

Import and Export Issues Impacting IP Rights

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For the Oregon State Bar, IP Section
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ATERWYNNE LLP
ATTORNEYS AT LAW

IP in Import and Export Trade

- **Not a technical discussion of Patents, Copyright or Trademarks - IP in the broad sense as Technology and Data as affected by current events in International Trade**
- Imports
 - 2018 US Tariffs as remedies for new circumstances
 - Are they appropriate to address technology development issues
 - Affect on US industry
 - Relief from tariffs
- GDPR
- Exports
 - Deemed Exports
 - What are they?
 - How do they occur?
 - What's the consequence?

Tariffs and World Trade

- Tariffs are rates of duty surcharge imposed upon imports
- Since 1947, generally administered by multilateral agreements covering goods, services, and intellectual property called the WTO Trade Rules and currently subject to the Doha Round of Multilateral Trade Negotiations
- Commitments by countries to lower tariffs and keep trade open
- WTO General Agreement on Tariffs and Trade (GATT - goods)
- WTO General Agreement on Services (GATS)
- WTO Trade-Related Aspect of Intellectual Property Rights (TRIPS)
- Individual country binding commitments (schedules)

2018 US Tariffs

- Trump administration expanded use of tariffs beyond specific goods, services or technology
- An instrument of international trade policy
- Application to purely political, non-economic circumstances (US Trade Act of 1962, 1974 etc.)
 - Section 201 (to correct trade inequities) – January 2018 on 30% on solar panels and 20% on washing machines
 - Section 232 (for National Security) - March 2018 against China, then also Canada, EU, Mexico, rest of world - 25% on steel, 10% on aluminum
 - Later exempting S Korea, Australia, Argentina, and Brazil
 - Later further exempting, Canada, Mexico and EU – based upon concessions and negotiated agreements or voluntary commitments
 - Imposed upon Turkey for holding a US citizen (Andrew Brunson) on espionage charges

2018 US Tariffs

- Section 301 (Intellectual Property losses) – April 2018 against China on a wide range of consumer, industrial and technology-based products associated with “Made in China 2025”
- US\$375 billion deficit in balance of goods trade in 2017
- To target China’s emerging and advanced materials industries
 - Advanced Information Technology
 - Robotics
 - Aerospace
 - Maritime
 - Rail transport
 - New energy vehicles
 - Power equipment
 - Agricultural equipment
 - Advanced materials
 - Biopharma
- July 6, 2018 – 25% on \$34billion of Chinese goods (List 1)
- August 23, 2018 potentially on \$16billion more goods (List 2)
- September 6, 2018 potentially on \$200 billion more goods (List 3)

New Tariffs on Technology

- Section 301 Tariffs
 - Tariffs for List 1 went into effect July 6, 2018, covering 818 different types of goods.
 - List 1 covers a variety of goods: chemicals, make-up, herbicides, televisions and related parts, cameras and projectors, engine parts, refrigerator and ice making machines, agriculture machinery such as harvesters, lawn mowers, hay balers, capacitors, touch screens, LED modules, and printed circuit assemblies.
 - Tariffs for List 2 went into effect August 23, 2018, covering 279 different types of goods.
 - List 2 covers a variety of goods: chemicals, acrylic polymers and plastics, steam turbines, motors and generators, electronic integrated circuits, and motor vehicles.
 - Tariffs for List 3 has not gone into effect yet and as of now has no identified implementation date. (Comment Period ends September 6, 2018)
 - List 3 covers a variety of goods: chemicals, fabric and yarn, paper, air conditioners, air humidifiers, engine parts, microwaves, circuit assemblies, lenses, prisms, and optical elements.

Prospects for US Tariffs?

