Directorate (TRLED). Critical provisions of the new regulations are summarized below.

EAPA is a Strict Liability Statute

The CBP Regulations define "evasion" as making any "material and false statement or any material omission that results in any cash deposit or security or any applicable amount of ADD or CVD being reduced or not being applied with respect to the covered merchandise." Instances of evasion include: (1) misrepresenting covered merchandise's country of origin (*e.g.*, transshipping covered merchandise through countries whose products are not encompassed within an ADD/CVD Order); or (2) misdescribing and/or misclassifying covered merchandise.

In essence, the EAPA is a strict liability statute because an importer can be found guilty of evasion even if he acted with reasonable care in declaring that his merchandise was not subject to ADD/CVD. All that is necessary for an affirmative finding is that CBP believes that the correct amount of ADD/CVD was not deposited upon entry. Whether the importer acted reasonably in filing his or her entry documents without depositing ADD/CVD, or in depositing an arguably incorrect amount of ADD/CVD, is not a relevant factor in CBP's determination. It would be interesting to see how CBP handles facially genuine clerical errors instances, resulting in lowering of ADD/CVD.

All Interested Parties Afforded Direct Participation in CBP's Investigation

Prior to enactment of the EAPA, interested parties who believed that ADD/CVD evasion was taking place could merely present their claims to CBP but had no further role thereafter in CBP's enforcement activities. These parties alleged that CBP was not doing its job, and was not effectively stopping exporters/importers from evading ADD/CVD payments. EAPA is designed to compel CBP to act on interested party's (*e.g.*, foreign manufacturer or exporter, US importer, US domestic manufacturer, wholesalers, business associations and labor unions) allegations of fraud, circumvention and evasion practices by foreign producers and importers, to allow them to participate directly in CBP's evasion proceedings and to be advised of the results of CBP's review.

Notably, importers also have the right to allege that their competitors are guilty of evasion and to participate in enforcement proceedings targeting their competitors. Similarly, the Department of Commerce and the International Trade Commission have a right to file an evasion allegation with CBP. The new framework requires comprehensive responses from the targeted importers within stipulated deadlines. These new procedures have, for the first time, turned CBP investigation into an adversarial proceeding (akin to Commerce's ADD/CVD proceedings). Likewise, in the subsequent administrative and judicial reviews of original CBP determinations, the interested parties are afforded full participation.

CBP Required to Adhere to a Formal Procedure with Strict Deadlines

Beginning December 15, 2016, all EAPA allegations are required to be submitted via CBP's online e-Allegation web portal. CBP is also required to undertake specified steps and render decisions within strict timelines.

First, CBP is now required to "initiate" an investigation of allegations that "reasonably suggest" that evasion is taking place, within 15 business days of receipt of a properly filed allegation. EAPA requires public disclosure of:

- The name of the party reporting an EAPA violation;
- The reporting party's standing to submit an allegation; and
- The name and address of the importer alleged to be evading an AD/CVD order

Entries of alleged covered merchandise made within one year prior to the receipt of such an allegation is the subject matter of EAPA investigation. In the initial part of investigation, the agency will be doing its own due diligence without formally involving the interested parties.

Second, if CBP's internal inquiry suggests that there is a

"reasonable suspicion" that the importer is guilty of evasion, the agency will take interim (provisional) measures. Such interim measures may include suspension of liquidation for unliquidated entries entered on and after date of initiation, extension of liquidation and requiring single transaction bonds or other security, or cash deposit of estimated ADD/CVD.

It may be noted that interim measures potentially may be extraordinarily onerous, since:

1. importers will not have participated in the investigation prior to imposition of these measures;
2. the "reasonable suspicion" standard may be easy for the claimant to satisfy;
3. cash deposits and/or security may be at prohibitive ADD/CVD rates (*e.g.*, adverse facts available China-wide rates in China investigations); and
4. interim regulations do not include a mechanism for challenging these interim measures before the final decision is issued.

