

Doing Business in the United States: Cross Border Disputes and Minimizing Litigation Risks

Interactive Webinar

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9:00 – 10:00 AM

Hosted By

King & Spalding

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The American-Danish Business Council

KING & SPALDING

AGENDA

- U.S. Litigation Risks
- Import Activities
- Economic Sanctions/Embargoes
- National Security Reviews Of Foreign Investment
- International IP Rights

U.S. LITIGATION RISKS

THE U.S. LEGAL SYSTEM: AN OVERVIEW

- U.S. Is Characterized By A System Of “Dual Sovereignty”
 - The U.S. has a body of federal law, which is supreme
 - Each state has its own body of law
 - Frequent overlap
- States Provide Much Of The Basic Law That Governs Business, And State Law May Differ
 - Contracts
 - Torts
 - Consumer Protection
- When Considering Investing In The U.S., It Is Important To Consider State As Well As Federal Law

U.S. Court System

- Federal Courts
 - Courts of limited jurisdiction -- jurisdiction fixed by U.S. Constitution and statutes
 - Cases between U.S. and non-U.S. parties
 - Statutory claims: Securities, Antitrust, Environmental, Employment
- State Courts
 - Courts of general jurisdiction – generally no limitation on subject matter

JURISDICTION OF U.S. COURTS

• Personal Jurisdiction

- Constitutes the most meaningful limitation on U.S. judicial power over non-U.S. parties
- U.S. and state courts' authority to adjudicate claims over non-residents is limited by U.S. Constitution Due Process Clause
- A court must find a nexus, or “minimum contacts,” between a non-resident defendant and the forum state
 - Minimum contacts must be with the state where the court is, not the United States generally
 - *International Shoe v. Washington*, 326 U.S. 310 (1945)

JURISDICTION OF U.S. COURTS

- Types Of Personal Jurisdiction
 - General Personal Jurisdiction
 - Exists where a party's contacts with the forum state are so regular and continuous as to justify the exercise of jurisdiction over the party for any claim
 - Examples: Maintenance of branch office, dedicated sales force in state
 - Specific Personal Jurisdiction
 - More sporadic, though still significant contacts that justify the exercise of jurisdiction over claims related to the party's contacts with the forum state
 - Examples: Negotiate contract in state, commit tort in state during visit

JURISDICTION OF U.S. COURTS

- Limitations On Jurisdiction
 - The U.S. Supreme Court has decided several key cases in the last few years that have reined in the jurisdiction of U.S. courts
 - Stream of Commerce
 - Nationwide Distribution
 - Extraterritorial Conduct

RECENT LIMITATIONS ON JURISDICTION

- *Goodyear Dunlop Tires Operations v. Brown* (S. Ct. 2011)
 - Plaintiff brought suit against U.S. subsidiaries of Goodyear based on bus accident in France that injured U.S. citizens
 - Claimed that lack of limitation on sales to forum state made sales there foreseeable
 - U.S. Supreme Court holds that stream of commerce jurisdiction cannot confer general personal jurisdiction – case dismissed
- *J. McIntyre v. Nicastro* (S. Ct. 2011)
 - Plaintiff was injured by a metal shearing machine manufactured in England and sold in the U.S.
 - Manufacturer of the machine sold products in the U.S. under a nationwide distribution agreement. No specific state was targeted.
 - Case dismissed for lack of state-specific contacts

RECENT LIMITATIONS ON JURISDICTION

- Extraterritorial Conduct

- Two recent decisions of the Supreme Court have held that U.S. law does not apply to conduct occurring abroad unless the law makes clear that it is intended to so apply
 - *Morrison v. National Australia Bank* (S. Ct. 2010)
 - *Kiobel v. Royal Dutch Petroleum Co.* (S. Ct. 2013)

MANAGING U.S. LITIGATION RISK

- Choice Of Law Clauses

- Parties may stipulate that the law of a particular U.S. state governs their contract
- Common choices: New York, Delaware
- Eliminate ambiguity

- Jurisdiction/Venue Clauses

- Avoid business unfriendly courts
- Eliminate ambiguity
- Avoid parallel proceedings/race to the courthouse
- No need for local/new counsel

