

CLIENT ALERT

The Month in International Trade — October 2017

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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

NAFTA RENEGOTIATION TO EXTEND INTO 2018

The fourth round of NAFTA re-negotiation, which took place October 11-17, confirmed that Canada, Mexico and the United States remain far apart on several major issues, and forced the three countries to postpone the hoped-for timeframe for reaching a final agreement to the end of the first quarter of 2018.

Following the round, U.S. Trade Representative (USTR) Robert Lighthizer said he has seen “no indication” that Canada and Mexico are willing to make changes that will address U.S. trade deficits, a major objective for President Trump’s administration. The three parties also agreed to postpone the fifth negotiating round to November 16-21.

With a significant portion of proposals now under discussion, there are three broad categories of U.S. proposals on the table:

1. **Updates of issues consistent with longstanding U.S. policy goals.** These include many measures that were negotiated in TPP, such as on state-owned enterprises, digital trade, financial services, and intellectual property. While there are likely disagreements within these issues, all three parties recognize the need for a major update.

2. **Revisions to existing NAFTA rules strongly opposed by Canada and Mexico.** These include the U.S. proposal to eliminate Chapter 19 dispute settlement for trade remedy disputes, as well as changes to NAFTA's procurement rules. While these revisions face significant opposition from Canada and Mexico, they are less of an issue for domestic U.S. stakeholders.
3. **Major changes to NAFTA facing significant opposition by U.S. (and North American) businesses (as well as Canada and Mexico).** This category of proposals is opposed by many large U.S. companies, and potentially a majority of the Republican-controlled Congress, and includes:
 - The "sunset clause" proposal which would terminate the agreement after five years unless all parties agree to extend the agreement.
 - The introduction of an "opt-in" system for investor-state dispute settlement.
 - Rules of origin for the automobile sector, an increase in the regional content requirement to 85 percent and the introduction of a U.S.-based content requirement of 50 percent. The U.S. auto industry has argued that these high content requirements will incentivize them to opt out of NAFTA, pay the U.S. import tariff (currently at a most-favored-nation rate of 2.5 percent) and source their inputs globally.
 - Rules of origin for the textiles sector, the elimination of "tariff preference levels" from the existing NAFTA, which permit a specified amount of certain non-NAFTA originating yarns and fabrics to be counted as originating inputs. While elimination is supported by U.S. textile manufacturers (as well as potentially members of Congress for whom they represent a constituency), it is opposed by major retailers and the U.S. apparel industry.

Though some progress has been made in the first category of issues, there is currently no clear path forward for the other two. Canada and Mexico have little incentive to move forward substantially on proposals tabled by the Trump administration when they know the proposals are opposed by U.S. domestic industry and the Republican majority in Congress. Many in the business community actively oppose these proposals and view them as "poison pills" for the overall agreement.

Concerns over the substantive proposals have been compounded by President Trump's statements this month, suggesting that announcement of an intention to withdraw will increase U.S. negotiating leverage. President Trump reportedly said in a meeting with Republican senators on October 24 that triggering withdrawal could be used as a negotiating tactic, and he has made similar comments to the press. Article 2205 of NAFTA permits any NAFTA party to withdraw from the agreement with six months' notice; how the withdrawal would be implemented if carried out remains an untested legal question.

Announcement of withdrawal would be opposed by agricultural groups, most U.S. industries, as well as a likely majority of the Congress (including even Democrats who would be concerned about the dividing line between executive and congressional authority on trade matters). Many U.S. companies are examining various scenarios for reacting to a U.S. withdrawal from NAFTA, should it occur, including mobilizing Members of Congress to protest the action and devise limits on the President's ability to act unilaterally.

For companies whose interests may be affected by NAFTA withdrawal, the high levels of uncertainty in the outcomes for the current NAFTA discussions will require continued close monitoring and engagement with appropriate stakeholders. Companies will also wish to evaluate their internal "worst case scenarios" for expected changes in duties and regulations affecting their supply chains in North America, to assess the extent of commercial effects resulting from a U.S. withdrawal.

For more information, contact: Robert Holleyman, Melissa Morris, Evan Yu

EU-MEXICO FREE TRADE AGREEMENT RENEGOTIATION MOVING FORWARD AS NAFTA TALKS SPUTTER

Unlike the NAFTA negotiations, discussions to modernize the Global Agreement between the EU and Mexico are proceeding steadily, such that the parties are still adhering to their objective of reaching an agreement in principle by the end of 2017. A fifth round of negotiations took place in Brussels at the end of September, followed by an important intercessional meeting in mid-October. A sixth round of negotiations is scheduled for the end of November in Mexico.

