CLIENT ALERT

This Month in International Trade - August 2015

Sep.02.2015

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CUSTOMS / IMPORTS / TRADE REMEDIES

U.S. Steelmakers File Trade Remedy Petition for Hot-Rolled Steel

On August 11, AK Steel Corporation, ArcelorMittal USA LLC, Nucor Corporation, SSAB Enterprises, LLC, Steel Dynamics, Inc., and United States Steel Corporation filed a petition requesting antidumping and countervailing investigations on yet another type of foreign steel products.

This time they are targeting hot-rolled steel flat products from Australia, Brazil, Japan, South Korea, Turkey, the Netherlands, and the United Kingdom.

This is the fourth trade remedy case on foreign steel products in just over two months. The preceding cases are: (1) Corrosion-Resistant Steel Products from China, India, Italy, South Korea, and Taiwan; (2) Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes from South Korea, Mexico, and Turkey; and (3) Cold-Rolled Steel Flat Products from Brazil, China, India, Japan, South Korea, the Netherlands, Russia, and the United Kingdom.

In all of these cases the petitioners are alleging that foreign imports of the subject steel products are sold at unfairly low prices in the U.S. and are either causing material injury or a threat of such injury to the U.S. steel industry. The petitioners are also alleging that the governments of some of the named countries are unfairly subsidizing steel exports.

The preliminary phase of the injury investigation is well underway at the International Trade Commission and the Department of Commerce recently initiated its investigations to determine whether unfair pricing and illegal subsidies exist with respect to each of the four types of steel products. Following the Department of Commerce's determination, the International Trade Commission will then make a final decision on the injury issue.

These steel investigations could have broader impacts on any downstream users of steel, such as increased costs.

Affected parties should contact counsel as soon as possible to discuss the various ways to engage in the investigation process because trade remedy investigations are subject to quick timelines and strict deadlines.

Also, companies should take note that this recent resurgence of U.S. steel cases may trigger retaliatory investigations in foreign jurisdictions against U.S. steel products. This type of behavior has been seen in other investigations. For example, the Chinese Ministry of Commerce (MOFCOM) recently published a statement against the U.S.' preliminary determination in the antidumping duty investigation of imports of China-manufactured crystalline silicon photovoltaic cells. The U.S. imposed dumping margins ranging from 31.14 percent to 249.96 percent. A Chinese periodical reported that MOFCOM identified six renewable energy initiatives in the U.S. that the Chinese government believes is in violation of World Trade Organization (WTO) rules on subsidies and countervailing measures in addition to the 1994 General Agreement on Tariffs and Trade (GATT) Agreement.

For more information, contact: Dan Cannistra, Alex Schaefer, Jini Koh, Pierce Lee

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Potential for Duty-Free Imports: USTR Reviewing Products Eligible for GSP

On August 19, the Office of the U.S. Trade Representative (USTR) published a Federal Register Notice announcing its review of products eligible for duty-free treatment under the Generalized System of Preferences (GSP) program and to modify the GSP status of certain GSP beneficiary countries. USTR is also prepared to receive petitions requesting waivers of competitive need limitations (CNLs).

Companies can petition USTR to:

- Designate additional articles as eligible for GSP benefits, including to designate articles as eligible for GSP benefits only if imported from countries designated as least-developed beneficiary developing countries, or only from countries designated as beneficiary sub-Saharan African countries under the African Growth and Opportunity Act (AGOA);
- Withdraw, suspend, or limit the application of duty-free treatment accorded under the GSP with respect to any article;
- Otherwise modify GSP coverage;
- Review the eligibility of any beneficiary country for reasons such as a country being Communist, participating in arrangements with other countries that restrict international trade of vital commodities, affording preferential treatment to the non-U.S. developed countries that has a significant adverse effect on U.S. commerce, expropriating U.S. property and foreign investments, failing to recognize or enforce international arbitral awards in favor of U.S. companies, aiding or abetting terrorists, failing to afford internationally-recognized worker rights, or failing to eliminate child labor; and
- Waive certain CNLs by granting continued duty-free access for products exceeding GSP import ceilings if such products are not made in the U.S. or total U.S. imports of such product are low.

This is an opportunity for companies to seek significant cost savings on imports or to address discriminatory trade and investment policies and practices of certain developing countries.

Deadlines

The deadline for the submission of petitions to modify the list of articles eligible for duty-free treatment under GSP or to review the GSP status of any beneficiary developing country is Friday, October 16, 2015. The deadline for the submission of petitions requesting CNL waivers is Monday, November 23, 2015.

Public comments should be submitted electronically to *www.regulations.gov* in docket number USTR-2015-0013.

For more information, contact: Benjamin Blase Caryl, Edward Goetz

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CIT Overturns CBP's Classification of Imported Bauxite Proppants

The U.S. Court of International Trade (CIT) has ruled that bauxite proppants are properly classified as bauxite ores, duty free. In so ruling, the court upheld the claims made by Crowell & Moring client Schlumberger Technology Corp.

In this case, Chief Judge Timothy C. Stanceu ruled that bauxite proppants, small grains that are used in hydro-fracking to "prop-open" well holes after water is pumped into the hole to create the fracture, were improperly classified by U.S. Customs and Border Protection (CBP).