- US rationale - US tariffs will keep Chinese technology out of the US market and coerce China into ceasing the practice of forced transfer or theft of US IP through:
 - Acquisitions of US companies,
 - Forced Tech Transfer Agreements to enter China market,
 - Cyber espionage
- However, since many of China's 10 core technology industries are not yet exporting, impact of US tariffs will be very limited, and likely to hurt US industries dependent upon Chinese goods before it affects Chinese emerging industries
 - Consumer electronics
 - Tires
 - Automotive
 - Machinery

Tariff Exclusion Request

- **5. Request for Exclusion from Section 232 or 301 Tariffs**
 - Section 232 Tariffs – followed USDOC report that US industry injury by foreign steel and aluminum imports is a national security threat
- **Section 232 Exclusion Request**
 - Identify if your products are covered by the HTS codes for that tariff
 - Identify products to the 1-digit level
 - 7206.10.00.00 = Iron and non alloy steel in ingot form
 - Each separate dimension or variation in product form or composition requires a separate Exclusion Request
 - Request forms are submitted electronically with considerable information about the specifications, origin, performance and use of the import
 - Describe how imports are essential to a US industry
 - Describe unavailability in US
 - Describe if lack of import will cause loss of US jobs
 - Congressional letter of support
 - Rebate of tariffs from date of publication by USDOC

Tariff Exclusion Request

- Who is eligible to submit Exclusion Requests?
 - Individual or organization that is a user or supplier of the imports
 - Steel and aluminum Imports from quota countries are now eligible
- Criteria for Approval
 - Import falls outside the scope of the tariffs
 - Not produced in the US in sufficient and reasonably available quantity or quality
 - Specific National Security consideration
- Approved Exclusion only applies to the Applicant
- Objections can be lodged within 30 days of publication of Request for Exclusion

Tariff Exclusion Request

- Section 301 Exclusion Request
 - Identity of the Chinese supplier is not needed; only that the import originates from China
 - Exclusion approval still based on whether the import is available in sufficient quantity and quality from the US, but:
 - US gov't will consider:
 - If product is available from sources outside of China
 - If new duties will cause severe economic harm to the Applicant of other US interests
 - If import is strategically important to or related to “Made in China 2025”
 - Exclusions are product-based. An approved exclusion will apply to ALL imports, even if importer was not the Applicant
 - Exclusion Requests are retroactive to July 6, 2018 for List 1 imports

Section 232 Request for Exclusion Application

OMB Control Number: 0694-0139

Expiration Date: 9/12/2018

Request for Exclusion from Remedies: Section 232 National Security Investigation of Steel Imports

Exclusion Request Requirements: Only individuals or organizations operating in the United States that use steel products (e.g. flat, long, semi-finished, pipe and tube, and stainless) in business activities (e.g., construction, manufacturing, supplying steel product to users) in the United States may submit an Exclusion Request. For an Exclusion Request to be considered, the Exclusion Requester must provide factual information on 1) the single type of steel product it requires using a 10-digit HTSUS code, including its specific dimension; 2) the quantity of product required (stated in kilograms) under a one-year exclusion; 3) a full description of the properties of the steel product it seeks to import, including chemical composition, dimensions, strength, toughness, ductility, magnetic permeability, surface finish, coatings, and other relevant data. Exclusion Requests must be submitted using this Excel-based document. Paper submissions will not be accepted.

A separate Exclusion Request must be submitted on each distinct type and dimension of steel product to be imported. All applicable question blocks in the form must be completed for the Exclusion Request to be accepted. Exclusion Requests will be denied if the applicant: 1) does not sufficiently address the specified reporting requirements; 2) cites the improper HTSUS code, or 3) provides incorrect product descriptions.

Organizations electing to attach supporting documents must provide these documents in PDF format and it must not exceed 25 pages. All information submitted in the Exclusion Request is subject to public disclosure. Do not provide sensitive Personally Identifiable Information.