Thereafter, CBP will launch a full investigation wherein it has authority to request information from parties to the investigation by issuing questionnaires. Parties to the investigation may provide factual information either in response to such questionnaires or even voluntarily, but other interested parties may provide information only in response to a request from CBP. CBP has the right to verify information including in foreign country. If a party fails to cooperate and comply to the best of its ability to provide the information requested by CBP, the agency has the right to apply an adverse inference in selecting from the facts otherwise available to make its determination as to evasion. Parties to the investigation may submit written arguments to CBP and must serve all other parties to the investigation with a public version thereof.

CBP's final decision would ordinarily be issued within 300 days of initiation. CBP can extend investigation for an additional 60 days if investigation is extraordinarily complicated. If CBP refers a matter to DOC, the deadlines are tolled for the time period when DOC is seized of the matter.

If CBP makes an affirmative determination of evasion, CBP will (1) suspend the liquidation of unliquidated entries of the covered merchandise that is subject to the determination and that entered on or after the date of initiation of the investigation, (2) extension of liquidation and (3) identify applicable ADD/CVD assessment rate or cash deposit rate in consultation with Commerce.

CBP can also initiate additional enforcement actions (*e.g.*, commencing a penalty investigation under 19 U.S.C. §1592 which could result in AD/CVD liability, plus potential penalties, for entries during the last five years) in addition to an affirmative finding of evasion under EAPA. It is unclear from the new regulations whether an importer will be entitled to file a prior disclosure after CBP has initiated an evasion inquiry.

At this point, the Regulations do not enable CBP to permit sharing of confidential information under Administrative Protective Orders (i.e., counsel obtains access to confidential data). Therefore, CBP will compel parties to submit a less redacted and meaningful public version of confidential submissions. However, the fact that confidential information will not be shared may sometimes limit effective representation.

It is impossible to predict how CBP will administer EAPA. It is likely that CBP will be under extreme pressure from domestic producers and many elected officials to give the benefit of the doubt to the party claiming evasion. The fair prosecution of EAPA cases would depend upon the ability of CBP officials to separate fact from fiction, and whether CBP allows importers a reasonable period of time in which to respond to reasonable requests for information, or conduct its investigations in a manner which ensures affirmative findings.

Standards of Review in Appeal

CBP's final decision shall be based on "substantial evidence" as to whether covered merchandise was entered into the United States through evasion. Parties have right to appeal a CBP Determination to Customs HQ ("Regulations and Rulings") within 30 days of the date of issuance of the determination. Customs HQ shall apply a "de novo" standard of review based "solely on the facts already upon the administrative record in the proceeding" and any other information that CBP specifically requests during the review process. Thus, parties to

the investigation must create a complete factual record in order to effectively challenge CBP's determinations during subsequent administrative or judicial proceedings. Importers will not be accorded a second chance to submit information on appeal to Customs Headquarters or to the CIT. Customs HQ reviews shall be completed within 60 days after they are commenced.

Parties can thereafter appeal the final administrative determination to the Court of International Trade ("CIT"), within 30 days of the Customs HQ review order. CIT will review CBP decision based on whether CBP followed procedures and whether the CBP determination was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. This standard of review makes it difficult to overturn CBP decisions.

Notably, there is a different standard of review between CBP evasion decisions and DOC scope decisions (which will be the basis for an affirmative finding of evasion when CBP refers a matter to the DOC for a scope determination in the context of an evasion investigation). This difference raises critical legal and strategic issues for all participants in these proceedings.

Conclusion

In sum, the new EAPA regime renders it easier for business competitors to file allegations of AD/CVD evasion. As such, importers would benefit from a pre-audit to ensure compliance with all applicable AD/CVD regulations. Importers need to be especially vigilant with regard to receipt of request for information (CBP Form 28), which may signal an EAPA inquiry. In such case, the importer should immediately consult the Customs consultant and explore options such as obtaining a prior scope ruling from Commerce or to file a prior disclosure with Customs.

The Role of Colombia's Customs Office in the Application of the United States – Colombia TPA's Rules of Origin: A Guideline for U.S. Exporters

By: Gabriel Ibarra Pardo[1]

From foreign investment law to unfair international trade practices and even rules following the increasing interest in industrial property rights, the so-called "New Generation Free Trade Agreements" have come to cover a vast number of matters, whose interpretation and application lead, at times, to administrative disputes between traders and the parties' authorities. The former is especially plausible with regards to the rules of origin designated in the United States – Colombia Trade Promotion Agreement (U.S. – Colombia TPA).