The parties report achieving progress in the areas of customs and trade facilitation, rules of origin, good regulatory practice, technical barriers to trade, digital trade, and investment. However, further work remains in the thornier areas of public procurement, dispute settlement, geographical indications, and the sectoral annexes for automobiles, pharmaceuticals, and wines.

The Global Agreement's trade pillars, which entered into force in 2000 for goods and 2001 for services, preceded by a number of years the Commission's drive to conclude trade agreements that are more ambitious in scope to address, for example, regulatory barriers to trade, sustainable development, government procurement, and intellectual property rights. The legal underpinnings of the important EU-Mexico trade relationship were therefore due for an update.

As it has come to coincide with the review of the North American Free Trade Agreement over the past year, the renegotiation of the Global Agreement between the EU and Mexico is marked by a sense of relative urgency. While the EU maintains a tough line on key negotiating positions including trade in services and government procurement, ultimate agreement with the EU will help Mexico secure one of its major trade relationships.

For more information, contact: Charles De Jager

TPP COUNTRIES PLAN TO PUSH FORWARD WITHOUT U.S.; ANNOUNCEMENT EXPECTED AT APEC LEADERS MEETING

The 11 remaining countries in the Trans Pacific Partnership (the TPP11) are hoping to announce progress on a path forward to proceed without the United States on November 11 on the sidelines of the Asia-Pacific Economic Cooperation (APEC) Leaders Meeting in Da Nang, Vietnam.

TPP11 trade ministers met November 8-9 to attempt to reach consensus, with Japan taking an active coordinating role. Trade officials from the TPP11 met in Urayasu, Japan, the week of October 31 to discuss specific rules and commitments to "suspend" from the agreement given the lack of U.S. participation and have reportedly exchanged proposals to suspend rules in many areas, including on intellectual property, investor-state dispute settlement, labor and the environment, as well as in several market access areas. It is likely that many of the commitments insisted on by the United States during the negotiations are among those under discussion for suspension. Any rule suspensions could be accompanied by mechanisms to reactivate the rules if and when the United States eventually rejoins the agreement.

Though the United States is not a party to the agreement, multinational companies with investments in the remaining TPP11 countries could still see benefits from TPP's commitments on digital trade, regulatory cooperation, state-owned enterprises, and intellectual property should the agreement be implemented, though much will depend on which provisions make it into the ultimate agreement. An announcement by the TPP11 later this week on the margins of the APEC Leaders Meeting may therefore have commercially meaningful impacts for companies.

For more information, contact: Robert Holleyman, Evan Yu

IS THE SAUDI-LED EMBARGO OF QATAR SUBJECT TO U.S. ANTIBOYCOTT REGULATIONS?

Is the ongoing effort to punish Qatar economically a boycott covered by the Bureau of Industry and Security's (BIS) Antiboycott Regulations? What about the Boycott, Divestment, and Sanctions (BDS) movement? Both present challenges for international business – what position will you take? How do you choose between the competing commercial and policy options? But, do they require compliance with part 760, Restrictive Trade Practices or Boycotts, of the BIS regulations?

According to the BIS web site, "The Arab League boycott of Israel is the principal foreign economic boycott that U.S. companies must be concerned with today. The antiboycott laws, however, apply to all boycotts imposed by foreign countries that are unsanctioned by the United States." So, the question is whether the collective effort to isolate Qatar and the BDS movement are unsanctioned boycotts.

1. Qatar. In what is being termed a diplomatic crisis, several countries suspended relations – such as a trade and travel ban -- in June, including Saudi Arabia, United Arab Emirates, Bahrain, and Egypt. The origins of the split can be found in the shifting allegiances in the Middle East, and a variety of differences between Qatar on the one hand and Saudi Arabia on the other. Caught in the middle, global business must navigate around the economic conflict, and find ways to maintain trade relations.
2. Boycott, Divestment, Sanctions (BDS). The BDS movement claims inspiration from the South African anti-apartheid movement, and is designed to put economic pressure on Israel through consumer and other boycotts of Israel, urging divestment, and advocating for sanctions. New York, among other states, is pushing back on BDS and taking the position that support for BDS disqualifies companies from doing business with NY State.

Guidance from BIS' Office of Antiboycott Compliance (OAC)

What does BIS think? After many months of silence, the Director of the Office of Antiboycott Compliance expressed the agency's position on both actions. At October's BIS Update 2017 in Washington, DC, the Director of the OAC explained that neither the Qatar "diplomatic crisis" nor BDS are considered "unsanctioned" foreign boycotts subject to Part 760.* The Director did warn, however, that OAC is monitoring these actions and reserves the option to address them in the future.

