THOMPSON HINE

International Trade Update

August 2021

China-U.S. Legal and Regulatory Update

Over the past year, there have been many legal and regulatory developments that critically impact trade and investment between China and the United States. Given the broad impact and frequency of these changes, we are providing quarterly, consolidated updates on key changes. For recent past developments, please also see our March 2021 update.

Newly Updated Xinjiang Supply Chain Business Advisory

On July 13, 2021, the U.S. government issued an updated Xinjiang Supply Chain Business Advisory highlighting the supply chain risk exposures related to forced labor and other human rights abuses linked to Xinjiang, China. The U.S. Department of Labor and the Office of the U.S. Trade Representative joined the U.S. Departments of State, Commerce, Homeland Security and the Treasury as signatories. The Advisory notifies companies of the human rights situation in the region and urges companies to undertake heightened due diligence. For information on the updated and prior version of the Advisory, *see* July 27, 2021 and July 14, 2020 SmarTrade Updates. Goods produced by forced labor are subject to detention and seizure at the border and several products from Xinjiang have been identified for withhold release orders (WROs) by U.S. Customs (see the WRO on silica below). Companies may also face penalties.

In addition, the Commerce Department's Bureau of Industry and Security (BIS) and the Treasury Department's Office of Foreign Assets Control (OFAC) have continued to designate individuals and entities to the Entity List and Specially Designated Nationals List that are complicit in the human rights abuses against ethnic and religious minorities in the Xinjiang Uyghur Autonomous Region. BIS continues to apply scrutiny to exports of products that may be used for surveillance and internment.

CIT Preliminarily Suspends Liquidation of Certain Entries Subject to China Section 301 Duties; U.S. Government Files Motion to Dismiss

The ongoing litigation before the U.S. Court of International Trade (CIT), in which thousands of plaintiffs have alleged an unlawful escalation of the trade war with China through the imposition of tariffs on imports under the Trade Act of 1974, there have been significant developments since the March 2021 Update.

On April 23, 2021, the plaintiffs filed a Motion for Preliminary Injunction Limited to Suspension of Liquidation of all unliquidated entries of imported products from China appearing on the Office of the U.S. Trade Representative's (USTR) Lists 3 and 4A subject to tariffs pursuant to Section 301 of the Trade Act of 1974. The preliminary injunction motion made clear that the plaintiffs do not seek to enjoin or limit the collection of these Section 301 duties and that the U.S. government defendants will continue to collect the duties during the litigation. Instead, the plaintiffs sought injunctive relief to preserve the status quo as to liquidation until the CIT issues a final judgment.

On July 6, 2021, the U.S. Court of International Trade (CIT) issued an opinion granting the plaintiffs' motion for a preliminary injunction in the ongoing China Section 301

tariff litigation. The two-judge majority opinion states that the plaintiffs "demonstrated they will likely suffer irreparable harm because their entries of subject merchandise will liquidate absent an injunction." The CIT's order requires that the government establish a repository for any unliquidated entries and requires the plaintiffs to take several steps in order to obtain suspension of liquidation of their unliquidated entries.

On June 1, 2021, the U.S. government defendants filed a dispositive motion – a motion to dismiss and, in the alternative, a motion for judgment on the agency record. The plaintiffs' response brief is due August 2, and amicus briefs are due August 9, 2021.

Biden Administration Restructures and Expands Sanctions on Chinese Military-Industrial Complex Companies

On June 3, 2021, President Biden issued Executive Order 14032, "Addressing the Threat from Securities Investments that Finance Certain Companies of the People's Republic of China" (EO). The EO supersedes the executive orders targeting "Communist Chinese Military Companies" that the Trump administration issued. Specifically, it revises Sections 1 through 5 of Executive Order 13959, as amended, and revokes Executive Order 13974. The impact of the EO is to expand the restrictions on investments in Chinese defense and surveillance technology firms by adding 59 Chinese companies to the Non-SDN Chinese Military-Industrial Complex Companies List (NS-CMIC List). Note: The previous annex listing Communist Chinese Military Companies has been replaced and superseded in its entirety by the Annex to the June 3 EO.

Effective at 12:01 a.m. Eastern Daylight Time (EDT) on August 2, 2021, the EO prohibits U.S. persons from engaging in the purchase or sale of any publicly traded securities of any persons listed in the Annex of the EO or the NS-CMIC List, or any persons added in the future. However, under the EO, companies may divest themselves from holdings in NS-CMIC entities listed in the EO before 12:01 a.m. EDT on June 3, 2022. Companies will be granted a one-year divestment period for all entities added to the NS-CMIC list in the future.