Rules of origin are of utmost importance, given the fact that they permit the linking of particular products to the territories of the Parties to an agreement and, in this sense, are crucial for granting preferential tariff treatment to originating goods under the standards of the treaty. The experience provided by the North American Free Trade Agreement (NAFTA) served the purpose of eliminating formal requirements as well as adding to the streamlining of origin procedures in subsequent treaties, of which the U.S. – Colombia TPA stands out.[2] This model invites importers, exporters, and producers to play a more active role in this respect, taking into consideration the importance of implementing the principles of due process, transparency, efficiency, justice, good faith and fair dealing as opposed to irresponsible practices on behalf of either of these agents.

Although Colombia's customs office has made an effort to act in accordance with the TPA's rules of origin established under Chapter 4, its formalistic administrative practice has

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2 Aguirre Cárdenas, C. F. (2015), *Reglas de origen en los tratados de libre comercio de los Estados Unidos con Latinoamérica. El caso colombiano,* in Pardo Carrero, G., *INCIDENCIA DEL ORIGEN DE LA MERCANCÍA EN MATERIA TRIBUTARIA,* Bogotá, Instituto Colombiano de Derecho Tributario, pp. 73 – 115.

sometimes hampered the recognition of substantive law with reference to the removal of customs duties. In this matter, certain guidelines addressed to U.S. exporters can contribute to develop a system that far from violating guiding administrative principles and business rights, designed to preserve legal certainty and, in general, the proper implementation of each of the TPA's provisions. This article aims at providing such guidelines taking into account the fundamental role Colombia's customs office plays in the application of the United States – Colombia TPA's rules of origin and the importance of elaborating certificates of origin that could hardly be questioned by this office.

Article 75 of the TPA's implementing norm in the Colombian legal system, Decree 730 of 2012, enshrines the importer's entitlement to claim the reimbursement of funds paid in excess as a result of not having demanded the preferential tariff treatment at the moment of the importation, as long as it concerns an originating good entering Colombian territory. As a result of these types of submissions, a series of intricacies could surface regarding administrative and procedural affairs revolving around the legitimacy and veracity of the certificate of origin's content, as it has been described by Gustavo Guzmán in his book, Las Reglas De Origen Del Comercio Internacional.[3] In particular, these complexities could be partially promoted by the self-certifying system featured on most "New Generation Free Trade Agreements", upon which the originating good's exporter or producer delivers a sworn statement providing for the assurance of the certificate's content and legal formality.[4] The preceding system implies a relationship between private parties and, to that extent, a major knowledge, deepening and controlled by producers, exporters, and importers as to both the interpretation and consequent application of the respective rules and origin procedures[5]. In this manner, although an U.S. exporter might have the strong belief that there is not an objection that could be raised against his certificate, Colombia's customs office or DIAN[6] could claim, in terms of the TPA's rules of origin, that the document's formal content does not illustrate the good's originating status.

In order to avoid the issues that may arise when the preferential tariff treatment is requested and, therefore, to fulfill the objectives of the Treaty, the question lies in determining which is the necessary content that a certificate has to expose for it to comply with the standards set by the Colombian Customs Authority.

With regards to Article 4.1 of the TPA, Colombia's DIAN interpretations, at times, lead to the collection of customs duties when there is no basis for paying them. In some instances, the authorities proceed by alleging that the certificate of origin was not properly executed. In order to avoid these contingencies, exporters and/or producers should be as clear as possible when filling down the certificates of origin, leaving nothing to the Authority's discretion. For example, particular problematic interpretations could be avoided by specifying if, having entirely produced the particular good inside U.S. territory, each and every one of the non-originating materials used in the production of the good undergoes an applicable change in tariff classification or if the good otherwise satisfies any applicable regional value content. In other words, it would be best if the specific criterion used to apply the precise rule of origin is literally designated on the certificate.

