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CLIENT ALERT

This Month in International Trade — February 2017

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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 John B. Brew or any member of the International Trade Group.

TOP TRADE DEVELOPMENTS

Trump Administration Issues Trade Policy Agenda Focusing on U.S. Sovereignty and Jobs

In a Congressionally-mandated report on U.S. trade policy released on March 1 , the Trump administration emphasized U.S. sovereignty in determining trade policy, promised to use trade remedy laws assertively to counter unfair trading practices, pledged to aggressively put pressure on countries to eliminate barriers to U.S. exports, and committed to reviewing the U.S. approach to trade agreements.

The Trump Administration's 2017 Trade Policy Agenda (Agenda) makes the case for "freer and fairer trade" as articulated by candidate Trump during his campaign for the presidency, noting that other governments often fail to follow the international rules adequately and fail to administer their trade actions in a transparent manner. Although the Agenda does not provide much detail, it does state that a fuller version of the administration's trade policy priorities will be released once President Trump's new U.S. Trade Representative is confirmed.

The Agenda's overarching message reflects messages heard on the campaign trail and during the confirmation hearing of U.S. Commerce Secretary Wilbur Ross. It states that U.S. trade policy will be designed to "increase our economic growth, promote job creation in the United States, promote reciprocity with our trading partners, strengthen our manufacturing base and our ability to defend ourselves, and expand our agricultural and services industry exports."

The reference to agriculture in the Agenda is likely a White House acknowledgement of concerns raised by Members of Congress from agriculture-exporting states that the Trump Administration had overlooked the importance of U.S. agriculture exports when highlighting trade deficits and the "job-killing" aspects of trade.

America First

Defending the United States' national interest in the realm of trade policy is a recurring theme in the Agenda, which begins by declaring the Administration's commitment to prioritize U.S. sovereignty over trade policy and its own trade objectives.

The Agenda sets out the basis in domestic law that adverse WTO decisions do not change U.S. law unless the U.S. Government decides to implement modifications administratively or through legislation. However, under WTO rules, WTO members may be authorized to take retaliatory measures – usually in the form of increased tariffs on American exports – if the United States does not bring a policy into conformity with WTO findings in a timely manner.

Aggressive Trade Remedy Laws will be in Play

The Agenda makes clear that U.S. trade remedy laws will take a front seat in the Administration's efforts to level the playing field for U.S. companies. This is not surprising: this stance was part of candidate Trump's "economic nationalism" on the campaign trail, and the Administration's pick for USTR, Robert Lighthizer, is known for his track record on steel antidumping cases and for recommending trade remedy actions against China if necessary to safeguard U.S. trade interests.

The Agenda highlights potential U.S. actions to be taken under Section 201 of the Trade Act of 1974 (safeguards), which allows the President to provide relief in response to a surge in imports, and Section 301 of the same act, which allows the United States to impose trade sanctions against countries that violate trade agreements or engage in unfair trade practices. In addition to "leveling the playing field," these provisions also will be used as policy levers to encourage countries to "adopt more market-friendly policies."

Section 201 was last invoked by President George W. Bush in 2002. Tariffs were imposed on foreign steel in a response to an alleged import surge. Section 301 has not been used unilaterally for more than 20 years (since 1995) as the U.S. committed to raising Section 301 issues first through the WTO's dispute settlement process when those issues are covered under WTO agreements.

However, recent press reports on, and op-eds by the Administration have covered or alluded to additional legal mechanisms (such as Section 122 import surcharges, Section 232 national security safeguards (under Trade Expansion Act of 1962), and even action under the Trading with the Enemy Act or International Emergency Economic Powers Act) that permit unilateral U.S. action for national emergency and security purposes. The Agenda appears to lay the legal groundwork for justifying actions independent of the WTO should the U.S. find it necessary to do so.

Rebalancing and Leveling the Playing Field

On opening up foreign markets to U.S. exports, the Agenda declares that the Trump Administration will take an "aggressive" approach to eliminating barriers to U.S. exports, using "all possible leverage," including the principle of reciprocity, applying limits on trade or investment on countries that refuse to open their markets (e.g., limiting U.S. market access to levels provided by U.S. trading partners).

