Crowell

Client Alert

The Month in International Trade — September 2017

October 9, 2017

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

USTR: FINISHING NAFTA BY END OF 2017 WILL BE "VERY, VERY DIFFICULT"

Following the third negotiating round for NAFTA modernization, held in Ottawa September 23-27, the U.S., Canada, and Mexico issued a joint statement asserting "significant progress" in several areas such as competition, state-owned enterprises, digital trade, competition policy, and telecommunications, as well as the substantive completion of a chapter on small- and medium-sized enterprises (SMEs).

Still, all three NAFTA parties conceded that many difficult issues still have not been resolved, casting significant doubt on the likelihood of concluding talks by the end of the year. U.S. Trade Representative Robert Lighthizer said following the round that finishing negotiations by the end of the year will be "very, very difficult."

According to press reports, several potentially contentious U.S. proposals were formally tabled during the latest round, including:

- An intellectual property proposal that did not include "safe harbor" limitations on copyright protection.
- A government procurement proposal to limit the dollar value of U.S. government procurement to that of the value of combined U.S. access to Canadian and Mexican procurement.
- A textiles proposal to eliminate existing NAFTA tariff preference levels for certain types of apparel, yarn, and fabric.
- A proposal to enable access to trade remedies measures for growers of seasonal fruit and produce.

These will all likely be added to the long list of issues that face significant opposition from Canada and Mexico.

The fourth round will take place in Washington, D.C. from October 11-15. USTR Lighthizer has said he hopes to table several proposals at the fourth round that are currently in the pipeline for interagency review and Congressional consultation, which may have major impacts on companies operating in North America. These include proposals on:

- **A "sunset review" mechanism**: The Trump administration has previously floated a proposal to automatically terminate NAFTA every five years unless all parties agree to extend the agreement.
- **Rules of origin for automobiles and auto parts**. The administration has previously floated proposals to increase regional content requirements as well as establish a national origin requirement.
- **Investor-State Dispute Settlement (ISDS)**. The administration has previously floated a proposal that would allow NAFTA parties to choose whether to "opt-in" to ISDS.
- **State to State Dispute Settlement**. The administration has previously floated a proposal to replace binding state-to-state dispute settlement with a non-binding advisory system.

As some if not all of these proposals are likely to be controversial for Congress as well as U.S. industry, the fourth round will be important to monitor closely to determine what the U.S. negotiators ultimately put forth to their negotiating partners and the potential impact on North American supply chains and business.

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

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NAFTA RULES OF ORIGIN AND THE U.S. AUTOMOTIVE AND AUTOMOTIVE PARTS INDUSTRY

"Our nation’s ballooning trade deficit has gutted American manufacturing, killed jobs and sapped our wealth," wrote Wilber Ross, the U.S. Secretary of Commerce, in a recent op-ed published in The Washington Post titled "These NAFTA rules are killing our jobs." Ross’ article focused largely on the automotive and automotive parts industry due to its large percentage of imports from Canada and Mexico as compared to other industries.

In short, he suggested that the current North American Free Trade Agreement rules of origin are outdated because the rules apply to parts no longer used. He also suggested that the rules are lenient from a content perspective due to the concept referred to as "substantial transformation," which, in some circumstances, qualifies non-NAFTA articles as originating within the territory due to further processing in the U.S., Mexico, or Canada. As a result of the current rules, he argued, the declining share in NAFTA content, as well as U.S. content specifically, in automobiles are causing the trade deficit with our NAFTA partners as well as putting jobs in the automotive manufacturing industry at risk.

Ross' outlook on the effects of the NAFTA rules of origin is met with some opposition from certain U.S. automotive industry groups and leaders, such as the Motor and Equipment Manufacturers Association, which claim that the rules of origin were never intended to create jobs. Instead, they claim the intent was to connect supply chains and allow U.S. businesses to remain competitive in the global market, particularly with Asia and Europe.

Despite such disagreements, the Trump administration is pushing ahead and has made it clear in its published objectives for the NAFTA renegotiation that the goals are, in part, to create more stringent rules of origin in an effort to increase the total NAFTA content requirement in a given product, as well as increase the U.S. portion of that requirement.

The development of unrealistic rules, U.S. automotive industry groups argue, would increase manufacturing costs, resulting in increased consumer prices and elimination of U.S. jobs. Certain interests argue that if content requirements become too onerous, automakers will not bother to claim NAFTA preference and will simply pay the applicable duties.

One way or the other, change is coming, and it will likely have a strong impact on the future of the industry.