- Arbitration Clauses

- Maximum flexibility to resolve disputes in familiar forum
- U.S. law is very favorable to both domestic and international arbitration; agreements and awards are easily enforceable
- No jury trials

IMPORT ACTIVITIES

HOT IMPORT ISSUES

- “Revenue” Generation By U.S. Customs
 - **Pendulum Swinging Back From Security Focus
- Valuation
- Security Programs (*e.g.*, C-TPAT Contractual Requirements)
- Returns Of Containers (Instruments Of Interstate Commerce)
- Country Of Origin/Marking
- Trade Remedy Enforcement

REASONABLE CARE - IMPORT

- Importers Are Responsible For Declaring The Value, Classification, And Rate Of Duty On Entered Merchandise
- Informed Compliance -- The Importer Of Record Is Required To Exercise “Reasonable Care” In Preparing And Submitting Information To Customs
- Reasonable Care May Be Demonstrated By:
 - Seeking guidance from Customs
 - Requesting binding rulings from Customs
 - Consulting with a customs attorney/broker
 - Performing internal compliance assessments

ENTRY OF A GOOD

- Tariff Classification

- Merchandise is classified under the Harmonized Tariff Schedule subheading that provides the most accurate product description
- Further manufacturing, importing of component parts, and the modification of specifications all affect classification

- Valuation

- Tariffs usually are calculated on an *ad valorem* basis, *i.e.*, as a percentage of the value of the imported merchandise
- Valuation is usually based on the price paid or payable for the merchandise

- Country Of Origin

- Substantial transformation changes the country of origin
- Generalized System of Preferences
- Free Trade Agreements

FORM 7501

- “Entry Summary”
- Typically Filed By Broker
- Provides Customs With Essential Data
- Includes “Declaration”

Form Approved OMB No. 1651-0022
EXP. 03-31-2012

DEPARTMENT OF HOMELAND SECURITY
U.S. Customs and Border Protection

ENTRY SUMMARY

8. Importing Carrier		9. Mode of Transport		10. Country of Origin		11. Import Date						
12. B/L or AWB No.		13. Manufacturer ID		14. Exporting Country		15. Export Date						
16. I.T. No.		17. I.T. Date		18. Missing Docs		19. Foreign Port of Lading		20. U.S. Port of Unlading				
21. Location of Goods/G.O. No.		22. Consignee No.		23. Importer No.		24. Reference No.						
25. Ultimate Consignee Name and Address				26. Importer of Record Name and Address								
City _____ State _____ Zip _____				City _____ State _____ Zip _____								
27. Line No.		28. Description of Merchandise		32. A. Entered Value B. CHGS C. Relationship		33. A. HTSUS Rate B. ADA/CVD Rate C. IRC Rate D. Visa No.		34. Duty and I.R. Tax Dollars _____ Cents _____				
Other Fee Summary for Block 39		35. Total Entered Value		CBP USE ONLY			TOTALS					
		\$ _____		A. LIQ CODE			B. Ascertained Duty			37. Duty		
		Total Other Fees		REASON CODE			C. Ascertained Tax			38. Tax		
		\$ _____					D. Ascertained Other			39. Other		
							E. Ascertained Total			40. Total		
36. DECLARATION OF IMPORTER OF RECORD (OWNER OR PURCHASER) OR AUTHORIZED AGENT												
I declare that I am the <input type="checkbox"/> importer of record and that the actual owner, purchaser, or consignee for CBP purposes is as shown above, OR <input type="checkbox"/> owner or purchaser or agent thereof. I further declare that the merchandise <input type="checkbox"/> was obtained pursuant to a purchase or agreement to purchase and that the prices set forth in the invoices are true, OR <input type="checkbox"/> was not obtained pursuant to a purchase or agreement to purchase and the statements in the invoices as to value or price are true to the best of my knowledge and belief. I also declare that the statements in the documents herein filed fully disclose to the best of my knowledge and belief the true prices, values, quantities, rebates, drawbacks, fees, commissions, and royalties and are true and correct, and that all goods or services provided to the seller of the merchandise either free or at reduced cost are fully disclosed. I will immediately furnish to the appropriate CBP officer any information showing a different statement of facts.												
41. DECLARANT NAME			TITLE			SIGNATURE			DATE			
42. Broker/Filer Information (Name, address, phone number)						43. Broker/Importer File No.						
Paperwork Reduction Act Notice CBP Form 7501 (06/09)												