For more information or to discuss antiboycott compliance, please contact Dj Wolff or Jeff Snyder.

* Please note that no official statement has been made by the IRS, which administers the Treasury provisions of the Antiboycott law. Treasury could, therefore, adopt the position that its regulations did extend to the Qatar dispute and/or BDS.

OFAC ISSUES GUIDANCE ON NEW RUSSIA AND IRAN SANCTIONS

The U.S. Treasury’s Office of Foreign Assets Control (OFAC) published new guidance in October related to the implementation of the Countering America’s Adversaries Through Sanctions Act (CAATSA). As we have previously summarized, the new law is divided into three parts: Title I-Sanctions with Respect to Iran; Title II-Sanctions with Respect to the Russian Federation and Combating Terrorism and Illicit Financing; and Title III-Sanctions with Respect to North Korea.

Although guidance is pending on Title III, OFAC has now published FAQs or updated FAQs on Titles I and II as follows.

Guidance on Title I / Iran Sanctions Developments

On October 13, in accordance with Section 105 of CAATSA, OFAC imposed sanctions on the Iranian Revolutionary Guard Corps (IRGC) applicable under global terrorism Executive Order 13224. On October 31, OFAC amended its Global Terrorism Sanctions Regulations to block the property and interests in property of foreign persons identified by OFAC as officials, agents, or affiliates of the IRGC.

As OFAC FAQs 533 and 534 explain, although the IRGC was previously sanctioned by OFAC under other programs, the new designation does not allow for certain exemptions related to personal communications, humanitarian donations, information or information materials, and travel, which were previously available.

Guidance on Title II / Russia Sanctions Guidance

OFAC and the State Department have also now published substantial guidance related to implementation of the various Russia-related sanctions. The following table summarizes the recent changes, issued at three separate times in the last six weeks (September 29, October 27, and October 31):

<u>Section of CAATSA</u>	<u>Topic</u>	<u>Agency</u>	<u>Guidance / Regulations Issued</u>
Section 223	Modification of sectoral sanctions	OFAC	Amended FAQs Nos. <u>370, 394-95, 405, 408-10, 415, & 419</u> Published Modified Directive <u>1</u> Published Modified Directive <u>2</u> Published Modified Directive <u>4</u>
	Sectoral sanctions related to railways and mining / metals	OFAC	Published New FAQ No. <u>539</u>
Section 225	Secondary sanctions related to special Russian crude oil projects	State	Published New Guidance and FAQ
Section 226	Secondary sanctions on FFIs related to financing	OFAC	Published New FAQs Nos. <u>541-543</u>

	transactions with sanctioned persons and related to special crude oil projects		
Section 228	Primary sanctions related to foreign sanctions evaders and serious human rights abusers in the Russian Federation	OFAC	Published New FAQs Nos. 544-546
Section 231	Secondary sanctions related to Russian defense or intelligence sector	State	Published New Guidance and FAQs Published List of Persons Operating in Russian Defense or Intelligence Sectors
Section 232	Secondary sanctions related to Russian energy export pipelines	State	Published New Guidance
Section 233	Secondary sanctions related to unjust privatization of Russian state-owned assets	OFAC	Published New FAQ No. 540

The guidance represents a continuation of OFAC’s recent trend of issuing guidance at the same time as implementing regulatory changes, but taken together with the State Department’s guidance, arguably represents the most substantial guidance ever issued by the two agencies in advance of implementation of newly enacted Congressional legislation.

For more details regarding the contents of the guidance, or with respect to any questions it raises, please contact one of the professionals listed below.

For more information, contact: Jeff Snyder, Carlton Greene, Cari Stinebower, Chris Monahan, Dj Wolff

SUDAN SANCTIONS REVOCATION: THE KEY TAKEAWAYS

On October 6, 2017, the U.S. Department of State [announced the revocation of economic sanctions](#) on Sudan and the Government of Sudan under Executive Orders 13067 and 13412. The State Department cited “the Government of Sudan’s sustained positive actions to maintain a cessation of hostilities in conflict areas in Sudan, improve humanitarian access throughout Sudan, and maintain cooperation with the United States on addressing regional conflicts and the threat of terrorism” as the basis for the revocation. The revocation became effective on October 12, 2017.

For more information on this topic, please see [Crowell & Moring’s Client Alert](#).