CBP had classified the imported product in Heading 6909 of the Harmonized Tariff Schedule of the U.S. as "ceramic wares for laboratory, chemical or other technical uses," which carries a four percent import duty rate.

The Chief Judge issued an opinion granting Schlumberger's motion and held that the bauxite proppants should have been classified by CBP under a tariff provision for "aluminum ores and concentrates," a duty-free provision. The Chief Judge determined that for the purposes of this provision, "ores" are minerals used by the metallurgical industry to extract metals.

CBP had argued that the proppants were produced from non-metallurgical grade bauxite. The court found CBP's interpretation of the Heading to be too narrow. "Even if the bauxite used to produce the proppants is not commercially suitable for the extraction of aluminum, it is indisputably bauxite," the court said, and contains aluminum oxides of the type used to produce aluminum. The Judge also found the processing that bauxite proppants undergoes does not change their character as aluminum ores.

The Crowell & Moring team was led by John Brew (partner) and Alex Schaefer (counsel), and comprised of Joe Meadows (counsel), Frances Hadfield (counsel), Dj Wolff (associate), Michael Appel (associate), and Ru Xiao-Graham (international trade analyst).

Fed Circuit: ITC Can Ban Imports with Potential to Infringe U.S. Patents

On August 10, the Federal Circuit, sitting *en banc* (*i.e.,* the full court instead of the typical three-judge panel), overturned a 2013 court panel ruling that said Section 337 of the Tariff Act only covered products that directly infringe U.S. patents at the time of importation, negating any Section 337 relief for induced infringement.

The Federal Circuit determined that the phrase "articles that infringe" was ambiguous with respect to induced infringement. The term "inducement" covers a range of actions by which one might cause, urge, encourage, or aid another to infringe a patent. Accordingly, the court determined that the U.S. International Trade Commission's (ITC) interpretation of the phrase to include induced infringement was reasonable, deferring to the ITC's statutory interpretation of its enabling statute.

The underlying Section 337 dispute was based on a complaint filed by Cross Match Technologies, Inc. against Suprema, Inc. and Mentalix, Inc. Suprema manufactures and imports optical fingerprint scanners, some of which were sold to Mentalix, who created a system by integrating separate hardware and software with the scanners.

The ITC determined that Mentalix's use of this integrated system directly infringed on a patent held by Cross Match. Suprema argued that "articles that infringe" required direct infringement at the time of importation. The ITC and Cross Match asserted that "infringe" included all forms of infringement, direct and indirect, because Congress intended to grant broad authority to remedy unfair trade practices.

The Federal Circuit's broad interpretation of "infringement" in Section 337 allows the ITC to issue exclusion orders for products that do not actually infringe at the time of importation.

In short, those attempting to import a non-infringing product and then encourage others to use that imported product in an infringing way may be banned from doing so under this decision.

For more information, contact: Frances Hadfield, Anne Elise, Herold Li

U.S. Seeks to Dramatically Reduce $3B in Meat Labeling Retaliatory Tariffs

A World Trade Organization (WTO) arbitration panel will convene September 15 to decide the amount of retaliatory tariffs Canada and Mexico may impose on the U.S. over the impact of its country of origin labeling (COOL) requirements for meat imports. The U.S. believes the $3 billion proposed by the two countries greatly overestimates the economic harm caused by the labeling rules.

In its submission to the WTO, the U.S. trade representative's office estimates the negative economic impact to Canada and Mexico caused by the regulations to be only $91 million.

WTO member states can seek to impose retaliatory tariffs for another country's violation of a WTO agreement. However, the level of retaliation must be "equivalent" to the level of harm caused by the violation.

Since 2011, WTO dispute resolution panels have consistently ruled against the U.S.' COOL rules, finding that the labeling requirements breach the national treatment commitment in Article 2.1 of the WTO Agreement on Technical Barriers to Trade by treating imported livestock less favorably than like domestic livestock. The U.S. regulations require "an unbroken chain of reliable country of origin information with regard to every animal and muscle cut" and, therefore, create limitations on what products can be labeled as "U.S. meat."

Prior to going into recess last month, the House and Senate failed to agree on a course of action to avoid retaliatory tariffs. The House voted to repeal the regulations entirely; however, in the Senate, lawmakers introduced two pieces of legislation. The first would repeal the COOL requirements in their entirety similar to the action taken by the House. The second, proposed by Senators Debbie Stabenow, D-Mich., and John Hoeven, R-N.D., would replace COOL with voluntary measures.

With only two weeks before the WTO meeting, it is unlikely Congress will act in time to avoid retaliatory tariffs.

For more information, contact: Jini Koh, Nick DeLong

CPSC and CBP to Launch E-Filing Pilot for Certificates of Compliance Elements

On August 12, the Consumer Product Safety Commission (CPSC) voted to initiate an e-filing pilot program to be conducted with U.S. Customs and Border Protection (CBP) for importers to report certain data elements related to imported products. The pilot program will launch in July 2016 and allow nine participants to file five data elements from the CPSC certificates of compliance electronically via CBP's Automated Commercial Environment (ACE), the electronic data interchange for declaring entries with CBP.