For more information and assistance monitoring this issue, contact: Amanda Simpson

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BREXIT: PM THERESA MAY CLARIFIES GOALS IN RECENT SPEECH

On 29 March 2017, the U.K.'s Prime Minister, Theresa May, formally began the Brexit process by giving notice pursuant to Article 50 of the Treaty on European Union of the U.K.'s intention to withdraw from the EU. Since then, the parties have held three rounds of negotiations. Frustration has been expressed in some quarters by the pace of these negotiations and a perceived lack of clarity of the U.K. government's ultimate goals for Brexit.

Against this backdrop, on 22 September 2017, Mrs May delivered her third speech on Brexit from Florence, with the apparent goal of providing greater clarity and reassurance in key areas of uncertainty. A full transcript of the speech is available here.

Mrs May framed her speech with reference to "shared European interests and values" and noted a desire for the U.K. to remain the EU's "strongest friend and partner as the EU, and the U.K. thrive side by side."

Mrs May then went on to set out her government's view on key areas of the negotiations.

Implementation Period

The Prime Minster confirmed the U.K. will seek a transition period, or, in her words an "implementation period", set to last "around two years". This implementation period aims to avoid the so-called "cliff-edge" Brexit, which some predicted would cause considerable damage to the British economy. The EU has made clear that any transition period would have to be on existing terms, which would mean free movement remaining in place, and the continued jurisdiction of the European Court of Justice. Mrs May appeared to accept this, but noted "there will be a registration system" for Europeans coming to live or work in the U.K., which she described as "an essential preparation for the new regime."

An implementation period is not an uncontentious proposition. Unsurprisingly, Nigel Farage MEP, the former leader of the United Kingdom Independence Party, and one of the key architects of Brexit, had previously suggested "this is not what we voted for, we voted to leave not transitional arrangements." Indeed, even among Mrs May's cabinet colleagues whether there should be an implementation period, and, if so, of what length, was a matter of some debate. For its part, the British Chamber of Commerce has suggested a transition period of "at least three years."

Mrs May's approach appears to have been a compromise between the various conflicting proposals, and is likely to be welcomed by the U.K.'s business community.

Financial Settlement

The settlement of the U.K.'s financial liabilities to the EU (the so-called "divorce bill") has been a particular source of consternation. In an effort to secure the implementation period, Mrs May made clear that "The U.K. will honour commitments we have made during the period of our membership." While the Prime Minister did not propose a concrete figure, she suggested "I do not want our partners to fear that they will need to pay more or receive less over the remainder of the current budget plan as a result of our decision to leave."

This will give some reassurance to Michel Barnier, the EU's chief negotiator, whose demands for financial settlement have to-date met with fierce opposition from David Davis, his U.K. counterpart. However, it is not clear whether Mrs May's intervention will satisfy Mr Barnier that the U.K. is prepared to settle the full extent of the liabilities he has identified, reportedly somewhere in the region of €50-100 billion.

Protection for EU Citizens

Since Mrs May invoked Article 50, the EU has been looking for reassurance that its citizens already living and working in the U.K. will continue to enjoy the same rights post Brexit.

The Prime Minister emphasized that "one of my first goals in this negotiation is to ensure that you can carry on living your lives as before." With this in mind, she added: "I know there are concerns that over time the rights of

EU citizens in the U.K. and U.K. citizens overseas will diverge. I want to incorporate our agreement fully into U.K. law and make sure the U.K. courts can refer directly to it."

However, this was not the end of the story, Mrs May added: "Where there is uncertainty around underlying EU law, I want the U.K. courts to be able to take into account the judgments of the European Court of Justice with a view to ensuring consistent interpretation." The EU had previously insisted that the ECJ oversee the rights of its three million citizens living and working in the U.K. The U.K. rejected this outright: removal of the U.K. from the jurisdiction of the ECJ had been one of Mrs May's "red lines" in the negotiations.

By ensuring EU citizens can enforce their rights in U.K. courts, which will continue to take into account ECJ jurisprudence, Mrs May will be hoping to satisfy the EU that its citizens will have sufficient recourse in the U.K., and, as such, further direct ECJ oversight will not be necessary.

Conclusion

The U.K.'s negotiating team has come under criticism for lack of clarity, and, indeed, members of Mrs May's government have made numerous interventions in the U.K. press, projecting the image of an administration which, at best, lacks a unity of purpose. In particular, an article by Foreign Secretary, Boris Johnson, published only a week before the Prime Minister's Florence speech was seen by many as an attempt to dissuade Mrs May from the softer Brexit favoured by, among others, her Chancellor Philip Hammond. There has been considerable speculation that, under normal circumstances, Mr Johnson's intervention would have resulted in his losing his cabinet position. As it is, Mrs May is leading a minority government, without the political capital to respond decisively to such distractions. She has subsequently made the comment that she does not want to be surrounded by "yes men" and thus, for now Mr Johnson's position seems to be safe and at the recent Conservative Party conference, Mr Johnson stated that he supports "every syllable" of Mrs May's Florence speech.