VALUATION



- Customs Value Generally Must Be Based On First Of The Following Viable Appraisement Methodologies:
 - Transaction value
 - Transaction value of identical merchandise
 - Transaction value of similar merchandise
 - Deductive value (*i.e.*, resale price after deductions)
 - Computed value (*i.e.*, production costs + profit and general expenses + assists + packing costs)
 - Values if other values cannot be determined
- Customs Must Be Notified At Time Of Entry If Reported Value Is Non-Final
 - Reconciliation procedures available
 - Penalties for not making accurate valuation declaration

VALUATION (cont'd)

- Assists
 - Material, component, part, tool, die, schematics, plans, *etc.* provided by the importer directly or indirectly to the seller free of charge or at a reduced cost
 - Must be valued properly and apportioned to entered merchandise
- Inter-Company Sales (Transfer Pricing)
 - Generally must reflect “arm’s length” price
 - Customs and tax standards are different (Customs is concerned with entries on a transaction basis)

COUNTRY OF ORIGIN

- Generally Determined As Last Place Of Substantial Transformation
- Determination Can Be Impacted By Trade Agreements
- Trade Agreement Origin Rules (Specific To 8-digit Subheadings)
 - Certificates of origin
 - Tariff classification change
 - Minimum regional value content
- In U.S., Foreign-Origin Articles Must Be Marked With The Country Of Origin

ECONOMIC SANCTIONS/ EMBARGOES



OFFICE OF FOREIGN ASSETS CONTROL: US SANCTIONS/EMBARGOES

- Restricts Transactions Involving The Target Of US Sanctions By:
 - Blocking property and property interests of target
 - Prohibiting “US persons” from engaging in transactions with target
 - Prohibiting transactions related to the export and reexport of US items that involve the target
- Two Main Types Of Sanctions:
 - Sanctions targeting a country or territory
 - List-based sanctions targeting specific individuals and entities (regardless of location)

WHAT IS A “US PERSON”?

- US Citizens And Permanent Residents (Green Card Holders), *Wherever Located*
- Any Person Or Company Present In The United States
- US-Incorporated Entities And Their Foreign Branches
- Except For Cuba, Companies Incorporated Outside The US (Including Separately Incorporated Subsidiaries Of US Companies) Generally Are Not US Persons

US citizens and permanent residents working for non-US companies are still subject to all OFAC restrictions

COMPREHENSIVE US TERRITORY-BASED EMBARGO PROGRAMS

- No US Person Involvement In Any Transactions Involving The Following Countries, With Limited Exceptions (*e.g.*, Exports Of Food And Medicine):



Cuba



Iran



Sudan

SANCTIONS (CONT'D)

• US Territory-Based Sanctions (cont' d)

- **Burma/Myanmar** (limited blocking)
- **Belarus** (limited blocking)
- **Congo** (limited blocking)
- **Côte d' Ivoire** (limited blocking)
- **Iraq** (certain entities and activities)
- **Liberia** (limited blocking)
- **Libya** (limited blocking - primary impact on flow of funds)
- **North Korea** (imports, certain exports and sales to certain entities)
- **Somalia** (limited blocking)
- **Syria** (no U.S. goods or technology, blocking limited to designated persons)
- **Zimbabwe** (limited blocking)

• List-Based Sanctions (Entities & Individuals)

- Sanctions apply to listed entities and individuals (regardless of location)
- US persons prohibited from engaging in virtually all business with the listed entities and require US persons to block their property interests
- **All targeted entities and individuals are listed on the Specially Designated Nationals List maintained by OFAC available at:**
<http://www.treas.gov/offices/enforcement/ofac/sdn/>

