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CLIENT ALERT

The Month in International Trade – January 2019

Feb.08.2019

In this issue:

This news bulletin is provided by the International Trade Group of Crowell & Moring. If you have questions or need assistance on trade law matters, please contact Jeff Snyder or any member of the International Trade Group.

TOP TRADE DEVELOPMENTS

Latest U.S. Trade Actions/Tariffs and Other Countries Retaliatory Measures

Finding it hard to stay on top of the latest in tariff increases?

Please click here anytime for the latest actions, covered products rate increases, and effective dates.

For more information, contact: Dan Cannistra, Robert Holleyman, Bob LaFrankie, Spencer Toubia, Ru Xiao-Graham, Cherie Walterman

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How Has Trump's Aggressive Trade Policy Dramatically Increased Litigation at the CIT? Read Crowell & Moring's 2019 Litigation Forecast to Find Out

Crowell & Moring has issued its seventh-annual "Litigation Forecast 2019: What Corporate Counsel Need to Know for the Coming Year."

The story focusing on international trade, "Big Questions For The CIT," provides a concise summary on how the Trump administration's aggressive trade policy has dramatically increased the scope and scale of litigation at the Court of International Trade (CIT).

In addition, the Forecast also explores trends in #MeToo litigation, consumer protection, and more, and it provides forward looking insights to help legal departments anticipate and respond to challenges that might arise in the year ahead.

Be sure to follow the conversation on social media with #LitigationForecast.

EU to Implement Safeguard Measures on Steel Products until July 2021

The European Commission voted to adopt definitive measures on imported steel products from all non-European Economic Area (EEA) countries following the safeguard proceeding launched in March 2018. However, certain countries in which the Commission has signed an Economic Partnership Agreement will be exempted from the scope of the measures. This list includes countries such as Botswana, Cameroon, Fiji, Ghana, Ivory Coast, Lesotho, Mozambique, Namibia, South Africa, and Swaziland.

The measures will consist of a country-specific quota based on average imports from 2015-2017 for 26 steel product categories to counter "trade diversion" due to the U.S. Section 232 tariffs on steel and aluminum products. Imports above the tariff-rate quota will be subject to a 25 percent ad valorem duty. The safeguard measures go into effect at the beginning of February 2019 and will remain in place until July 16, 2021.

The 26 steel categories consist of the following steel products:

1. Non-Alloy and Other Alloy Hot-Rolled Sheets and Strips.
2. Non-Alloy and Other Alloy Cold-Rolled Sheets.
3. Electrical Sheets (other than Grain Oriented Electrical Steels, or GOES).
4. Metallic Coated Sheets.
5. Organic Coated Sheets.
6. Tin Mill Products.
7. Non-Alloy and Other Alloy Quarto Plates.
8. Stainless Hot-Rolled Sheets and Strips.
9. Stainless Cold-Rolled Sheets and Strips.
10. Stainless Hot Rolled Quarto Plates.
11. Non-Alloy and Other Alloy Merchant Bars and Light Sections.

12. Rebars.
13. Stainless Bars and Light Sections.
14. Stainless Wire Rod.
15. Non-Alloy and Other Alloy Wire Rod.
16. Angles, Shapes, and Sections of Iron or Non-Alloy Steel.
17. Sheet Piling.
18. Railway Material.
19. Gas Pipes.
20. Hollow Sections.
21. Seamless Stainless Tubes and Pipes.
22. Other Seamless Tubes.
23. Large Welded Tubes.
24. Other Welded Pipes.
25. Non-Alloy and Other Alloy Cold Finished Bars.
26. Non-Alloy Wire.

A comprehensive list of the steel categories subject to the tariff-rate quota can be found in Annex II of the EU's notification to the WTO to impose safeguard measures.

There is currently no company exclusion process for the EU safeguard measures.

The Commission circulated the notification to impose safeguard measures to all WTO members. According to the notification, countries with a "significant supply interest" will get a specific tariff-rate quota, while all other countries will import under a "residual quota". Any remaining balance of the quota for each product category will become available to all exporters in the last quarter of the period.