In the face of her party's lack of cohesion over Brexit, Mrs May has set out the basis of her own vision, and has called on the EU to approach the Brexit negotiations with a view to finding "imaginative and creative" solutions. Mr Barnier has called the speech "a step forward", but will be looking for concrete proposals as the next round of formal negotiations get underway.

For more information, contact: Michelle Linderman, Gordon McAllister

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VENEZUELA SANCTIONS UPDATE

FinCEN Warns Financial Institutions to Guard against Corrupt Venezuelan Money

On September 20, the U.S. Treasury's Financial Crimes Enforcement Network (FinCEN) issued an Advisory on Widespread Public Corruption in Venezuela, warning financial institutions of methods that Venezuelan government officials may be using to flow money related to corruption into the U.S.

The advisory alert provides financial red flags to assist financial institutions in identifying and reporting suspicious activities possibly related to corruption involving the Venezuelan government, Venezuelan officials, or Venezuelan state-owned enterprises (SOEs). The alert gives examples of activities which may be indicative of Venezuelan corruption, such as abusive Venezuelan government contracts, wire transfers from shell corporations, and certain real estate purchases in South Florida and Houston, Texas.

Financial Sanctions Similar to Russia Sectoral Sanctions

As previously reported, on August 25 President Trump issued an Executive Order prohibiting U.S. companies from dealing in new debt with the Government of Venezuela and Petróleos de Venezuela (PDVSA) for a maturity of more than 30 and 90 days, respectively. In a new development, on October 3, OFAC published an FAQ explaining what constitutes "profit" for the purposes of Subsection 1(a)(vi) of the E.O.

These new sanctions against Venezuela resemble the U.S. sectoral sanctions on Russian energy and finance sectors issued by OFAC in July 2014. Of particular importance, both sets of sanctions define "new debt" broadly, including, for example, extensions of credit. The new financial sanctions would also require U.S. companies to conduct further due diligence to identify Venezuelan customers that are owned 50 percent or more by either the Government of Venezuela or PDVSA.

For more details on the E.O. issued by President Trump on August 24, see Crowell & Moring's Client Alert.

Canada Sanctions

On September 5, Canada issued Special Economic Measures Regulations on Venezuela, imposing targeted sanctions against 40 Venezuelan officials and individuals. The list includes most of the names that the U.S. Government has added as Specially Designated Nationals (SDNs).

In view of the escalated sanctions on Venezuela, companies doing business with Venezuelan government agencies or SOEs should monitor developments relating to possible future measures by the U.S. and/or other countries against Venezuela.

For more information, contact: Cari Stinebower, Jeff Snyder, J.J. Saulino, Dj Wolff, Eduardo Mathison

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WTO APPELLATE BODY THREATENED WITH PARALYSIS DUE TO U.S. OBSTRUCTIONISM

The Trump administration is threatening to undermine the World Trade Organization's dispute settlement system, often considered the crown jewel of the multilateral trade system, by blocking efforts to fill a number of vacancies at the WTO Appellate Body (AB). The AB hears appeals by WTO Members from reports issued by WTO dispute settlement panels. It can uphold, modify, or reverse these panels' legal findings. It is a standing body of seven persons serving renewable four-year terms. Each appeal before the AB is heard by three of its members.

In recent years the AB has been hearing an increasing number of appeals, such that even with seven members available to consider multiple appeals at once, the limits of the system were being tested. In accordance with the WTO Dispute Settlement Understanding, the AB should rule upon an appeal within 60 days, extendable to a maximum of 90 days. Given the complexity of many recent cases, these are tight deadlines in the best of times. However, the AB is now down to five members, with the term of one set to expire in December 2017, and another in September 2018. Absent the approval of new members, the AB might be reduced to three members in one year's time.

To the frustration of many WTO Members, the Trump administration has not clearly articulated its reasons for blocking the approval of new AB members. Past administrations have expressed concern over what has often been perceived in the U.S. as judicial activism on the part of AB members. There is also the perception that the AB has failed to act in the U.S. interest in important disputes. However, beyond these general concerns, the Trump administration appears to remain purposefully vague in a seemingly willful attempt to undermine the WTO, which President Trump has often denounced.