Organizations should upload their completed Exclusion Request pertaining to a steel product to www.regulations.gov under Docket Number BIS-2018-0006. An Exclusion Request may be submitted at any time. Processing of an Exclusion Request will take approximately 90 business days. Notification of granted Exclusions will be posted on www.regulations.gov. For questions related directly to completing this form, contact BIS via email (steel232@bis.doc.gov) or telephone (202-482-5642).

1.a Identify the class of steel product for which the Exclusion is sought:		10-Digit Harmonized Tariff Schedule Code of the United States (HTSUS) for the single steel product covered by this request: (See http://www.usitc.gov/publications/reading_room/hts/hts_consultation/0909_23_0_e10)	
Requesting Organization Information		Importer of Record for Organization Requesting an Exclusion	
Full Organization Legal Name		Full Organization Legal Name	
Street Address		Street Address	
City		City	
State		State	
Zip Code		Zip Code	
Headquarters Country		Headquarters Country	
Point of Contact Name		Point of Contact - Representative Name	
Phone Number		Phone Number	
1.b E-mail Address		E-mail Address	
Web Site Address		Web Site Address	
Parent Company of Requesting Organization		Requester's Authorized Representative/Agent (If applicable)	
Full Organization Legal Name		Requester Point of Contact Name	
Street Address		Point-of-Contact Organization	
City		Country Location	
State/Province		Phone Number	
Zip Code/Postal Code		E-mail Address	
Headquarters Country		Web Site Address	
Web Site Address		Other Information	

Request for Exclusion from Remedies: Section 232 National Security Investigation of Steel Imports - *Continued*

2.a Average annual consumption for years 2015-2017 of the steel product that is subject of this Exclusion Request - Kilograms							
2.b Explain why your organization requires an Exclusion using 1) the drop-down box to the right and 2) by providing written comments in the space provided below.							
Comments:							
2.c Identify the percentage of total steel product covered under this Exclusion Request not available from steel manufacturers in the United States:							
2.d Estimate the number of days required to take delivery of the steel product covered by this Exclusion Request, from the time the purchase order is issued by your organization:							
2.e Estimate the number of days required to manufacture the steel product covered by this Exclusion Request, from the time a binding purchase order is executed:							
2.f Estimate the number of days required to ship the steel product covered under this Exclusion Request, from the foreign port of departure to the Exclusion Requester's loading dock:							
2.g Estimate the number of distinct shipments from the foreign port(s) of departure that will be needed for transporting to the United States the steel product subject to this Exclusion Request:							
Identify the U.S. Destination Port(s) of Entry through which the steel product subject to this Exclusion Request would be transported:							
2.h	Port 1	Port 2	Port 3	Port 4	Port 5	Port 6	Port 7
Is the organization making this Exclusion Request doing so on behalf of a non-U.S. steel producer that does not manufacture steel products in the United States?							
2.i If "Yes" identify the non-U.S. steel producer					Identify the country where the organization is headquartered		
Comments:							
Exclusion Request Product Information							
For this single Exclusion Request, provide a full, complete description of the product in the space provided below. * See explanation below. The product for which an Exclusion is being requested is defined as follows:							
2.j • With regard to the product for which an Exclusion is requested, such a description must be limited to a single product. The description must be limited solely to physical properties (e.g., chemical requirements, mechanical requirements, dimensions, etc.) and exact descriptive terms/phrases covering the product subject to the Exclusion Request (e.g., "hot-rolled," "seamless pipe," "suitable for use in boilers," "longitudinally submerged arc welded," etc.).							
All such physical properties must be defined based on actual, rather than nominal, measurements; references to specific dimensions (e.g., "cross-sectional diameter of 5.50 mm") or measurements (e.g., "yield strength of 300 MPa," "carbon content 0.08%," etc.) will be interpreted as meaning the exact dimension or measurement. Ranges (e.g., "cross-sectional diameter falling within the range 5.35 mm and 5.65 mm," "yield strength greater than or equal to 300 MPa," "carbon content less than or equal to 0.15%, by weight," etc.) are allowed. Where a range is needed, it should be identified based on the end points of the range (as in the examples above), rather than through references to absolute or percentage tolerances.							
Comments:							

Section 301 Request for Exclusion Application

Section 301 Investigation: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation - Form to Request Exclusion of Product

When submitting a product exclusion request using this form, enter the specified information in the following fields and explain the basis and rationale for your statements. By completing this form, you certify that the information provided is complete and correct to the best of your knowledge.