The five data elements selected by the CPSC are to facilitate minimal targeting/enforcement data, which can be e-filed in two ways: (1) filing a minimum of five data elements at the time of entry via ACE or (2) filing a reference to targeting/enforcement data stored in a registry maintained by the CPSC. The data elements include:

1. Identification of the finished product;
2. Each consumer product safety rule to which the finished product has been certified under 16 C.F.R. part 1110;
3. Where the finished product was manufactured, produced or assembled, including the identity and address of the manufacturing party;
4. Parties on whose testing a certificate under 16 C.F.R. part 1110 depends (*i.e.*, name and contact information of the testing entity); and
5. A check box indicating that a required certificate currently exists for the finished product, as required by sections 14 and 17 of the Consumer Product Safety Act.

This pilot program is a welcome compromise with importers of consumer products to the CPSC's proposed rule amending 16 C.F.R. Part 1110 *et al*, commonly known as the '1110 rule.' When first published in May 2013, the proposed rule would replace the existing 1110 rule in its entirety. Key proposed changes included who is required to certify, what information is listed on the certificate, and when and how long the certificates must be issued and maintained. Importantly, if finalized, the rule would require electronic filing of certificates with each shipment as a requirement for imported products to make entry into the U.S. Additional background information can be found in this previous Crowell news alert.

Importers and key stakeholders quickly engaged the CPSC as to the administrative burden that the 1110 rule would impose on companies, particularly those importing consumer products. The CPSC reopened the comment period and held a workshop to better understand the importing community's concerns. The e-filing pilot program addresses certain concerns raised, in particular, by removing the voluminous and duplicative paperwork that the 1110 rule would have created by requiring certificates of compliance to be filed with each shipment for all regulated products in the shipment. Ideally, the pilot program being able to store certain data in the registry will eliminate the administrative burden importers would have with declaring duplicative data for multiple shipments of the same product covered by the same testing report or certificate of compliance.

The pilot program also aligns CPSC requirements at import with those from other governmental agencies who have admissibility of shipment information requirements for importation, such as the plant and plant products information required under the Lacey Act by the Department of Agriculture. Importers, and their customs brokers and logistics providers, will be able to adapt to these additional data elements easier than obtaining, tracking, and manually uploading/filing the certificates of compliance as originally proposed under the 1110 rule.

The e-filing pilot program allows importers to file the certificate of compliance data elements using the Partner Government Agency message set within ACE, rather than requiring a separate certificate upload, thereby enabling all data necessary for importation to be entered in one location. The CPSC would then be able to review the data real-time for "validation, risk assessment, and admissibility determinations" at entry, thereby facilitating compliant trade. The pilot is expected to run for approximately six months, and then may be extended, expanded, or opened to the larger importing community.

Companies already filing their customs entries via ACE will be able to submit their desire to participate in the program following the publication of the pilot program in the Federal Register.

Please contact Crowell to discuss whether the pilot program is a good fit for your company's needs and compliance, privacy, and operational considerations, before moving forward.

For more information, contact: Jini Koh

CIT Orders Commerce to Recalculate All-Others Dumping Rate in Aluminum Extrusions CVD Investigation

Senior Judge Donald C. Pogue of the U.S. Court of International Trade (CIT) remanded for the fourth time the U.S. Department of Commerce's calculation of the "all-others" rate in the Countervailing Duty (CVD) investigation of aluminum extrusions from China, so that Commerce may use a weighted-average, rather than a simple average, of the calculated CVD rates for two "voluntary respondents," which will presumably result in a higher all-others rate.

In the 2011 original CVD investigation, Commerce had selected three mandatory respondents, representing the largest volume of subject imports during the investigation period. Commerce assigned the mandatory respondents a 374.15 percent CVD rate based entirely on adverse facts available (AFA) because none of the mandatory respondents cooperated with Commerce's requests for information. Two other companies, however, requested to be voluntary respondents and ultimately received individually calculated CVD rates (originally 8.02 percent and 9.94 percent, but subsequently reduced via separate litigation to 4.89 percent and 9.94 percent). At the time, Commerce regulations prohibited including the voluntary respondents' CVD rates in the all-others rate calculation, so Commerce set the all-others rate equal to the AFA rate (which after two remands, was reduced to 137.65 percent). This regulation reflected a concern of Commerce (and petitioners) that voluntary respondents' rates are unrepresentative of the remaining companies because (unlike the mandatory or all-other respondents) they "willingly submit their sales data on their own accord, presumably because their commercial practices are such that they have good reason to believe that their CVD rates will be lower than those set for the mandatory respondents … such that including the rates established for this self-selected group threatens distortion of the weighted-average of the more representative rates."

In 2014, the U.S. Court of Appeals for the Federal Circuit, however, invalidated that Commerce regulation as inconsistent with the statute's requirement that the all-others rate be calculated based on a weighted-average of all non-zero/*de minimis* and non-AFA rates of "exporters and producers individually investigated"—which the Federal Circuit interpreted as including voluntary respondents. The Federal Circuit also rejected the all-others rate calculation and remanded this case for Commerce to include the voluntary respondents' CVD rates in the all-others' rate calculation.

On remand, Commerce used a simple average of the voluntary respondents' CVD rates (7.42 percent) because using a weighted-average would have revealed business proprietary information (each voluntary respondents' respective sales volumes) due to the voluntary respondents' failure to submit publicly ranged data (as required under the Department's regulations).