The EO clarifies that the Treasury Department has final authority in determining which companies are added. Unlike the previous Trump-era executive orders, the designation criteria in this EO have been extended to companies that are deemed (1) to operate or have operated in the defense and related materiel sector or the surveillance technology sector of the economy of China, or (2) to own or control, or to be owned or controlled by, directly or indirectly, parties operating in these sectors, and/or designated pursuant to this EO.

CBP Issues WRO for Silica-Based Products from Hoshine Silicon Industry Co., Ltd. and its Subsidiaries

On June 23, 2021, U.S. Customs and Border Protection (CBP) issued an immediate Withhold Release Order (WRO) requiring U.S. ports to detain shipments of "silica-based products manufactured by Hoshine Silicon Industry Co., Ltd., a company located in Xinjiang, China and its subsidiaries," and "materials and goods (such as polysilicon) derived from or produced using those silica-based products. The related CBP press release defines silica as a "raw material that is used to make components for solar panels, electronics, and other goods." The White House also issued a fact sheet noting that CBP "will continue investigating allegations in the polysilicon industry and other industries in Xinjiang and elsewhere." The WRO is expected to have a large impact on many different industries that source some or all of their raw materials from silica mined in Xinjiang.

CBP Issues WRO for Seafood Products Imported from the Dalian Ocean Fishing Company

On May 28, 2021, the CBP issued a press release announcing that it had issued a WRO for imports of seafood products from Dalian Ocean Fishing Co., Ltd., a Chinese entity, "based on information that reasonably indicates the use of forced labor in the entity's fishing operations." The WRO will be effective immediately.

The WRO instructs all CBP personnel to detain at all U.S. ports of entry all shipments of tuna, swordfish, and other seafood harvested by vessels owned or operated by Dalian Ocean Fishing Co., Ltd.

While the CBP issued WROs on individual distinct water fishing vessels in the past (*e.g.*, Lien Yi Hsing No. 12, the Da Wang, and the Yu Long No. 2), this is the first WRO issued against an entire fleet of fishing vessels.

China's New Anti-Foreign Sanctions Law

On June 10, 2021, China passed a new Anti-Foreign Sanctions Law ("AFSL"). The AFSL provides a sweeping and yet structured statutory authority for the State Council to issue countersanctions to target individuals or entities. Through the AFSL, China may impose countersanctions on foreign officials, diplomats, individuals or entities, directly or indirectly, involved in formulating, deciding, or implementing the discriminatory restrictive measure, *i.e.*, the China-related sanctions implemented by foreign governments that China considers violates international laws and international relations, and are implemented to suppress or discriminate against China.

The broad language of the AFSL creates some vagueness as to how China will implement the AFSL. It, however, may be interpreted as that China can target companies that comply with those "China-related discriminatory restrictive sanctions", anywhere in the world. Unlike the EU's blocking statute, the AFSL does not point to specific "extraterritorial sanctions" as examples. This provides China authorities broad discretion as to how to implement AFSL, but in the meantime creates uncertainty and compliance challenges for companies that seek to comply with the AFSL.

BIS Adds Seven Chinese Supercomputing Entities to Entity List for Their Support of China's Military Modernization and Other Destabilizing Efforts

On April 8, 2021, the BIS issued a final rule adding seven Chinese supercomputing entities to the Entity List for "conducting activities that are contrary to the national security or foreign policy interests of the United States" due to their support of China's military modernization and "other destabilizing efforts."

These Chinese entities are:

- Tianjin Phytium Information Technology
- Shanghai High-Performance Integrated Circuit Design Center
- Sunway Microelectronics
- The National Supercomputing Center Jinan
- The National Supercomputing Center Shenzhen
- The National Supercomputing Center Wuxi
- The National Supercomputing Center Zhengzhou

According to a statement issued by BIS, these entities "are involved with building supercomputers used by China's military actors, its destabilizing military modernization efforts, and/or weapons of mass destruction (WMD) programs."

The listing of these seven entities on the Entity List was effective as of April 8, 2021. Their listing imposes a license requirement that applies to all items subject to the Export Administration Regulations (EAR) and removes any license exceptions on exports, reexports or transfers (in-country) to these entities. In applying for any license to export to these entities, BIS has adopted a license review policy of a presumption of denial.