Given a lack of progress in key areas of the multilateral trade negotiations under the aegis of the WTO in recent years, the dispute settlement system has become the organization's most important feature and has been instrumental in preserving confidence in the organization's usefulness. By obstructing what until now has been the largely routine exercise of approving new members of the AB, the Trump administration is striking at the heart of the WTO with no clear resolution in sight.

For more information, contact: Charles De Jager

DOJ ALLEGES CALIFORNIA COMPANY IS EVADING AD/CVD DUTIES ON ALUMINUM FROM CHINA

On September 15, the Department of Justice filed a complaint against California-based Perfectus Aluminum, accusing Perfectus of evading $1.5 billion in subsidy and dumping tariffs on Chinese imports of aluminum pallets.

According to the complaint, Perfectus is owned and controlled by Zhongtian Liu, a Chinese national, and the founder and chairman of China Zhongwang, one of the world's largest industrial aluminum extrusion companies.

DOJ alleges Perfectus illegally imported 2.1 million aluminum pallets from Zhongwang Holdings Ltd. between 2011 and 2014. The government claims the pallets were actually aluminum extrusions, which carry a 374.15 percent countervailing duty (CVD) for the Zhongwang Group.

The complaint accused Perfectus Aluminum of merging several entities in 2014 to dispose of Zhongwang Holdings massive stockpile of aluminum. Pengcheng, Transport Aluminum, Century American Aluminum, American Apex Aluminum, Global Aluminum, Aluminum Source, and Aluminum Industrial were the Chinese companies included in the 2014 merger.

The complaint claims Liu also attempted to develop another facility in Barstow, California, by melting aluminum ballets to be sold as billet in the U.S. However, a stock analysis report alleged Liu Zhongtian of fraudulent activity, causing him to abandon the development. Instead, Liu shipped 6,337 shipping containers of pallets to Vietnam to melt the pallets and re-import the aluminum to the U.S. without having to pay Chinese duties on Vietnamese imports.

According to the DOJ, the purpose of the company's action was not to use or sell the aluminum pallets, but instead to avoid antidumping and countervailing duties imposed by the U.S. Department of Commerce on certain types of Chinese aluminum.

For more information, contact: Dan Cannistra, Alex Schaefer, Cherie Walterman

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ENFORCEMENT ACTIONS FOR SEPTEMBER

Bureau of Industry and Security

- On August 31, BIS announced a Settlement Agreement with Narender Sharma and his company Hydel Engineering Products (Hydel/Sharma), both of Rumpur Bushahr, India. Hydel/Sharma was charged with one count of Conspiracy to Export Items from the U.S. to an Iranian Government Entity without Authorization. The purpose of the conspiracy was to sell and export U.S.-origin waterway barrier debris systems and related components to Iran via third countries. The company was assessed a penalty of $100,000 and agreed to a five-year denial of export privileges, suspended for a five-year probationary period.
- On September 25, BIS announced a Settlement Agreement with Millitech, Inc., of Northampton, Massachusetts to settle 18 alleged violations of the Export Administration Regulations (EAR). Millitech is alleged to have engaged in prohibited conduct when it exported multiplier chains, controlled under Export Control Classification Number (ECCN) 3A001.b.4, to China and Russia without a license. The company was assessed a civil penalty of $230,000.

Department of Justice and Securities and Exchange Commission

- Telia Company AB, a Stockholm-based international telecommunications company, entered into a deferred prosecution agreement in connection with a criminal information filed on September 21 in the Southern District of New York charging the company with conspiracy to violate the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA). Its Uzbek subsidiary, Coscom LLC, pled guilty to the same charge. Telia agreed to pay a total criminal penalty of $274,603,972 to the U.S., including a $500,000 criminal fine and $40 million forfeiture on behalf of Coscom. Separate settlements were made with the Securities and Exchange Commission and the Public Prosecution Service of the Netherlands in related proceedings. The total amount of criminal and regulatory penalties paid to U.S., Dutch, and Swedish authorities will be $965,773,949.

- In its press release, the DOJ stated, "According to the companies' admissions, Telia and Coscom, through various managers and employees within Telia, Coscom and affiliated entities, paid approximately $331 million in bribes to an Uzbek government official, who was a close relative of a high-ranking government official and had influence over the Uzbek governmental body that regulated the telecom industry. The companies structured and concealed the bribes through various payments including to a shell company that certain Telia and Coscom management knew was beneficially owned by the foreign official. The bribes were paid on multiple occasions between approximately 2007 and 2010, so that Telia could enter the Uzbek market and Coscom could gain valuable telecom assets and continue operating in Uzbekistan. Certain Telia and Coscom management also contemplated structuring an additional bribe payment in late 2012, after Swedish media began reporting about Telia's corrupt payments in Uzbekistan, Swedish authorities began a criminal investigation and Telia opened an internal investigation."