This August, Senior Judge Pogue remanded the case for Commerce to use a weighted-average of the voluntary respondents' CVD rates, by either obtaining publicly ranged data from the voluntary respondents or publicly ranging their proprietary data itself.

Partly in response to this litigation, petitioners have attempted to address their concern of voluntary respondents' distorting all-others' rates with provisions in the recently passed trade legislation that clarifies Commerce's discretionary authority to decline to analyze voluntary respondents.

For more information, contact: Dan Cannistra, Alex Schaefer, Benjamin Blase Caryl

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CIT Remands Challenge to Commerce Revocation of Diamond Sawblades Antidumping Duty Order

In the latest development of a dispute dating back to 2006, Senior Judge R. Kenton Musgrave of the U.S. Court of International Trade (CIT) rejected Chinese exporters' motion to dismiss U.S. producers' challenge to the partial revocation of the antidumping duty order on diamond sawblades from China.

In the 2006 original investigation, Commerce granted the collapsed "ATM entity" of Chinese exporters/producers, defendant-intervenors in this current litigation, a separate calculated dumping rate because the ATM entity had demonstrated independence from government control. The domestic industry challenged Commerce's separate rate determination at the CIT and the Chinese government challenged Commerce's use of the controversial "zeroing" methodology in the original investigation at the World Trade Organization (WTO).

In June 2012, the WTO ruled that Commerce's use of zeroing in the original investigations was inconsistent with the U.S.' WTO obligations. The Office of the U.S. Trade Representative (USTR) directed Commerce to initiate "section 129" proceedings to bring the United States into compliance with the adverse WTO decision. Commerce issued its final section 129 determination in March 2013. In that determination, Commerce continued to assign the ATM entity a separate rate (as it had in the original investigation), recalculated the rate without zeroing, which resulted in a zero percent margin. This led Commerce to partially revoke the order as to the ATM entity. USTR then instructed Commerce to implement the section 129 determination. The domestic industry filed a complaint challenging Commerce's finding in the section 129 determination that the ATM entity was eligible for a separate rate and revocation.

After two remands of Commerce's original investigation, Commerce changed course and assigned the ATM entity the country-wide margin of 164 percent because the ATM entity had failed to rebut the presumption of government control and was thus not entitled to a separate rate. The CIT affirmed that determination in October 2013, which led the domestic industry to file a motion for judgment in its appeal of the section 129 determination, arguing that the CIT's October 2013 decision replaced Commerce's revocation as a matter of law, requiring remand.

Subsequently, this case was stayed pending a final decision in the ATM entity's appeal of the CIT's October 2013 decision, which the U.S. Court of Appeals for the Federal Circuit ultimately affirmed (sustaining Commerce's remand determination that the ATM entity was ineligible for a separate rate).

In April 2015, in the light of the above developments, Commerce moved for a voluntary remand to re-evaluate its separate rate determination and reconsider its section 129 determination to revoke the order with respect to the ATM entity. The ATM entity responded with a motion to dismiss for lack of subject matter jurisdiction, arguing that the domestic industry was asking the CIT to ignore USTR's section 129 implementation instructions and that USTR's instructions were not judicially reviewable.

In June 2015, because the preliminary injunction enjoining liquidation in the earlier litigation had ended, the domestic industry moved for a preliminary injunction enjoining liquidation during the pendency of the current litigation.

In August 2015, Senior Judge Musgrave remanded this case to Commerce. First, he concluded that the CIT had subject matter jurisdiction over the domestic industry's challenge to Commerce's revocation of the order for the ATM entity, which was separate from the section 129 determination to eliminate zeroing.

Second, Senior Judge Musgrave concluded that remand was appropriate because the section 129 determination is based on data (the original margin calculations and separate rate eligibility determination for the ATM entities) that Commerce itself, the CIT, and the Federal Circuit have determined is incorrect. Senior Judge Musgrave found that the fact that Commerce "released its second remand results subsequent to its section 129 determination does not deprive this court of jurisdiction or otherwise foreclose this court from remanding the revocation of the antidumping duty order for reconsideration."

Third, Senior Judge Musgrave rejected the ATM entity's challenge that section 129 determinations are not judicially reviewable because they are "political questions," noting that Congress expressly provided for judicial review of section 129 determinations that USTR has instructed be implemented.

Finally, Senior Judge Musgrave granted the preliminary injunction, noting that allowing the ATM entity's imports to enter the U.S. duty-free would deny a portion of the relief owed to the domestic industry under the trade remedy laws and cause further serious and irreparable harm, and the domestic industry was likely to succeed on the merits of the case.

For more information, contact: Frances Hadfield, Benjamin Blase Caryl

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SANCTIONS

Congress Watch: Iran Nuclear Deal and Potential New Sanctions

When Congress returns to work on September 8, the Senate has scheduled seven legislative days, and the House just six, before the September 17 deadline to pass a joint resolution to block implementation of the six-nation nuclear deal with Iran.

The Obama Administration is pushing hard to reach the 41 votes necessary to prevent Republicans from breaking a Democratic filibuster; however, the more important goal is to gain the support of 34 Democratic Senators, enough to uphold a Presidential veto, should it become necessary. On September 2, Senator Barbara Mikulski (D-MD) announced she would support the nuclear deal, giving the President the 34th vote.