For more information, contact: Dan Cannistra, Cherie Walterman

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Latest Information on OFAC General Licenses and FAQs Related to Designation of PdVSA

On January 31 and February 1, 2019, the Department of the Treasury's Office of Foreign Assets Control (OFAC) amended two General Licenses (GLs) relating to the January 28, 2019 designation of Petróleos de Venezuela, S.A. (PdVSA), amended two Venezuela-related Frequently Asked Questions (FAQs), and issued thirteen new FAQs.

The new amendments and additions provide additional guidance for navigating the PdVSA sanctions and clarify, to some extent, the scope of authorization in each of the new GLs.

Amended GLs:

- General License 3b ("GL3b"): replaces GL3a by authorizing certain transfers and divestment of funds, provided that they must be to a non-U.S. person. Importantly, it adds a new authorization to enable U.S. persons to engage in transactions necessary to facilitating, clearing, and settling trades of holdings in the bonds specified in the Annex, provided that such trades were placed before February 1, 2019, even if the whole trade was not completed prior to the issuance of the GL. Finally, this GL allows until March 3, 2019, transactions that are necessary to the wind down of financial contracts and other agreements (entered into prior to February 1, 2019).
- General License 9a ("GL9a"): replaces GL9 by amending the term, "PdVSA-related debt" to "PdVSA securities," and authorizing transactions necessary to facilitating, clearing, and settling trades of holdings in the PdVSA securities that were placed before January 28, 2019. GL9a also allows until March 3, 2019, transactions that are necessary to the wind down of financial contracts and other agreements (entered prior to February 1, 2019) linked to PdVSA securities issued prior to August 25, 2017. Lastly, GL9a updates the List of Bonds (Annex) by adding bonds issued by Petrozuata Finance Inc., Cerro Negro Finance Ltd., and La Electricidad de Caracas.

For more information on the original GL3a and GL9 please see our recent client alert.

Amended FAQs:

In conjunction with the Amended GLs, OFAC issued supplemental guidance in the form of FAQs, as follows:

FAQ 595 was amended to (a) state that GL5 remains in effect despite OFAC's designation of PdVSA, and (b) include guidance on GL9, which authorizes transactions involving certain PdVSA debt, including the PdVSA 2020 8.5 percent bond. FAQ 595 states that U.S. persons who are bondholders would be included under this exclusion.

FAQ 648 defines "maintenance" under GL6 and GL11 to include all transactions that are necessary to continue operations. OFAC further defines the term as including "all transactions and activities ordinarily incident to performing under a contract or agreement in effect prior to the sanctions effective date (in the case of General License 6, January 8, 2019, and in the case of General License 11, January 28, 2019)." It will be key for companies to demonstrate in their transaction history that the transactions it will engage in are consistent and recurring from previous transactions. This FAQ also states that GL6 and GL11 could include renewing contracts if they are ordinarily incident and necessary to contracts in effect prior to the applicable sanctions effective date. However, this FAQ does highlight that U.S. financial institutions may not process transactions that will benefit PdVSA or any entity they possess 50 percent or more ownership.

New FAQs:

The new FAQs provide guidance on the seven newly issued GLs as well as explain the changes and authorizations in the amended GLs:

- Address the expected level of due diligence necessary associated with the transfer of debt under GL9a.
- Address bonds issued by PdVSA or any entity in which it owns, directly or indirectly, a 50 percent or greater interest.
- Do not allow funds to be bought, sold, or engaged with any entity that appears in OFAC's List of Specially Designated Nationals and Blocked Persons (SDN List).

- Authorize, with certain exceptions, U.S. person employees of non-U.S. entities located in a country other than the United States or Venezuela to engage in transactions and activities prohibited by E.O. 13850 that are ordinarily incident and necessary to the maintenance or wind down of operations, contracts, or other agreements involving PdVSA or entities owned, directly or indirectly, 50 percent or more by PdVSA that were in effect prior to January 28, 2019.
- State that U.S. persons are allowed to purchase petroleum products from PdVSA as long as funds owed to PdVSA are placed in a blocked, interest-bearing account located in the United States.
- State that U.S. persons in Venezuela are allowed to purchase gasoline products from PdVSA as long as it is done in a blocked, interest-bearing account located in the United States.
- Address cash transactions with PdVSA.
- Address exporting issues, while noting that the GLs do not generally extend to cover transactions with ALBA de Nicaragua (ALBANISA), meaning U.S. persons are generally prohibited from engaging in most transactions with ALBANISA today.
- Explain that the path to sanctions relief for PdVSA is through a bona fide transfer of control of the company to Interim President Juan Guaidó or a subsequent, democratically elected government.