1. Indicate whether the comment contains business confidential information (BCI), is a public document, or is a public version of a BCI document.

Public Document

2. Please provide a complete and detailed description of the product of concern:

3. 10-digit HTSUS item number* for product you wish to address in this product exclusion request:

*Use numerical characters only with no special characters (example: 1023456789). For help in finding the HTSUS item number associated with your product, see <https://hts.usitc.gov/>

4. Requestor Information

Requestor Name (Last, First):

Organization Name:

Note: Representatives submitting on behalf of an organization must enter information below.

Requestor Representative:

5. Requestor's relationship to the product: Other

6. Does this submission in regulations.gov include additional attachments?

NO

7. Please indicate whether any additional attachment contains business confidential information (BCI), is a public document, or is a public version of a BCI document.

N/A

VERSION 1

CONTINUED BELOW

8. Is this product, or a comparable product, available from sources in the United States?:

NO

9. Is this product, or a comparable product, available from sources in third countries?:

NO

10. Please provide the value and quantity (with units) of the Chinese-origin product of concern that you purchased for each calendar year specified. Limit this figure to the products purchased by your firm (or by members of your trade association) alone. Please provide estimates if precise figures are unavailable.

2017 Value: 2017 Quantity:

2016 Value: 2016 Quantity:

2015 Value: 2015 Quantity:

11. Please provide information in support your request, taking account of the instructions provided in Section B of the Federal Register notice (note: text entered below can extend beyond the apparent size of this box).

VERSION 1

END

Letter of Support from Congressional Delegation

Congress of the United States

Washington, DC 20510

July 13, 2018

The Honorable Wilbur L. Ross Jr., Secretary
United States Department of Commerce
1401 Constitution Avenue NW
Washington DC 20230

Dear Mr. Secretary:

We write to call your attention to requests recently filed by [REDACTED], for exemption from the steel tariffs imposed under Section 232 of the Trade Expansion Act of 1962. [REDACTED] headquartered in [REDACTED] is one of the United States' largest producers of [REDACTED] and has over 100 full time employees at their facility in Oregon.

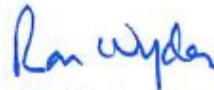
We respectfully request you give full, fair, and timely consideration to [REDACTED] requests.

Thank you for your prompt attention to this matter.

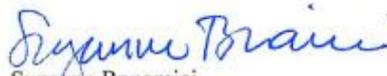
Sincerely,



Jeffrey A. Merkley
United States Senator



Ron Wyden
United States Senator



Suzanne Bonamici
Member of Congress

Additional Threatened Section 301 Tariffs Against China

- Section 232 started with a handful of HTS codes relating to steel and aluminum each
- Section 301 tariffs currently cover about 818 HTSUS codes
- List 2 covers 284 goods from the HTSUS list and a 25% tariff went into effect on these goods on August 23, 2018.
- List 3 covers and additional set of goods from China and will impose a 25% tariff. There is no specific implementation date for these tariffs, although the projected implementation date is September 6, 2018.

Have Section 337 Complaints Been Overlooked?