Congress will also be considering new legislation that has been introduced to impose new sanctions on Cuba, Iran, North Korea, and Syria. The Administration and a significant number of Senators oppose new Cuba or Iran sanctions, so while the votes may produce media attention, the likelihood of them actually passing appears slim.

Republicans could also add new sanctions as an Amendment to the Appropriations legislation and force the Administration to either veto continued federal funding or accept new sanctions. New sanctions on North Korea and Syria could fall into this category.

For more information, contact: Cari Stinebower, Dj Wolff, Edward Goetz

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U.S. Re-Opens Havana Embassy, but Advantages Still with Non-U.S. Companies

After the Cuban flag was raised in July at the State Department and the Cuban embassy reopened in Washington D.C., it was Cuba's turn to host the U.S. embassy's opening ceremony in Havana. On August 14, Secretary of State John Kerry traveled to Cuba to raise the U.S. flag, marking the first time in 70 years that a U.S. Secretary of State visited the island.

The thawing of U.S.-Cuba relations has already produced some key changes to Cuban commerce. Although a significant amount of time will be necessary for Cuba to become a full market-based economy, based on public reporting, several high-profile companies are operating on the island, providing evidence of changes in Cuba since President Obama's shift in U.S.-Cuba policy was announced last December.

Meanwhile, the Obama Administration continues to use executive branch authority to soften the restrictions imposed on American business and citizens. As an example, the White House is pushing to reach a deal to start commercial flights to Cuba by the end of 2015. The U.S. prohibition on these flights had been lifted as part of the January 2015 relaxations, but the U.S. and Cuba must reach several aviation-related agreements to enable the flights to resume.

These measures have, however, had a limited effect on U.S. trade and investment in Cuba because of the scope of the remaining restrictions which remain in place.

This means U.S. investors and businesses continue to be unable to engage in some activity permitted for their non-U.S. competitors. The press frequently reports on non-U.S. delegations traveling to Cuba. Additionally, almost every EU member state has sent its own delegation to identify business opportunities. The most recent of these delegations is a Belgium delegation of 12 private companies that reportedly explored investment in the telecommunications, construction, logistics, food, and agriculture industries.

For more information, contact: Cari Stinebower, Dj Wolff, Mariana Pendas

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EU and Switzerland Amend Iran Sanctions To Implement Parts of the Nuclear Deal

On July 31, the Council of the European Union (EU) passed an amendment to Regulation 267/2012 concerning restrictive measures against Iran. The amendment follows the United Nations Security Council's (UNSC) adoption of Resolution 2231 endorsing the Iran nuclear deal (aka the Joint Comprehensive Plan of Action or JCPOA), and provides limited authority for Member States to authorize exports to Iran necessary for Iran to meet its obligation under that agreement.

In particular, the amendment empowers the competent authorities of the EU Member States to authorize:

- the provision of goods and services directly related to allowing Iran to modify and modernize the Fordow nuclear facility and Arak nuclear plant and to export enriched uranium in excess of 300 kilograms in return for natural uranium; and
- on a case by case basis, transfers and activities directly related to the implementation of the nuclear-related measures described in Sections 15.1. to 15.11 of Annex V of the JCPOA, required for the implementation of the JCPOA more in general, and determined by the UN Sanctions Committee to be consistent with the objectives pursued by Resolution 2231.

All other EU sanctions on Iran, including those that will be suspended under the JCPOA, remain in effect until Implementation Day, expected at some point in mid-2016 when the International Atomic Energy Agency (IAEA) certifies to the UNSC that Iran has taken certain nuclear related steps.

Switzerland, which has aligned its sanctions measures with those imposed by the EU, added a new exemption clause to its Iran Ordinance. This clause authorizes the State Secretariat for Economic Affairs (SECO), after consultation with the competent authorities of the Federal Department of Foreign Affairs and the Federal Department of Finance, to grant exemp-tions from the prohibitions, authorization and notification requirements under the Iran Ordinance in accordance with Resolution 2231. As far as necessary, SECO will secure the approval of, or notify exemptions grant-ed to, the competent UN sanctions committee.

In other news from Switzerland, on August 12, the Swiss Federal Council announced the lifting of previously suspended (since January 30, 2014) sanctions concerning:

- the ban on precious metals transactions with Iranian state bodies;
- the requirement to report trade in Iranian petrochemical products; and
- the requirement to report the transport of Iranian crude oil and petroleum products, as well as insurance and reinsurance policies taken out in relation to such transactions.

Moreover, in the financial sector, Switzerland increased ten-fold the threshold values for reporting and licensing obligations in relation to money transfers from and to Iranian nationals.

The Swiss Federal Council noted that it will continue to "monitor implementation of the JCPOA and adapt Swiss measures accordingly" and that it reserved the right to re-impose sanctions if the JCPOA implementation failed.

For more information, contact: Cari Stinebower, Salomé Cisnal de Ugarte, Dj Wolff, Lorenzo Di Masi crowell moring

EXPORT CONTROLS

U.S. Approves Oil Swap with Mexico; Support Builds in Congress to End Sales Ban

On August 14, the Department of Commerce's Bureau of Industry and Security (BIS) approved licenses for limited exchanges of crude oil with Mexico. Although the number of barrels to be swapped is unknown, according to reports, Mexico's Petroleos Mexicanos SA discussed the idea of 100,000 barrels per day (bpd) with BIS last December.