Even though, the administration is compelled to execute a full, harmonious, coordinated reading of the certificate as a whole, and in some cases a comprehensive analysis could amount to the identification of the criterion that confers

3 Guzmán Manrique, G. (2012), LAS REGLAS DE ORIGEN DEL COMERCIO INTERNACIONAL, Primera Edición, Editorial Legis.

4 Lavandera, P. (2004), LAS NORMAS DE ORIGEN EN EL DERECHO DEL COMERCIO INTERNACIONAL. SU RELEVANCIA EN EL ÁMBITO TRIBUTARIO E INFRACCIONAL, Universidad de Montevideo, Montevideo, Año III, Revista Derecho, (6), pp. 99 – 110.

5 The initials DIAN stand for "Dirección de Impuestos y Aduanas Nacionales de Colombia".

6 Beltrán Amado, A. C. (2015), *Origen desde el punto de vista de su prueba y su tratamiento por la Dirección de Aduanas de Colombia,* in Pardo Carrero, G., INCIDENCIA DEL ORIGEN DE LA MERCANCÍA EN MATERIA TRIBUTARIA, Bogotá, Instituto Colombiano de Derecho Tributario, pp. 301 – 323.

origin to the good in question, the best way to proceed by the exporters or producers that elaborate origin certificates is to be absolutely thorough and present the information that clearly specifies the criterion that grants origin to the exported merchandise.

As if the above were not enough, according to the principles guiding the TPA, as well as the administrative proceedings that take place under the treaty, customs authorities ought to establish an atmosphere of good faith and mutual trust, mainly in reference to the goods' declarations of origin by U.S. exporters. Similarly, Colombia's DIAN is call by duty to ensure that substantive law prevails over all formal requirements. Otherwise, it might lead to a clear violation of the exporters' rights of due process and effective defense, depriving traders from the possibility of submitting additional documents that will assist the determination of the goods' origin.

In some instances, DIAN might claim that the certificate demonstrating the origin of goods imported through multiple shipments has coverage that applies only towards the future. Therefore, it does not apply to shipments carried out before the issuance of the certificate. Nevertheless, the implementing decree merely describes how one certification of origin may apply to: (a) solely a shipment or (b) multiple shipments of identical goods, in any period of time determined in the written or electronic certificates, as long as it does not exceed 12 months from the certification date.

In an effort to settle down the complications arising from evaluating the accuracy of the aforementioned interpretation, it would be preferable for U.S. exporters to act preventively and, when the recognition of the preferential tariff treatment is requested after the importation is made, execute one certificate for each of the shipments instead of one concerning multiple shipments. Still, one could argue that these interpretations of the Treaty are inconsistent with the principle of justice. Under this maxim, a high spirit of justice must govern the application of customs provisions by officials acting in the exercise of their supervisory role, and thus the State is banned from demanding customs users additional requisites that go beyond the legal mandates.

A plausible cause that might explain such interpretations given by the authorities is the proliferation of enrollments in Free Trade Agreements, which could be challenging for customs officers. For instance, depending of the treaty at issue, they are to employ numerous rules of origin of varying nature given the absence of universal rules applying to all FTAs. Therefore, in order to really prosper from the signing of any of these treaties it would be necessary to question whether a positive impact could result from bringing forth universally accepted rules of origin.[7]

In addition, one could ask the question whether it would be far more efficient, in the sake of greater legal certainty, to implement a system of certification that in fact verifies the good's origin through written statements by government authority or a delegated entity commissioned to serve such purposes in the exporting country's territory, such as the one adopted in other recent agreements like *Alianza del Pacífico*. Despite critics of being more onerous, beyond sophisticated and less expeditious, this could represent a well-suited alternative to the self-certifying system, highly controversial with regards to the declaration of origin.

Also, the exporter could ask the U.S. competent authority for the issuance of a resolution that, after examination and study will determine classification as an American originating good. The resolution not only provides for major legal certainty, but also guarantees past trade operations while at the same time it requires the training of public or private officials along with important investment in the development of adequate computer systems.

Likewise, the existence of clear, exact, and precise rules must be promoted in an effort to correctly inform exporters and importers about customs requirements under the TPA.[8] For that matter, U.S. exporters should keep up with the operating guidelines submitted by the importing country's authorities and in the event of doubt, proceed by contacting the customs office through written note.