- Section 337, Tariff Act of 1930
Investigation of Unfair Practices in Import Trade
 - Infringement of U.S. patent, copyright, registered or common law trademark, trade secrets false advertising, or mask work to be an unlawful practice in import trade.
 - Provides for the protection of unfair methods of competition and unfair acts in the importation and subsequent sale of infringing products in the United States
 - When infringement is demonstrated of IP that is already in use in the US, one does not need to establish injury to prove a violation of Section 337 .
 - Remedy is exclusion order, not damages
 - Faster than Dist. Ct. lawsuit, but no guarantee of ITC investigation
 - ALJ sets ground rules for investigation

The GDPR

- The earthquake that caused flooding but not the feared tsunami
 - “But you can still drown in a foot of water”
- May 25, 2018 Effective Date
- “processing of any information relating to an identified or identifiable natural person (‘data subject’).... directly or indirectly.... identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.”
 - Medical, social media postings, email address, employment, school, social, shopping and marketing data etc.

GDPR Fines & Sanctions

- **Up to 4% of annual revenue or**
- **US\$22 million (whichever is higher)**
 - E.g., Processing without legal basis
 - Breach of Data Subject right
 - International transfer
- **Up to 2% of annual revenue or**
- **US\$11 million (whichever is higher)**
 - E.g., Failure to notify re: data breach
 - No representative in the EU
 - Lack of written records
- **DPA authority to 1) audit, 2) issue warnings, 3) ban from processing personal data**
- **Data Subjects can sue for compensation, right to be forgotten**



GDPR Screening

- 1. Recognition of personal data privacy risk
 - Especially owners and managers
- 2. Data Inventory and Mapping
- 3. Gap Analysis
- 4. Prioritization and Action Plan
- 5. Lawful Basis for Processing
- 6. Policies and Procedures
 - Notice
 - Consent
 - Accountability for Onward Transfer
 - Measures to protect Personal Data
 - Data Subject Access and Rights