The exchanges benefit both countries. The U.S. will receive heavy grade crude, which is better suited for its refineries, while Mexico will receive light sweet crude oil that is a better match with its refinery configuration.

The Export Administration Regulations (EAR) generally authorize BIS to license the export of crude on a case-by-case basis provided that the exports benefit the U.S.'s national interests and are consistent with the Energy Policy and Conservation Act (EPCA). The EAR provide the following guidance on the types of transactions that meet these criteria, including those for which the crude exports will be "part of an overall transaction":

1. That will result directly in the import into the U.S. of an equal or greater quantity and an equal or better quality of crude oil, or quantity or quality of petroleum products;
2. That will take place under contracts that can be terminated if the petroleum supplies in the U.S. are interrupted or seriously threatened; and
3. In which the applicant can demonstrate that, for compelling economic or technical reasons that are beyond the control of the applicant, the crude cannot be reasonably marketed in the U.S.

Aside from the oil swaps, Congress is beginning to show signs of loosening the crude oil ban. Two senior Democratic Senators have indicated a willingness to find a compromise on oil exports. These are Senator Harry Reid (D-NV) and Senator Robert Menendez (D-NJ). With oil prices at record lows, the domestic U.S. oil industry is seeking new markets.

So far, the White House has not indicated support for a repeal of the ban, allowing the possibility of a Presidential veto should legislation be passed by both the House and the Senate. With a full legislative slate, to include the Iran nuclear deal, this Fall, it is unlikely to see change in the coming months, but a push to end the ban could resurface in 2016.

For more information, contact: Jennifer Waters, Jana del-Cerro, Edward Goetz

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TRADE AGREEMENTS

Informal TPP Talks Continue; Doubts Remain on Its Conclusion

Trans-Pacific Partnership (TPP) negotiators continued sideline negotiations on market access and other sticking points this month, even as doubts linger over whether negotiators can reach agreement this year.

TPP trade ministers did not meet as a group in August; instead, negotiators met bilaterally or in small groups. The U.S., Mexico, and Canada held talks this month in Washington on their remaining outstanding issues, which include the automotive rule of origin and market access for dairy.

Some TPP negotiators, including U.S. Trade Representative Michael Froman, as well as negotiators for Brunei, Malaysia, Singapore, Australia, and New Zealand, attended a portion of the Association of South East Asian Nation (ASEAN) Economic Minister's Meeting in Kuala Lumpur from August 22-25, seeking to resolve key outstanding issues on the sidelines. In addition to those mentioned above, these issues include intellectual property for biological medicines, market access for sugar and rice, potential exemptions to the investor-state dispute settlement (ISDS) mechanism related to public health and tobacco, provisions addressing state-owned enterprises, and labor.

The difficulty of the remaining issues has dissipated some of the momentum resulting from the U.S. passage of Trade Promotion Authority (TPA) in June, following the failure of TPP ministers to reach a conclusion on the agreement in their meeting late July. The Japanese Minister responsible for TPP negotiations, Akira Amari, voiced concern about the lack of drive towards a conclusion for TPP on his official blog on August 11. Some in the business community are also concerned that Canada's October 19 national elections will further delay resolution of the controversial automotive and dairy market access provisions, leaving little time to finalize the agreement before the impending 2016 U.S. election season and the ensuing political commotion.

For more information, contact: Paul Davies, Dj Wolff, Evan Yu

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AGENCY ENFORCEMENT ACTIONS

Office of Foreign Assets Control (OFAC)

- Production Products, Inc. (PPI) agreed to pay $78,750 to settle potential civil liability for two alleged violations of the Weapons of Mass Destruction Proliferators Sanctions Regulations (the WMDPSR). From on or about December 15, 2009, to on or about August 18, 2010, PPI shipped three duct fabrication machines, valued at $500,000, to China National Precision Machinery Import and Export Corp. (CNPM), a party listed as a Specially Designated National, and received payment in connection with that export without authorization from OFAC.
- Navigators Insurance Company (Navigators), an insurance company that specializes in marine insurance, professional liability insurance, and commercial umbrella and primary and excess casualty businesses, agreed to remit $271,815 to settle its potential civil liability for 48 apparent violations of: the Foreign Assets Control Regulations (the FACR); the North Korea Sanctions Regulations (the NKSR); the Iranian Transactions and Sanctions Regulations (the ITSR); the Sudanese Sanctions Regulations (the SSR); and the Cuban Assets Control Regulations (the CACR). Specifically:
    - Navigators and its London, U.K. branch (Navigators U.K.) issued global protection and indemnity (P&I) insurance policies that provided coverage to North Korean-flagged vessels and covered incidents that occurred in or involved Iran, Sudan, or Cuba—some of which led to the payment of claims.
- UBS AG (UBS), a financial institution headquartered in Zurich, Switzerland, agreed to pay $1,700,100 to settle its potential civil liability for 222 apparent violations of the Global Terrorism Sanctions Regulations (GTSR). From January 2008 to January 2013, UBS processed 222 transactions related to securities held in custody in the U.S. for or on behalf of

an individual customer of UBS in Zurich, Switzerland designated by OFAC in October 2001 pursuant to Executive Order 13224, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism."