Foreign trade barriers mentioned include foreign subsidies, currency interventions, theft of intellectual property, unfair competitive behavior by state-owned enterprises, violation of labor laws, use of forced labor, and technical barriers to trade – more loosely defined in media reports as burdensome or unnecessary regulations. Examples raised in the Agenda included theft of trade secrets, restricting the flow of digital data and services, and limiting competition in the services sector.

Hint on Next Steps for Bilateral Trade Deals?

The Agenda is critical of current U.S. trading arrangements, including the North American Free Trade Agreement (NAFTA) and the U.S.-Korea Free Trade Agreement. It cites trade deficits and other economic figures and attributes poor U.S. economic performance to trade developments, such as China's accession to the WTO, which was also raised in the President's February 28 address to the joint session of Congress, suggesting that China will be a major focus of scrutiny and action.

In response, the Agenda states that the Administration will review the U.S. approach to trade agreements and will likely seek bilateral, rather than multilateral agreements going forward. It states that by withdrawing from TPP, the Trump Administration has "paved the way for potential bilateral talks with the remaining TPP countries," signaling that it may seek bilateral deals with Japan, Canada, and Mexico (whose leaders President Trump or his cabinet officials have met with recently on a variety of issues, including trade).

While the Agenda goes on to note that "the President has begun his consultations with Congress on the ways in which future trade agreements can work for all Americans more effectively than they have in the past," detailed consultations with Congress on new bilateral agreements will also need to await the confirmation of a USTR (trade lawyer Stephen Vaughn has been named acting USTR and General Counsel, the former until the USTR, presumably Lighthizer, is confirmed). Notably absent was any reference to "key allies" (such as the U.K.) as candidates for future bilateral trade agreements, although both sides are acting as though this is a given.

A more detailed trade policy agenda will be released once a USTR has been confirmed. In the meantime, the trade policy agenda as previewed in the report released March 1 confirms signals and statements made by the President and his key advisors to date. The Trump administration is signaling that it is prepared to take a more aggressive approach to unfair trade practices being pursued by U.S. trading partners.

The Agenda signals that the White House will seek to use the leverage of the U.S. market wherever possible to increase market-opening that benefits U.S. exports, while reworking existing and future U.S. trade agreements to achieve economic outcomes focused solely on U.S. workers, farmers, ranchers and businesses.

For more information, contact: Melissa Morris, Tracy Huang, Ben Caryl

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ZTE Pleads Guilty and Agrees to Combined U.S. $1.19 Billion Penalty for Iran and North Korea Transactions

On March 7, Zhongxing Telecommunications Equipment Corporation and its subsidiaries and affiliates, as well as ZTE Kangxun Telecommunications Ltd. and its subsidiaries and affiliates (collectively referred to as ZTE or ZTE Corporation) entered into a guilty plea with the U.S. Department of Justice and "agreed to pay a $430,488,798 penalty to the U.S. for conspiring to violate the International Emergency Economic Powers Act (IEEPA) by illegally shipping U.S.-origin items to Iran, obstructing justice and making a material false statement."

Simultaneously, ZTE also entered into settlement agreements with the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) for $100,871,266 related to the same conduct, as well as the U.S. Department of Commerce's Bureau of Industry and Security (BIS) for $661 million for illegal exports of U.S.-origin product to Iran and North Korea.

In total, ZTE's settlement reached $1.19 billion; BIS has agreed to suspend payment of $300,000,000, which ZTE will be required to pay if it violates the BIS settlement agreement.

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

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PODCAST – CETA, ISDS, and the Belgian Veto – A Warning of Failure for Future Trade Agreements with the EU?

The EU-Canada Comprehensive Economic and Trade Agreement (CETA) was expected to be finalized in the fall of 2016. However, final agreement was vetoed by politicians in Belgium, specifically by parties in Wallonia and Brussels, over issues related to the investor-state dispute settlement (ISDS) chapter.

Ian Laird and Flip Petillion, partners in Crowell & Moring's International Dispute Resolution Group, sit down for this special Crowell & Moring podcast to discuss CETA—what happened and what it could mean for the future of EU and Canada trade, and international investment arbitration.

Ian, resident in the firm's Washington, D.C. office, is a Canadian-qualified lawyer and previously served as chief of staff to a Canadian cabinet minister, as well as a senior political aide to the Ontario Minister of Energy. Ian represents companies engaged in U.S.-Canada trade and business relations and has provided counsel on NAFTA dispute settlement issues for more than 15 years.