BEWARE OF “FACILITATING” TRANSACTIONS ENGAGED IN BY NON-US PERSONS

- No US Person, Wherever Located, May Approve, Finance, Facilitate, Or Guarantee Any Transaction By A Foreign Person Where The Transaction If Performed By A US Person Or Within The United States Would Be Prohibited
- Examples Include:
 - Providing support for transactions such as: business and legal planning; contract negotiations; decision making; designing; accounting services, IT systems and support
 - Changing operating policies and procedures for purposes of facilitating transactions with embargoed countries

NATIONAL SECURITY REVIEWS OF FOREIGN DIRECT INVESTMENT

NATIONAL SECURITY REVIEWS

- **US Restricts Foreign Direct Investment In Certain Sectors, Including Energy Resources, Coastal And Domestic Shipping, And Air Transport**
- **Exon-Florio Amendment**
 - Enacted in 1988 as the Exon-Florio amendment to the Defense Production Act of 1950
 - Gives President authority to review all mergers, acquisitions, and takeovers that could result in foreign control of persons engaged in interstate commerce in the United States
 - President may suspend, block, or unwind a transaction that threatens to impair US national security, even years after closing
 - President's decision is not subject to judicial review
- **President Delegated His Review Authority To Committee On Foreign Investment In The US (“CFIUS”)**

CFIUS



CFIUS REVIEW

- Process Allows One Or Both Parties To File Notice Of A Transaction With CFIUS To Initiate A National Security Review
- Once The Transaction Has Been Cleared, It Cannot Be Blocked, Unwound, Or Suspended, Unless The Initial Review Was Based On Materially Incorrect Or Incomplete Information, Or There Is A Breach Of A Mitigation Agreement
- CFIUS May Self-Initiate A Review, Based On Notification From Another CFIUS Member
- Review Can Occur Pre- Or Post-Closing

“CONTROL”

- “The Power, Direct Or Indirect, Whether Or Not Exercised, And Whether Or Not Exercised Or Exercisable Through The Ownership Of A Majority Or A Dominant Minority Of The Total Outstanding Voting Securities Of An Issuer, Or By Proxy Voting, Contractual Arrangements Or Other Means, To Determine, Direct Or Decide Matters Affecting An Entity”
- Minority Shareholder That Has Decision-making Authority May Be In “Control” Of An Entity For Purposes Of The CFIUS Review
- When More Than One Foreign Person Has An Interest In A US Person, CFIUS Will Consider Other Factors, Including:
 - Are the foreign persons related?
 - Do the foreign persons have commitments to act in concert?

“US PERSON” & “FOREIGN PERSON”

- *US Person* Means Any (1) Natural Person Or (2) Entity That Has Business Activities In Interstate Commerce In The US, Regardless Of The Nationality Of The Natural Persons Or Entities Which Control It
- *Foreign Person* Means Any Foreign National Or Any Entity Over Which Control Is Exercised Or Exercisable By A Foreign Interest
- Thus, An Acquisition Of A US Company By The US Subsidiary Of A Foreign Company Could Be Subject To CFIUS Review
- Joint Ventures Could Be Subject To CFIUS Review If A US Person Contributes An Existing Identifiable US Business Concern To The Joint Venture And A Foreign Interest Would Gain Control Over The Business By Means Of The Joint Venture