Bureau of Industry and Security (BIS)

- On August 7, BIS issued a final rule amending the Export Administration Regulations (EAR) to add a Russian oil and gas field, the Yuzhno-Kirinskoye Field located in the Sea of Okhotsk, to the Entity List. The government determined that exports, reexports, and transfers (in-country) of all items subject to the EAR to this Russian field by any person without first obtaining a BIS license present an unacceptable risk of use in, or diversion to, the activities specified in the Russian industry sector sanctions.

Securities and Exchange Commission (SEC)

- On August 12, the SEC announced that a former executive at a worldwide software manufacturer agreed to settle charges that he violated the Foreign Corrupt Practices Act (FCPA) by bribing Panamanian government officials through an intermediary to procure software license sales. Vicente E. Garcia, the former vice president of global and strategic accounts for SAP SE, orchestrated a scheme to pay $145,000 in bribes to one government official and promised to pay two others in order to obtain four contracts to sell SAP software to the Panamanian government.
- On August 18, the SEC revealed that BNY Mellon agreed to pay $14.8 million to settle charges that it violated the FCPA by providing student internships to family members of foreign government officials affiliated with a Middle Eastern sovereign wealth fund. BNY Mellon did not evaluate or hire the family members through its existing, highly competitive internship programs that have stringent hiring standards and require a minimum grade point average and multiple interviews. The family members did not meet the rigorous criteria yet were hired with the knowledge and approval of senior BNY Mellon employees in order to corruptly influence foreign officials and win or retain contracts to manage and service the assets of the sovereign wealth fund.

Financial Crimes Enforcement Network (FinCEN)

- FinCEN has determined that FBME Bank Ltd, formerly known as the Federal Bank of the Middle East, is a financial institution of primary money laundering concern. On August 28, under the authority of Section 311 of the USA PATRIOT Act, FinCEN issued a final rule imposing the so-called "fifth special measure" prohibiting the opening or maintaining of correspondent or payable-through accounts for FBME Bank Ltd by U.S. financial institutions. FinCEN had previously issued a notice of finding and a notice of proposed rulemaking regarding FBME Bank Ltd. on July 22, 2014. However, on August 27, before the final rule was published, the bank obtained a preliminary injunction temporarily staying its effect while the bank challenges the rule under the Administrative Procedure Act.

New York Department of Financial Services (DFS)

- On August 18, DFS announced that Promontory Financial Group agreed to a six-month ban on taking on new work for clients regulated by DFS over allegations that it "sanitized" a report on Standard Chartered PLC's alleged violation of U.S. sanctions against Iran. The settlement also included a $15 million fine.

For more information, contact: Cari Stinebower, Dj Wolff

OTHER AGENCY ACTIONS

Office of Foreign Assets Control (OFAC)

- On August 7, OFAC issued "Revised Guidance on the Continuation of Certain Temporary Sanctions Relief Implementing the Joint Plan of Action, as Extended." The guidance clarifies that Joint Plan of Action (JPOA) guidance only applies during the period of the JPOA; however, the Joint Comprehensive Plan of Action (JCPOA) "as a general matter" is of a broader scope. Therefore, JPOA activities that continue beyond Implementation Day do not give rise to sanctions exposure. This does not apply to specific licenses or to sanctions if they snap back. OFAC also:
    - Published 15 FAQs that relate to the continuation of certain temporary sanctions pursuant to the JPOA prior to implementation of the JCPOA; and
    - Issued the Third Amended Statement of Licensing Policy for Civil Aviation. The only change was a revision to Note 1 to indicate that activities must end before the specific license expires (rather than previous references to June 30, 2015). Moreover, all specific licenses that were going to expire on or before July 14, 2015 have been extended to Implementation Day.

U.S. Customs & Border Protection (CBP)

- On August 7, CBP published a Federal Register Notice amending its regulations by:
    - (1) Removing some of the requirements for drawback claimants to establish proof of exportation;
    - (2) Conforming Appendix B to part 191 of the CBP regulations to previous regulatory changes reflecting the closing of four drawback offices;
    - (3) Updating the regulations to reflect that CBP is now part of the Department of Homeland Security; and
    - (4) Making other non-substantive editorial and nomenclature changes.

- On August 31, CBP adjusted the mandatory transition to ACE for electronic entry and entry summary filing, as described below.
    - Nov 1, 2015 begins a transition period for electronic entry and entry summary filings in ACE to allow industry and participating government agencies more time to test and provide feedback as they fully transition into the new system. Use of ACE is allowed and encouraged for electronic entry and corresponding entry summary filings for entry types 01, 03, 11, 51, and 52 with or without PGA data.
    - On Feb 28, 2016, filers will only be permitted to file in ACE, and no longer permitted to file in ACS, all electronic entries and entry summaries. In addition, electronic FDA, NHTSA, and APHIS (Lacey) data must be filed in ACE and ACS will no longer be available.
    - In July 2016, upon publication of the Final Rule, ACE must be used for filing AMS, APHIS Core, ATF, CDC, DCMA, DDTC, DEA E&C, EPA, FSIS, FWS, NMFS, and TTB data. Hybrid submissions will no longer be allowed. This requirement for FWS is contingent on FWS having its regulatory revisions in place by the July 2016 publication of the CBP Final Rule eliminating hybrid filings.