However, these previous guidelines, aimed at helping U.S. exporters in the insights of their trading operations with Colombia, would be senseless without calling the attention of the customs officers, who need to understand that the

7 Maldonado Narváez, M. I. (2014), LAS REGLAS DE ORIGEN EN LOS TRATADOS DE LIBRE COMERCIO, Revista de Derecho, (41), 32 – 50.

8 Beltrán Amado, A. C. (2015), *Origen desde el punto de vista de su prueba y su tratamiento por la Dirección de Aduanas de Colombia,* in Pardo Carrero, G., INCIDENCIA DEL ORIGEN DE LA MERCANCÍA EN MATERIA TRIBUTARIA, Bogotá, Instituto Colombiano de Derecho Tributario, pp. 301 – 323.

method for strengthening subsequent control over origin verification and/or request for recognition of preferential treatments cannot be, in any way, the demand of several formal requirements. Interpretations that distort the TPA's norms as well as the origin of particular products are by no means admissible. The genuine origin of a good is always to prevail over both, the formal requirements for filling origin certificates and the whims of customs authorities. No measure set forth by the customs office is to disrupt the motives and purposes that promoted the signing of the TPA. Instead, the interpretation and application of the FTA's rules should be directed towards the establishment of clear and mutually advantageous rules governing trade between both countries and the assurance of a predictable legal and commercial framework for business and investment.

Global Trade Has Finally Gotten A New Ally In France's Sapin 2

By Marcia B. Moulon-Atherley[1]

As a legal practitioner in Intellectual/Industrial Property, Investment, Trade and Finance, I have always been perplexed that – unlike the United States' Foreign Corrupt Practices Act (FCPA) and the broad-reaching U.K. Bribery Act (UKBA) – France did not have a piece of national legislation which, given its perceived global status, regulates trade and perceived corrupt practices.

One can, therefore, imagine the challenges in ensuring regulatory compliance in a diverse range of sectors of global trade when working with France. Thus, it is extremely exciting that Sapin 2 was adopted by France's National Assembly on November 8, 2016, after five of France's large companies (including banks) were subject to hefty fines by the US Department of Justice.

Grey Areas and Trade

The grey areas in perceived corruption have got my hairs up.[2] Indeed, since the enactment of the UKBA in July 2011, I have been at odds with the manner in which this extremely cavernous piece of legislation has had an overarching principle of a no-tolerance approach to the act of bribery and corruption, and its effect on international trade. The UKBA imposes a mandatory requirement that all parties involved in international trade be highly mindful of its nature and contents, given its broad reach. Individuals seeking to do business or trade, and who offer to public officials or foreign public officials[3] ANY promise or advantage[4] (financial, gift, charitable offer), will face the relevant penalties provided for in the UKBA. Commercial entities that receive business contracts (or gifts) must show they have adequate anti-bribery procedures in place[5] and that any gifts (contracts[6]) are not, *a priori,* as a result of a bribe.[7]

Bribery and corruption are what can be described as a hamper to trade and development. And the song and dance – by governments in stamping out such improper conduct in international trade – has long been seen as a necessary evil by some while others understand and underscore the economic benefits to practices which have been defined – by the legislature – as corrupt[8].

I have described the Act as "cavernous and one-stop shop"[9] and must be compared to the FCPA, which has been described[10] as the most widely enforced anti-

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2 Bribery Act 2010 http://www.legislation.gov.uk/
3 *Id.* at Section 6 – Bribery of Foreign public officials
4 *Id.* at Section 1 – Offences of bribing another person
5 *Id.* at Section 9 – Guidance about commercial organizations preventing bribery
6 Gifts and business contracts can be interpreted as one and the same throughout
7 *Id.* at Section 7 – Failure of commercial organizations to prevent bribery
8 https://www.justice.gov/opa/pr/technip-sa-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-240-million
9 Marcia B Moulon-Atherley, *Trade and the UK Bribery Act,* ABA International Trade Newsletter, Vol.VI., N°2, March 8th 2012, p.11-13
10 Business Anti-Corruption Portal

corruption law because it is the first piece of legislation to introduce corporate liability, responsibility for third parties and extraterritoriality for corruption offences, meaning companies and persons can be held criminally and civilly responsible for corruption offences committed abroad.[11] Thus, the FCPA bites where corrupt practices occur outside of the United States.