President Biden Signs Executive Order to Protect the U.S. Information and Communications Technology and Services Supply Chain

On June 9, 2021, President Joseph Biden issued an Executive Order (E.O.) to further address the threat posed to the U.S. information and communications technology and services (ICTS) supply chain declared in Executive Order 13873 (the "Telecom Supply Chain E.O."; *see* SmarTrade blog post of May 16, 2019). The June 9, 2021 E.O. also revoked and replaced three E.O.s aimed to prohibit transactions with TikTok, WeChat and eight other communications and financial technology software applications (*see* SmarTrade blog post of August 7, 2020). According to a brief statement from the White House, the new E.O. "directs the use of a criteria-based decision framework and rigorous, evidence-based analysis to address the risks posed by ICTS transactions involving software applications that are designed, developed, manufactured, or supplied by persons that are owned or controlled by, or subject to the jurisdiction of a foreign adversary, including the People's Republic of China, that

may present an undue or unacceptable risk to the national security of the United States and the American people."

The new E.O. seeks to continue to protect sensitive personal data and directs the Department of Commerce (Commerce) to evaluate foreign adversary-connected software applications and to take action as necessary. The E.O. continues to apply the criteria established in E.O. 13873 but highlights other potential indicators of risk.

Commerce is also directed to consult with other federal government departments and agencies in preparing a report with recommendations "to protect against harm from the unrestricted sale of, transfer of, or access to United States persons' sensitive data, including personally identifiable information, personal health information, and genetic information, and harm from access to large data repositories by persons owned or controlled by, or subject to the jurisdiction or direction of, a foreign adversary." This report is due in 120 days (*i.e.*, October 7, 2021). Commerce has further been directed to make any additional recommendations for executive and legislative branch actions to address ICTS risks involving foreign adversaries no later than December 6, 2021.

U.S. Government Issues Hong Kong Business Advisory

On July 16, 2021, the U.S. Departments of State, Commerce, Homeland Security and the Treasury issued a Hong Kong Business Advisory highlighting growing risks for U.S. companies operating in the Hong Kong Special Administrative Region (SAR) due to ongoing actions taken by the Government of the People's Republic of China (China). The advisory states that these risks fall into four categories: (1) risks for businesses following the imposition of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (NSL); (2) data privacy risks; (3) risks regarding transparency and access to critical business information; and (4) risks for businesses with exposure to sanctioned Hong Kong or China entities or individuals.

Regarding risks under the NSL, which was implemented in June 2020 and under which China significantly reduced Hong Kong's autonomy and undermining protected rights and freedom, the advisory notes that potential offenses include secession, subversion, terrorist activities, and collusion with a foreign country or external elements to endanger national security. The advisory notes that Hong Kong authorities have arrested foreign nationals under the NSL including one U.S. citizen.

Concerning data privacy, the business advisory notes that China and Hong Kong authorities are using expanded legal authorities to collect data from businesses and individuals in Hong Kong for actions that may violate "national security." Further, the NSL grants Hong Kong law enforcement broad authorities to conduct wiretaps or electronic surveillance. For U.S. businesses with transactions involving Hong Kong, the business advisory reminds these companies that the United States has implemented several export control and sanctions regulations and orders targeting specific China and Hong Kong persons or entities without a license from the appropriate U.S. government agency. The advisory notes that Hong Kong has been removed as a separate destination and that "all items subject to the EAR that are destined for export, reexport or transfer (in-country) to or from Hong Kong will be treated as exports, reexports or transfers (in-country) to or from [China]." Failure to comply with these U.S. sanctions and current export restrictions can result in civil and criminal penalties under U.S. law. Importantly, the business advisory notes China's response to these sanctions and export restrictions with its recent passage of a law to "counter foreign sanctions." The business advisory provided a detailed background of China's new law on this matter and the countermeasures China may take against such foreign sanctions. As a result, U.S. businesses operating in Hong Kong may face heightened risk and uncertainty in connection with U.S. sanctions and export compliance efforts.

The business advisory "strongly encourages organizations subject to U.S. jurisdiction, as well as foreign entities, including foreign financial institutions, that conduct business in or with the United States or U.S. persons, or deal in U.S.-origin goods or services, to employ a risk-based approach to sanctions compliance by developing,

implementing, and routinely updating a sanctions compliance programs" as they relate to Hong Kong and continuing efforts by China reduce Hong Kong's autonomy and restrict rights and freedoms.

For past important Thompson Hine SmarTrade Updates on Hong Kong, see:

- OFAC Publishes Formal Hong Kong Sanctions Regulations
- Commerce Removes Hong Kong as a 'Separate Destination' Under the EAR
- CBP Issues Notice on Country of Origin Marking for Hong Kong Products
- President Trump Signs the Hong Kong Autonomy Act and Issues Executive Order on Hong Kong Normalization

FOR MORE INFORMATION

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