CBP reiterated that the transition period initiated on November 1, 2015 does not impact the December 2016 deadline for full implementation of the Single Window via ACE.

Directorate of Defense Trade Controls (DDTC)

- In a Licensing Web Notice published on August 6, DDTC announced the export of military unmanned aerial systems (UAS) requires an addendum to paragraph five (5) of the DSP-83, Non Transfer and Use Certificate, in addition to the certificate itself.
  - This must be submitted at the time of initial application for a permanent export license;
  - The temporary export of UASs (*i.e.*, marketing) does not require assurance at time of export, but any subsequent permanent export must comply with this requirement; and
  - The addendum format is provided in the web notice.

U.S. International Trade Commission (USITC)

- The USITC has launched an investigation to provide advice to the president on the probable economic effect of removing duties on "environmental goods" under the Environmental Goods Agreement (EGA) now being negotiated. The investigation and the EGA negotiations cover a vast range of products from nearly 400 tariff lines (for the full list of goods, please click here). Thus, this is a valuable opportunity to not only reduce the costs of one's global supply chain, but also to expand access and competitiveness in key emerging market sectors abroad.
  - The USITC will hold a public hearing in connection with the investigation on October 14, 2015. The deadline for requests to appear at the hearing is October 5, 2015.
  - Industry is encouraged to provide written submissions for the investigation. The deadline for submissions is October 19, 2015.
- The USITC is seeking industry input on a congressionally-mandated investigation of the economic impact on the U.S. of the following trade agreements:
    - The Uruguay Round Agreements, the North American Free Trade Agreement (NAFTA—Canada, Mexico), and U.S. free trade agreements (FTAs) with Australia, Bahrain, Canada, Chile, Colombia, the Dominican Republic and five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua), Israel, Jordan, Korea, Morocco, Oman, Panama, Peru, and Singapore;
  - The USITC will hold a public hearing in connection with the investigation on November 17, 2015. The deadlines for filing requests to appear at the hearing is November 2, 2015, for filing pre-hearing briefs and statements is November 4, and the deadline for filing post-heating briefs is November 30.
  - The deadline for filing all other written statements is February 5, 2016.

For more information, contact: Edward Goetz, Nicholas DeLong

CROWELL & MORING SPEAKS

John Brew will be speaking at the World Customs Organization's 10th Annual PICARD Conference in Baku, Azerbaijan, September 8-10.

Crowell & Moring is an official sponsor of WorldECR's Washington, D.C., and London Export Controls and Sanctions Forums this fall. The Washington, D.C. event will be held September 21-22 at the Crystal Gateway Marriott, and will be followed by the London forum, being held at the Royal Mint, on October 14-15. For further details, please contact Cari Stinebower (Washington, D.C.) and Alan Gourley (London).

Alex Schaefer will be a panelist on a September 29 webinar providing guidance to trade counsel on minimizing the risks associated with importing goods subject to antidumping (AD) and countervailing duty orders (CVD). The panel will discuss new law and its impact for importers, how the courts have recently treated AD and CVD cases, and share best practices for import compliance.

Alex Schaefer and Chris Monahan will be panelists on an October 6 webinar sponsored by the American Bar Association titled "International Trade Compliance for the Business Lawyer." The program will include an overview of the statutory and regulatory landscape; guidance on managing and mitigating trade compliance issues in transactions; perspectives on recent changes to U.S. sanctions related to Ukraine, Russia, and Cuba; and industry perspective from in-house counsel.

Dan Cannistra will be speaking at the C5 (UK) 2016 International Trade Disputes Conference in Brussels on October 21. His panel's topic is "Demystifying the Multifaceted Calculations: The Drivers of Dumping Duties and How to Control Them."

Chris Monahan will be speaking at the International Compliance Professionals Association's (ICPA) Fall Conference in Grapeview, Texas, October 25-27. His topic is "Automated Export System (AES) Overview, Common Issues, and Routed Transactions."

CROWELL & MORING WELCOMES

To provide greater support to our clients, and to reflect our ongoing commitment to deepen our trade capabilities in Brussels and Europe, we are pleased to welcome**Elena Klonitskaya** and **Charles De Jager** to the International Trade Group.

Elena joins the firm as counsel in Crowell & Moring's Brussels office. Her practice focuses on trade remedies and other international trade regulations. We are pleased to welcome Elena back to Crowell after a few years at another international firm in Brussels.

Elena's joining deepens the linkages of international trade issues among our offices, with ongoing trade cases in the U.S. involving clients from Russia.

Charles joins the firm as counsel in Crowell & Moring's Brussels office. Charles joins us after two years as a Dispute Settlement Lawyer (Rules Division) at the World Trade Organization. Before his time at the WTO, Charles has been an international trade lawyer in Washington and Brussels for many years, with experience in export controls/sanctions, customs, and trade litigation, including antidumping cases. He has significant policy experience as well, devising lobbying strategies for multinational companies, industry associations, and sovereign governments in trade law and EU regulatory law.

Charles' joining also strengthens our trade team in Brussels, as we grow to provide clients with increasingly complex and transatlantic guidance on international trade laws.

We look forward to the opportunity of supporting you in the near future, and should you wish to contact Elena and Charles directly, please see below for their contact details.

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

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