Directorate of Defense Trade Controls

- On September 11, DDTC announced Bright Lights USA, Inc. settled 11 allegations that it violated the International Traffic in Arms Regulations (ITAR) with unauthorized exports of defense articles, including the export of technical data to a proscribed destination. Bright Lights voluntarily disclosed the alleged violations and agreed to pay a civil penalty of $400,000. DDTC did not seek disbarment because the company cooperated with the Department's review, expressed regret, and took steps to improve its compliance program.
  - Among other things, between 2010 and 2012, the company exported ITAR-controlled technical data under Categories II, IV, and VII without authorization. Four of these were to China. The company also misclassified items under the Export Administration Regulations and exported them without a license to non-prohibited destinations.

Office of Foreign Assets Control

- On September 26, OFAC announced Richemont North America, Inc., doing business as Cartier, agreed to pay $334,800 to settle its potential civil liability for four alleged violations of the Foreign Narcotics Kingpin Sanctions Regulations (FNKSR). Between 2010 and 2011, Cartier exported four shipments of jewelry to an entity on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List).

For more information, contact: Jeff Snyder, Edward Goetz

NEW U.S. AND UN SANCTIONS INCREASE PRESSURE ON NON-U.S. PERSONS TRANSACTING WITH NORTH KOREA

On September 20, 2017, President Trump signed Executive Order 13810, which substantially increases the authority of the U.S. Department of the Treasury's Office of Foreign Assets Control to impose both primary and secondary sanctions on non-U.S. persons transacting with the Democratic People's Republic of Korea (aka North

Korea). These new sanctions come soon after, and implement, two United Nations Security Council Resolutions (UNSCRs) expanding sanctions on North Korea. They also follow new sanctions imposed in August by the Countering America's Adversaries Through Sanctions Act and a travel ban imposed by the United States in July.

For more information, please see Crowell & Moring's Client Alert.

For more information, contact: Carlton Greene, Cari Stinebower, Michelle Linderman, Chris Monahan, Dj Wolff

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CROWELL & MORING WINS

C&M SECURES VICTORY FOR IRWIN TOOLS IN CUSTOMS IMPORT DUTY LITIGATION OVER VISE GRIPS® HAND TOOLS

Crowell & Moring represented Irwin Tools in a dispute over whether the company should have to pay increased duties on its Vise Grip® brand imported hand tools. On September 21, the U.S. Court of International Trade (CIT) granted summary judgment to Irwin Tools holding for Plaintiff on all five types of the challenged hand tool products: large jaw, curved jaw, long nose with wire cutter, curved jaw with wire cutter, and straight jaw.

After two rounds of summary judgment briefing and the government's motion for reconsideration, Judge Claire Kelly's opinion rejected U.S. Customs and Border Protection's (CBP) proposed historical classification, which had been used by the agency for more than 30 years, classifying the products as wrenches and dutiable at 9 percent *ad valorem*. Instead, it agreed with Irwin that the Vise Grip® products were properly classified as pliers, dutiable at 12 cents/dozen + 5.5 percent *ad valorem*.

Dan Cannistra (Partner, DC), Frances Hadfield (Counsel, NY), J.J. Saulino (Counsel, DC), Aaron Marx (Associate, DC), Preetha Chakrabarti (Associate, NY), Ade Johnson (Associate, DC), Nicholas DeLong (Trade Analyst, DC), and Wing Cheung (Trade Analyst, NY).

CROWELL & MORING SPEAKS

John Brew spoke at the American Conference Institute's Annual Forum on Customs and Trade Enforcement, held September 26-27 in Washington, DC. He interviewed three CBP Center of Excellence and Expertise (CEE) Directors. In addition to a Q&A session with the audience, John focused on:

- How to work effectively with the CEEs.
- An update on account-based processing: How this will lead to a smoother process when working with your CEE.
- How to deal with overlap when your product(s) are covered by multiple CEEs.

- Engagement with other agencies, including the FDA.

Chris Monahan and Aaron Marx will be speaking at the ICPA's Annual Fall Conference and One Day Valuation Seminar in Grapevine, Texas, scheduled for October 23-25. Chris' topic is "Understanding Commodity Jurisdictions (State vs. BIS)", while Aaron will be discussing IP Protection and Trademark Enforcement.

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.

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