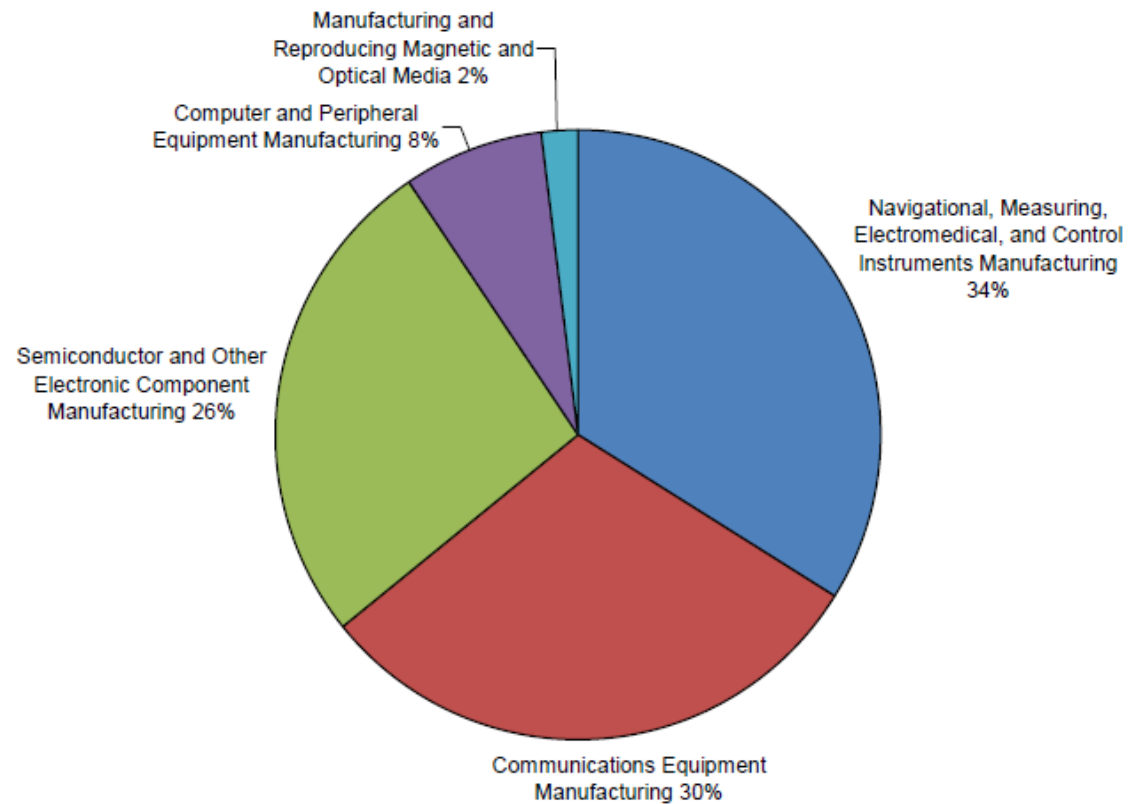


“NATIONAL SECURITY”

- “National Security” Is Not Defined In The Statute Or The Regulations, But The Statute Provides That The President Should Consider A Number Of Factors, Including:
 - Domestic production needed for projected national defense requirements
 - Capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services
 - Control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the US to meet the requirements of national security
 - Potential effects of the transaction on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons
 - Potential effects of the transaction on US technological leadership in areas affecting US national security

TRANSACTIONS REVIEWED BY CFIUS

Computer and Electronic Products 2009-2011



Covered Transactions from the Computer and Electronic Products Subsector

FOREIGN INVESTMENT AND NATIONAL SECURITY ACT OF 2007 (“FINSA”)

- Clarified That National Security Review Also Should Examine:
 - Issues relating to homeland security, including its application to “critical infrastructure”
 - Potential effects on US “critical technologies”
 - Long-term projection of US requirements for sources of energy and other critical resources and materials
 - Potential effects on sales of military goods, equipment, or technology to any country that poses a regional military threat to the interests of the US

SECTION 337 INVESTIGATIONS

SUMMARY OF SECTION 337 INVESTIGATIONS

- The U.S. International Trade Commission Conducts Investigations Under Section 337 Of The Tariff Act Of 1930
- Section 337 Counteracts Any Unfair Act In The Importation Of Goods In The U.S., Typically Intellectual Property Infringement
- ITC Makes Substantive Determinations Of Patent Infringement Under Section 337

SUMMARY OF SECTION 337 INVESTIGATIONS

- The Complainant Must Have A Domestic Industry If The Alleged Violation Involves A Patent, Trademark, Copyright, Mask Work, Or Design; The Complainant Must Establish Injury For Other Types Of Unfair Acts
- The Unfair Act -- Typically Patent Infringement -- Must Involve An Imported Article
- The Remedy Consists Of An Exclusion Order Against Imports Of Infringing Or Unfairly Traded Articles And A Cease And Desist Order Against Named Respondents--in Other Words The Infringing Imported Article Is Totally Knocked Out Of The Market – But No Damages
- The Remedy Must Be In The “Public Interest”--Though This Is Not A Major Issue Thus Far