An interesting example of the application of the UKBA and the FCPA can be found in recent case law, whereby a review of the manner in which public officials are targeted – under both pieces of legislation – is undertaken and guidelines as to assessing improper conduct as well as steps to be taken in promoting transparency – pursuant to a decision by the United States District Court for the District of Connecticut in the *Alstom S.A* case[12] – have been laid down.

Indeed, according to the OECD, the language in the FCPA - which (since 1988) - *"excludes from the definition of bribery those payments which are necessary to facilitate the performance of routine administrative actions, is not limited to 'small' facilitation payments….. To the extent that the exception is open to interpretation, it may be regarded as an area of risk and open to misuse as noted in Phase 1 evaluation of the United States"*[13].

The OECD further underscores that *"there is an absence of any clear, published guidance as to what the words mean and where the limits are. The FCPA contains no per se limit on the size of the payment, focusing instead on the purpose of the payment"*[14]. To that end, some have argued that outlawing such payments may mean very little because enforcement of same will be a further challenge for governments.[15]

Sapin 2

It can therefore be argued, that in light of the hefty fines by the Department of Justice, on *inter alia*, Alstom – which had to pay $77M in 2014[16], Total SA – which had to pay $398M in 2013[17], and Technip SA – which had to pay $338M in 2010[18], and France's National Assembly recognizing – in a report by the Commission of Foreign Affairs and the Commission for Finance[19] – and the impact of the extraterritoriality of US legislation on French companies and on French citizens, that Sapin 2 was long overdue and of course, long awaited by practitioners in global trade.

Sapin 2, adopted on November 8, 2016, is defined as a law to promote transparency, anti-corruption and modernize the French economy. It is expected that the law will serve to identify and weed out perceived corrupt practices and bribery, and as a corollary, terrorist activities.

With this backdrop in mind, it is worth underscoring some of provisions of Sapin 2, which creates a French Anti-Corruption Agency[20] ("the Agency") and requires the President to appoint a Judge who will head the Agency and

11 http://www.business-anti-corruption.com/about/about-corruption/foreign-corrupt-practices-act-(fcpa).aspx – last accessed on 15.05.2016
12 Case no: 3:14-CR-00246-JBA, U.S District Court for the District of Connecticut, *USA v Alstom, SA,* Filing date: 22.12.2014, at paras 143 – 144 and 145 – 146
13 UNITED STATES: PHASE 2 REPORT ON APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATTING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS - OCTOBER 2002, at para 114, https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/1962084.pdf last accessed on 16.05.2016
14 *Id.* at para 115
15 http://www.fcpablog.com/blog/2015/10/14/joe-murphy-heres-why-outlawing-grease-payments-may-mean-very.html
16 https://www.justice.gov/opa/pr/alstom-sentenced-pay-772-million-criminal-fine-resolve-foreign-bribery-charges
17 https://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international
18 https://www.justice.gov/opa/pr/technip-sa-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-240-million
19 http://www2.assemblee-nationale.fr/14/missions-d-information/missions-d-information-communes/mission-d-information-c
20 Article 1 of the text adopted by France's National Assembly on November 8, 2016 (Sapin 2)

who will serve for a non-renewable term of 6 years.

Sapin 2 also takes a very important step by introducing in French law protection for whistleblowers[21] and professionals in the banking and financial services industry are made liable for negligence and breach of duty to clients and for lack of internal whistleblowing procedures.[22]

Sapin 2 also targets public officers of, *inter alia*, companies belonging to a group and having at least 500 employees and with, *inter alia*, their headquarters in France. It madates that those companies have measures in place to detect, weed out bribery and corruption in France and internationally. Finally, Sapin 2 goes on to amend the French Criminal Code for lack of internal procedures which, *inter alia*, identify diverse risks to the Company.

21 Article 6 Sapin 2
22 Article 16 Sapin 2

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Conclusion

Sapin 2, in recognizing the grey areas in global trade, significantly imposes obligations on companies, bankers and financial services providers to, inter alia, assess and identify risks in their business drivers and to implement risk management policies and programs when undertaking global commercial and financial transactions. This has been long awaited!

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