For more information, contact: Carlton Greene, Cari Stinebower, Chris Monahan, Dj Wolff, Joel Mallord

ENFORCEMENT ACTIONS FOR OCTOBER

Department of Justice

- On October 4, a retired U.S. Army colonel was charged with one count of conspiracy to violate the Foreign Corrupt Practices act (FCPA) and the Travel Act and one count of conspiracy to commit money laundering in an indictment filed in the District of Massachusetts. The indictment is connected to his alleged role in a scheme involving a planned \$84 million port development project in Haiti.

Office of Foreign Assets Control (OFAC)

- On October 5, OFAC announced BD White Birch Investment LLC (White Birch USA) of Greenwich, Connecticut, agreed to pay \$372,465 to settle its potential civil liability for three alleged violations of the Sudanese Sanctions Regulations. The company facilitated the sale and shipment of Canadian-origin paper from Canada to Sudan in 2013.
 - Aggravating factors included:
 - “(1) White Birch USA exhibited reckless disregard for U.S. sanctions requirements by failing to exercise a minimal degree of caution or care with regard to the apparent violations;
 - (2) White Birch Canada personnel appear to have attempted to conceal the ultimate destination of the goods from its bank (a U.S. financial institution serving as the confirming bank on a letter of credit) with respect to two of the apparent violations;
 - (3) multiple White Birch USA personnel, including individuals in supervisory or managerial positions, had actual knowledge of and were actively involved in, or had reason to know of, the conduct that led to the apparent violations;
 - (4) White Birch USA is a large and commercially sophisticated company;
 - (5) White Birch USA’s compliance program was either non-existent or inadequate at the time of the apparent violations; and
 - (6) White Birch USA did not initially cooperate with OFAC’s investigation into the apparent violations, particularly when it submitted materially inaccurate, incomplete, and/or misleading information to OFAC.”
 - Mitigating factors included:
 - “(1) White Birch USA has no prior OFAC sanctions history, and has not received a penalty notice or Finding of Violation in the five years preceding the earliest date of the transactions giving rise to the apparent violations; and
 - (2) White Birch USA has reported to OFAC that it has taken remedial steps in response to the apparent violations, including by updating the company’s employee manual to include additional information concerning economic sanctions, implementing new compliance policies, and administering company-wide OFAC compliance training.”

For more information, contact: Jeff Snyder, Edward Goetz

CROWELL & MORING SPEAKS

Chris Monahan and Aaron Marx spoke at the [ICPA's Annual Fall Conference and One Day Valuation Seminar](#) in Grapevine, Texas, scheduled for October 23-25. Chris' topic was "Understanding Commodity Jurisdictions (State vs. BIS)", while Aaron discussed IP Protection and Trademark Enforcement.

Patty Wu moderated a panel on [Challenges and Opportunities for Tech in Trade at CompTIA and Women in International Trade's Trade Talk on Tech](#), held November 2 in Washington, DC, with panelists from Salesforce, Cisco Systems, and Mastercard. Keynote remarks were provided by Chairman David Reichert, Ways and Means Subcommittee on Trade.

Ambassador Robert Holleyman moderated high-level discussions at the [inaugural APEC University Leaders' Forum](#) on November 8 in Danang, Vietnam. This platform, led by the Association of Pacific Rim Universities (APRU) in partnership with the Ministry of Education and Training of Vietnam, brought together over 50 leaders from academia, government, and the private sector to discuss the opportunities and challenges universities are facing in the Fourth Industrial Revolution – an age where digital technology is re-shaping how we define jobs, education, and our way of life. Robert brought together viewpoints from university presidents and company executives to identify potential areas of collaboration to ensure educational institutions and the private sector could work hand-in-hand to equip youth with the very competencies needed in the marketplace and address the skills gap seen in APEC economies today.

[Michelle Linderman](#) will be speaking at the [Leather & Sustainability in Retail Conference 2017](#) in London on November 16. She will be providing an update on the U.K. Modern Slavery Act.

[Ambassador Robert Holleyman](#) will be speaking at a China-India-U.S. Trilateral on Cyberspace Cooperation in New Delhi, India on November 16-17. The event is co-hosted by the East-West Institute and the Vivekananda International Foundation. Participants in the trilateral talk will discuss the Internet of Things revolution and implications for a digital society, as well as how those changes will impact global trade. Robert will be speaking on a session titled "Regional Cooperation to Avoid Miscalculation," which will cover the various multilateral platforms available to further cooperation on cyberspace issues and built trust between the three countries.

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

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