For more information on the PdVSA sanctions and guidance under any Venezuela-related sanction, please contact the Crowell & Moring team.

For more information, contact: Dj Wolff, Eduardo Mathison, Alexandra Solorzano

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White House Hints it May Allow Lawsuits over Cuban-Confiscated Properties

On January 16, 2019, the Trump administration signaled a possible major shift in its policy toward Cuba by announcing it was considering allowing the suspension of Title III of the Helms-Burton Act to lapse, thereby opening the floodgates to litigation over property confiscated by Fidel Castro and the Cuban government 60 years ago.

History of the Act

The Helms-Burton Act, formally titled the Cuban Liberty and Democratic Solidary Act (a/k/a the Libertad Act), was signed into law in 1996 with the goal of increasing pressure on Cuba for peaceful democratic change. The Act codified the United States embargo in place at the time on trade and financial transactions with Cuba and required the President to produce a plan for providing economic assistance to a transition government. Additionally, the Act aimed to punish non-U.S. companies doing business in Cuba. Title III created a private cause of action authorizing U.S. nationals to file suit in U.S. courts against persons or companies that may be trafficking in and profiting from properties confiscated by the Cuban government following the 1959 socialist revolution. U.S. claimants that had their claims certified by the Foreign Claims Settlement Claims Commission may also be able to seek treble damages for their claims.

The Helms-Burton Act was not well received in the international community, however. Both the European Union and Canada quickly announced their opposition, arguing that the provisions violated international trade treaties by punishing foreign companies for doing business outside of the U.S. The EU went so far as to bring a case at the World Trade Organization. At the

time, the U.S. threatened to invoke the "national security exception" that is contained in the WTO treaty texts, but following negotiations between the U.S. and the EU, the suit was dropped in 1998.

Although Title III could have kept many lawyers busy throughout the U.S., Cuba, and beyond, the provision never actually took effect. The Act granted the President authority to suspend the lawsuit provision for consecutive six month periods if necessary to expedite a transition to democracy in Cuba and if doing so was in the national interest. Every president since President Clinton has relied on and exercised this suspension authority. In 2013, President Obama delegated the power to suspend the provision to his Secretary of State, who then continued to suspend the provision each time it came up.

Rumblings of Change

The Trump administration first had to weigh in on the provision in July 2017. Then Secretary of State Rex Tillerson delegated the decision to his Under Secretary who in turn suspended Title III. In recent months though, the administration has hinted that it may break from more than 20 years of tradition and allow lawsuits to be brought under Title III. In November 2018, White House National Security Adviser John Bolton remarked that the administration planned to give the provision "serious review." In the most definitive move yet, earlier this month the administration suspended Title III for only 45 days until March 18, 2019 and urged any person doing business in Cuba to consider whether they were "abetting this dictatorship" by trafficking in confiscated property.

What To Expect

Although no official changes have been made, the Trump administration has vowed to be tougher on Cuba. Invoking Title III would permit Americans with claims to confiscated property in Cuba to attempt to sue companies whose business in and with Cuba today are connected to these properties, creating a potential risk for companies that do business in Cuba and which may also be subject to the jurisdiction of courts in the U.S.

So what does this mean for potential claimants and companies doing business in Cuba? It really depends on their situation. For the last 60+ years, people have believed that change in Cuba and/or change in U.S. policy towards Cuba was potentially imminent. And since Helms-Burton was enacted and came into (as of now still suspended) force, there have been some changes in Cuba and some changes in U.S. policy toward the island that is located only 90 miles away. Nevertheless, 60 years later, the embargo persists and claimants whose property was confiscated by the Cuban Government remain uncompensated.

Rumors that the suspension of Title III might end circulate every few years, but usually not so publicly and never from such highly placed sources. Could this time be different? – The answer is yes.

If you have or believe you may have claims to property confiscated by the Cuban Government on or after January 1, 1959, should you start dusting off old documents and trying to determine who, if anyone, may be trafficking in property in which you may have a claim?