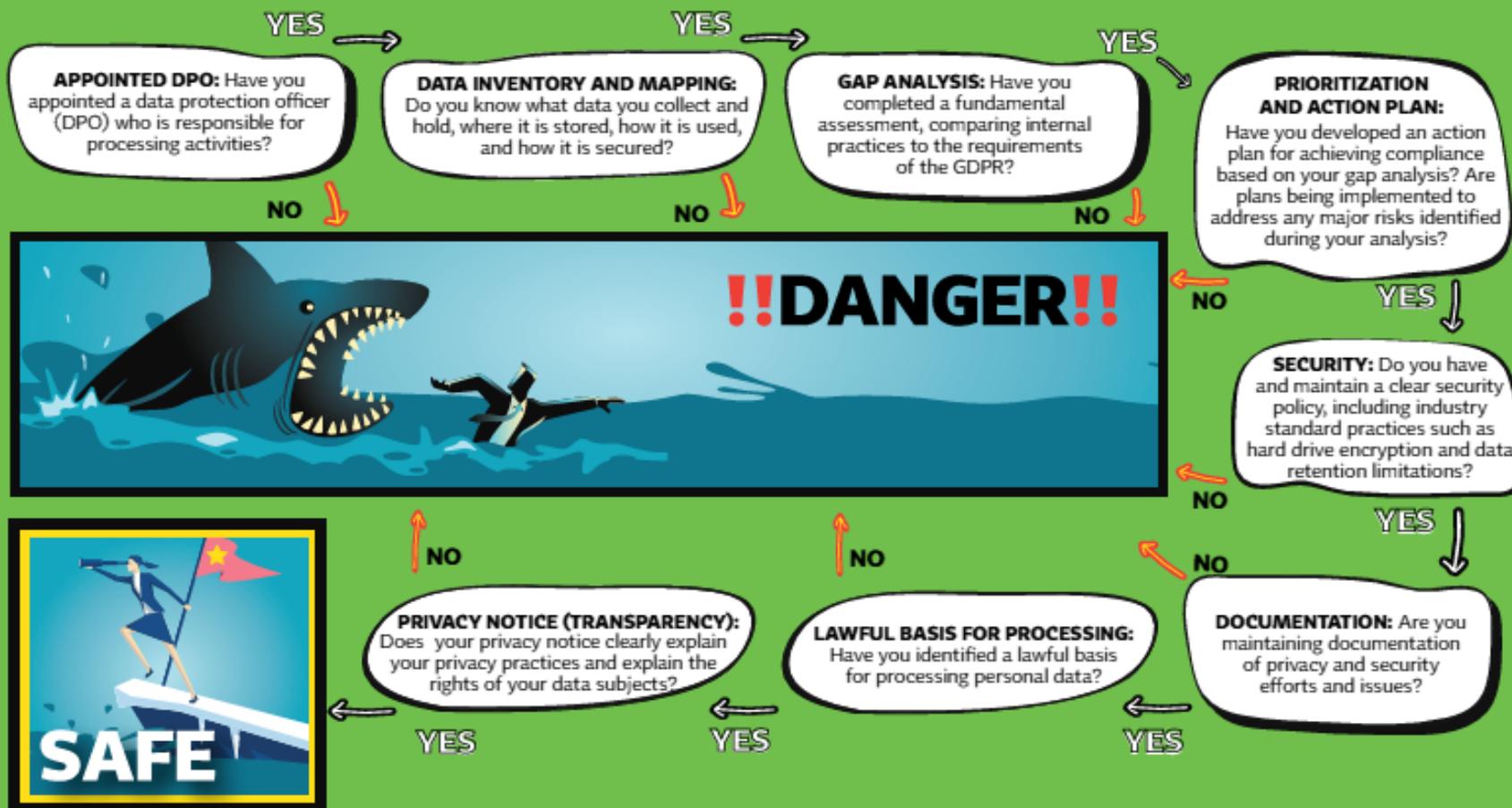
GDPR Screening

- Procedures for handling data requests within GDPR timeframes
 - Children and their guardians
- 7. Data Security
 - E.g., Pseudonymization
 - Encryption
 - Data breach and response within GDPR timeframes
- 8. Data Protection Officer?
 - Mandatory, Optional
- 9. Documentation and Recordkeeping
- 10. Recourse, Enforcement, and Liability
 - Use of DPAs or Private dispute resolution authority
 - Fulfillment of Data Subject's rights to access, transfer or delete personal data

GDPR Enforcement Priorities

European Supervisory Authorities have shed light on their initial enforcement priorities. The French CNIL publicly acknowledged the difficulty of complete GDPR compliance, stating that companies not yet fully compliant "can expect to be treated leniently initially provided that they have acted in good faith." The Dutch AP has similarly stated that "fines will only be imposed at the beginning if it is obvious something is very wrong" in response to the fears of local municipalities.