SECTION 337 - SUBSTANCE - PROHIBITED UNFAIR ACTS

- Section 337 Counteracts Any Unfair Act In The Importation Of Goods In The U.S., Including
 - Acts that infringe U.S. patents, trademarks, copyrights, mask works, or designs
 - Misappropriation of trade secrets
 - Gray market goods
 - Antitrust violations
 - Possibly other kinds of unfair acts

SECTION 337 -- PROCEDURE

- Investigations Are Conducted By Administrative Law Judges, Who Are Experts In Patent Law, Which Are Reviewed By The Commission
- Discovery Is Similar To Discovery In The Federal Courts
- The ITC Has Nationwide Jurisdiction And Can Compel International Discovery
- Investigations Are Typically Completed In 16 Months
- Appeal Is To The U.S. Court Of Appeals For The Federal Circuit
- Exclusion Orders Are Subject To Presidential Review Within 60 Days Of The Final Commission Decision

SECTION 337- ENFORCEMENT

- Customs Enforces ITC Exclusion Orders; It Is Not Authorized To Make Substantive Determinations Of Patent Infringement
- Customs Has Seizure And Forfeiture Authority
- Parties Frequently Try To “Design Around” The Infringed Patent To Avoid The Exclusion Order
- Customs Can Issue Ruling Letters On The Design Around Claims
- The Commission Can Undertake Enforcement Proceedings
- The Commission Can Issue Advisory Opinions On The Scope Of Its Exclusion Orders

Speaker Biography



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Jeffrey M. Telep

Mr. Telep has over 20 years of experience litigating high-profile international trade remedy disputes, including unfair trade practice investigations under Section 337 of the Tariff Act of 1930; antidumping and countervailing duty investigations and reviews under the Tariff Act; Customs fraud investigations, seizures and forfeitures; and other commercial disputes. Before joining King & Spalding, Mr. Telep spent six years as a trial attorney with the Civil Division of the United States Department of Justice. During his tenure with the Justice Department, Mr. Telep was lead counsel for the United States in more than 75 cases involving the regulation of international trade.

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Mr. Taylor is a partner in King & Spalding's International Trade practice group in Washington, D.C., where he counsels clients on complex regulatory trade compliance issues and represents manufacturing interests in international trade remedy proceedings. He assists clients with audits, internal investigations, prior disclosures, penalty mitigation, obtaining customs rulings, developing logistics and compliance programs, and assessing the trade-related aspects of international mergers and acquisitions. Mr. Taylor is a graduate of Duke University. He received his J.D. from the University of Alabama and an LL.M. degree from Georgetown University Law Center.

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Mr. Berger is a partner in the Global Disputes practice group, resident in the firm's New York office. He represents clients in commercial disputes before courts and arbitral tribunals, with a focus on cross-border and multi-jurisdictional proceedings and matters involving state-owned enterprises. Mr. Berger writes and speaks regularly on international dispute resolution topics. He has given numerous presentations on international arbitration, disputes involving states, and other U.S. litigation issues to corporate and foreign governmental in-house counsel. He has served as a guest lecturer on international arbitration at Renmin University of China School of Law, Fordham University School of Law, and New York Law School. In addition, he is the editor (and a contributing author) of the forthcoming American Bar Association treatise entitled *International Aspects of U.S. Litigation*, and a contributing author to the "Point of Law" column in the *South China Morning Post*.

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Ms. Stevens is a consultant in King & Spalding's International Arbitration Group. Prior to joining King & Spalding, she worked for nearly 20 years at the World Bank Group's International Centre for Settlement of Investment Disputes (ICSID). Ms. Stevens serves on the Board of the Arbitration Institute of the Stockholm Chamber of Commerce and is the Founding Member of the Washington, D.C. International Arbitration Club. In addition, Ms. Stevens is a former Vice Chair of the International Bar Association's Mediation Committee and is a member of the IBA Task Force on Counsel Ethics in International Arbitration. Ms. Stevens holds a Cand. Jur. degree from the University of Copenhagen and an LL.M. from the London School of Economics. She is fluent in Danish, English and Spanish.

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