If you are a company doing business in or with Cuba, or with Cuban products (such as nickel, timber, sugar, etc.), should you examine whether you are potentially subject to civil jurisdiction in the U.S. such that you could be sued as a defendant under Title III of Helms-Burton?

If you are the EU, should you start dusting off the old WTO complaint against the U.S.? And what might that mean if the Trump administration invokes the national security clause?

If you are Cuba and worried that such threats might stifle further foreign investment, should you "come to the table" to try to make a deal with the Trump administration?
The answer to all of these questions is of course – it depends. It depends on what you think the Trump Administration might do. It depends on whether you think the Trump Administration might be willing to break with decades of tradition. It depends on the magnitude of your potential claims and exposure. It also depends on whether there is anything that you might be able to do about it.

Are these answers satisfying and/or do they bring increased certainty to your everyday or business relations concerning Cuba? The answer is of course no. But for the last 60+ years, U.S. relations with Cuba have been impacted both because of and despite that uncertainty.

If you would like to discuss your particular situation with regard to potential claims as either a potential plaintiff or defendant under Title III, please reach out to your regular Crowell & Moring attorney or one of the POCs listed on this post.

For more information, contact: David Baron, Dj Wolff, Mariana Pendas, Allegra Flamm, and Brian McGrath

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USTR: No Exclusion Process on $200 Billion List 3 Products unless Tariff Raised to 25 Percent

On October 18, 2018, U.S. Senator Tim Kaine (D-VA) and ten other Democratic senators sent a letter to the Office of the U.S. Trade Representative (USTR) asking why an exclusion process was not in place for the 10 percent tariff on List 3's $200 billion of imported Chinese goods.

On January 11, 2019, USTR replied, telling Senator Kaine an exclusion process will not be initiated on List 3 unless negotiations fail with China and the President raises the tariff on the $200 billion worth of goods from 10 percent to 25 percent. Currently, President Trump has agreed to delay the implementation of the higher tariff until March 2, 2019.

USTR's reply also addressed Chinese goods admitted into a Foreign Trade Zone (FTZ). The letter said, "Understandably, every importer, including importers who make use of FTZs, would prefer a special exemption from the additional tariffs. As of this time, we have not found a basis for exempting U.S. importers who use FTZs from the additional duties, when those duties apply to all other U.S. importers."

For more information, contact: Frances Hadfield, Edward Goetz

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CROWELL & MORING SPEAKS

John Brew spoke at The International Surface Event in Las Vegas, NV on January 22-25, 2019. He discussed "The Impact of International Trade on the Surface Industry". John examined the current state of affairs on how government actions are impacting the global supply chains of the surface industry, including a review of the US dispute with China under Section 301, unfair trade proceedings, the USCMA, and other free trade agreements.

Ambassador Robert Holleyman moderated a panel in Tokyo on Monday, January 28, as part of a conference hosted jointly by the Asia-Pacific Financial Forum (APFF) and the Ministry of Economy, Trade and Industry of Japan (METI). The panel was entitled "Innovative Health Care Financing Mechanisms," and included Ryan MacFarlane of C&M International as a panelist.

Ambassador Holleyman was the featured speaker in a breakfast event at the Tokyo American Club on Tuesday, January 29, hosted by the American Chamber of Commerce Japan (ACCJ) and its Healthcare Committee. The range of topics included a debriefing of the conference hosted by the APFF and METI, as well as the progress of U.S.-Japan trade agreement negotiations and Japan's G-20 priorities as this year's host. Andrew Blasi and Ryan MacFarlane of C&M International also participated in the event.

Ambassador Holleyman and Andrew Blasi of C&M International spoke at a luncheon hosted by the ACCJ on Tuesday, January 29, which included the Japan heads of multinational companies involved with ACCJ. The group discussed U.S.-Japan relations and the U.S. political environment within the context of the 116th Congress.

Chris Monahan will be speaking at the International Compliance Professionals Association's 2019 Annual Conference on March 25, 2019 in Orlando, FL. His topic is "Anatomy of an Internal Investigation."

David Stepp and Frances Hadfield will be speaking at the Federal Bar Association's 2019 Fashion Law Conference on February 8, 2019 in New York City. Both David and Frances will be discussing "Trade Wars with China: Analysis of Outcome".

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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