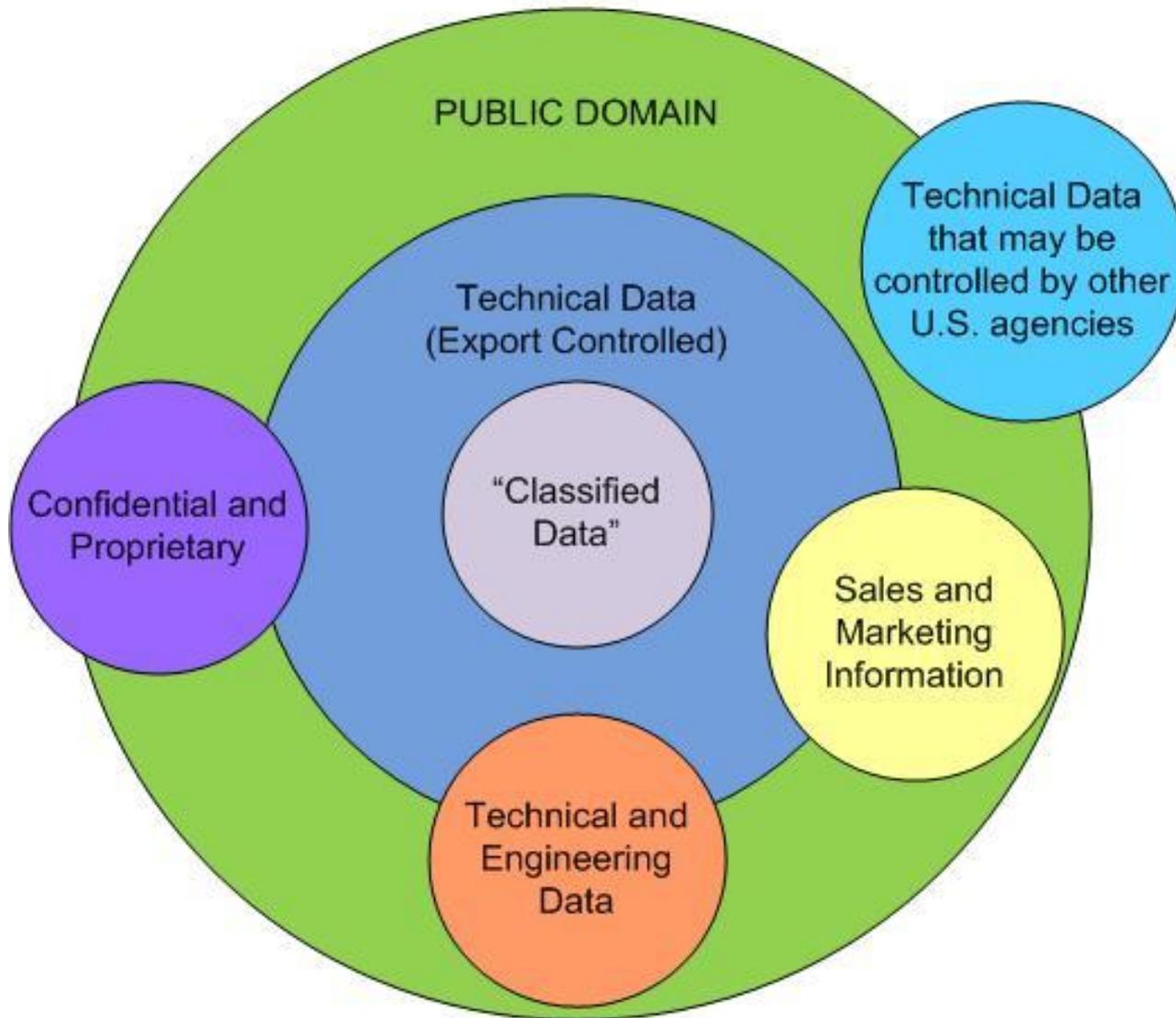
What do "acting in good faith" and "very wrong" mean? Follow our handy flow chart to see if you're likely to come into the crosshairs of European regulators:



Technical Data – Where Export and IP Law Overlap

- Commercial items – the Export Administration Regulations administered by USDOC
 - **The CCL - Commodities** (consumer products to industrial test equipment), **materials** (biomedical bacteria to industrial bulk materials), **software**, and **technical data**
 - Those needing an export license
 - NLR
 - Dual Use
- Military items (defense articles) – the ITAR administered by the USDOS, DDTC
 - **The US Munitions List** – Section 121.1 with 21 Categories of controlled items
 - Defense articles, services, software, and technical data
 - Foreign brokers promoting, handling, selling Defense articles
- Both EAR and ITAR control US goods, services and certain information wherever located (inside and outside the US)

Information Categories Under the ITAR



Technical Data

- EAR Part 772
 - “Technology” (General Technology Note) – Specific information necessary for the “development”, “production”, or “use” of a product. The information takes the form of “technical data” or “technical assistance”...[Data may be subject to controls]
 - “Technical Data” – May take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories.”

Technical Data

- Technical Data - ITAR Part 120.10
 - Information, other than software..., which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles....including
 - Classified information
 - Information covered by a secrecy order
 - Software as defined in §121.45(f) is broadly defined, including algorithms for design implementation, test, operation, diagnosis and repair of defense articles

Technical Data

- ITAR §120.10(b)
 - Technical data does not include ... general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain...basic marketing information on function or purpose or general system descriptions of defense articles.

What is a Deemed Export?

- A release, disclosure, transfer of controlled technical data or technology to a foreign national (EAR) or foreign person (ITAR) in the U.S.
 - Physical export out of the U.S. not required
 - Transfer inside the U.S. can be verbal, electronic, physical
- “Deemed” to be an export to the foreign national’s home country
- Export would have required an export license or other approval

Examples of Potential Deemed Exports

- Product demonstrations
- Technical trainings
- Sharing drawings, visual inspections, verbal conversations
- Working with business “partners” - foreign interns, consultants, employees, JV partners (e.g., the plant floor visit or technical meeting)
- Collaborations in the educational setting – teachers/students, foreign lecturers, foreign visitors
- Access to database containing controlled technology

ITAR Enforcement

- Three U.S. agencies principally enforce export control regulations:
 - USDOC, OEE; FBI; ICE and DTCC



Enforcement -The Roth Case

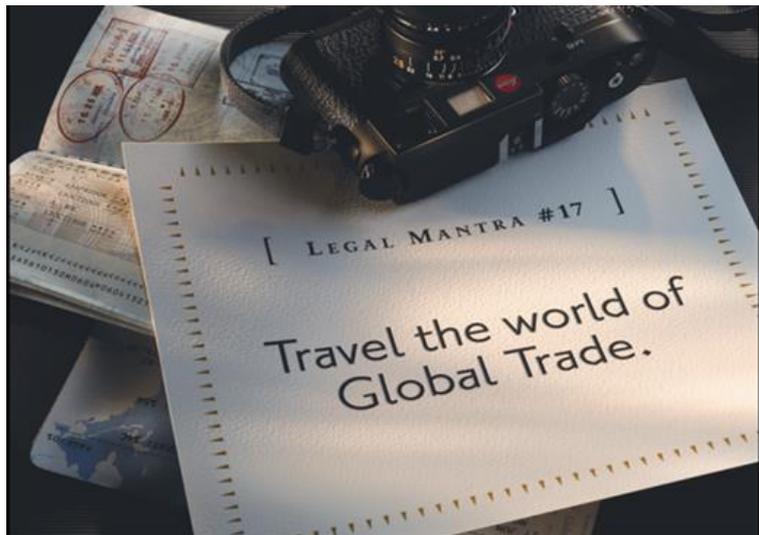
- October 4, 2011 the U.S. Supreme Court declined to review (denied Certiorari) of the conviction of University of Tennessee plasma physics professor J Reece Roth who had been found guilty in September 2008 of allowing research assistants from China and Iran to access sensitive data from a U.S. Air Force project in violation of the Arms Export Control Act, the law that underlies the ITAR and EAR
- Roth was also convicted of taking controlled documents to China on his laptop.
- First deemed exports case the U.S. Gov't has prosecuted under this law in the university context
- Roth served 42 of 48 month prison sentence –
Commencing January 18, 2012



The Flir Case

- April 24, 2018 – US\$30 million penalty (US\$15 million in cash installments over 4 years + US\$15 million for an remedial measures and upgrades compliance program + special monitor
 - Systemic failure of an export controls compliance program
 - Failure to identify and protect Technical Data in various forms
 - Confusion as to difference between business proprietary and export controls procedures
 - Inadequate protection of Technical Data on company IT system
 - Improper access to controlled Technical Data by Non-US Persons
 - Inadequate screening of 3rd country citizen employees
 - Failure to monitor subsidiaries

Thank You.



We believe a great Global Trade lawyer is a creative thinker who sees the complexities of international business with both a local and global perspective. That's our approach. It's how we help clients overcome the challenges of doing business here and abroad, so they can focus on the future.

At Ater Wynne, we do more than give legal advise. We create worldly solutions.

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