Flip, resident in Crowell & Moring's Brussels office, is a leading domestic and international negotiator, litigator, and arbitrator. He has been handling arbitrations for more than 25 years.

Discussed in this 27 minute podcast:

- How it's possible for individual regions within a signatory country to block the agreement.
- The objections raised against CETA and the ISDS chapter.
- What to expect next.
- Implications on future trade agreements with the EU.

Click below to listen:
SoundCloud

For more information, contact: Ian A. Laird, Flip Petillion

New Trade Cases Filed

Silicon Metal from Australia, Brazil, Kazakhstan, and Norway

On March 8, Globe Specialty Metals, Inc. filed antidumping (AD) and countervailing duty petitions on low-priced imports of silicon metal from Australia, Brazil, Kazakhstan, and Norway. Silicon metal is primarily used in the production of aluminum, silicones, and polysilicones. Globe Specialty Metals alleges that U.S. imports of silicon metal are being dumped at levels ranging from 28 to 134 percent of their prices. There are already US AD orders on silicon metal from China and Russia.

The U.S. International Trade Commission (ITC) will hold a public preliminary conference on March 29, in which interested parties (U.S. producers, importers, purchasers, and foreign producers/exporters) may testify and answer ITC staff questions about the silicon metal industry and market.

For more information, contact: Benjamin Blase Caryl

Aluminum Foil from China

On March 9, the Aluminum Association Trade Enforcement Working Group, whose membership is currently confidential, filed antidumping and countervailing duty petitions on low-priced imports of aluminum foil from China. Aluminum foil is used in food and pharmaceutical packaging, thermal insulation, fin stock for air conditioners, transformers, capacitors for radios and televisions, and insulation for storage tanks. Petitioners have alleged that U.S. imports of aluminum foil are being dumped at levels ranging from 37 to 134 percent of their prices.

The U.S. International Trade Commission (ITC) will hold a public preliminary conference on March 30, in which interested parties (U.S. producers, importers, purchasers, and foreign producers/exporters) may testify and answer ITC staff questions about the aluminum foil industry and market.

For more information, contact: Benjamin Blase Caryl

WTO's Trade Facilitation Agreement Entered into Force on Feb 22

On February 22, 2017, the World Trade Organization's (WTO) Trade Facilitation Agreement (TFA) entered into force after receiving four additional ratifications, meeting the required two-thirds acceptance of the agreement from its 164 members.

The TFA "seeks to expedite the movement, release and clearance of goods across borders, launches a new phase for trade facilitation reforms all over the world and creates a significant boost for commerce and the multilateral trading system as a whole," according to the WTO.

It is expected to reduce members' trade costs by an average of 14.3 percent, according to a 2015 study by WTO economists. The TFA is unique in that developing and least-developed countries are allowed to set their own timelines for implementing the agreement and a Trade Facilitation Agreement Facility was created to aid these countries in receiving the maximum benefits of this multilateral accord.

For more information, contact: Charles De Jager

DOJ Sheds Light on Evaluation of Corporate Compliance Policies

On February 8, 2017, DOJ Fraud Section issued new guidance on the Evaluation of Corporate Compliance Programs. This guidance, discussed more fully on Crowell's Government Contracts blog, serves as a useful framework for compliance

professionals in crafting and strengthening corporate compliance policies, corporate officers and directors who want to ensure their compliance program meets the DOJ's expectations, and counsel to use in navigating communications and disclosures to the DOJ Fraud Section.

For more information, contact: Lorraine Campos, Sarah Bartle

NYDFS Implements First-in-the-Nation Cybersecurity Rule for Covered Financial Services Companies

On February 16, 2017, the New York Department of Financial Services (NYDFS) published a final rule imposing new cybersecurity requirements on covered financial institutions. The Rule takes effect on March 1, 2017; however, covered institutions will have 180 days to come into compliance with most requirements, with longer transition periods of 1-2 years for certain obligations. The Rule requires covered entities to certify annually that they are in compliance with its requirements, with the first certification due on February 15, 2018. NYDFS revised its prior drafts of the Rule based on two rounds of public comment.

For more information on the new Rule, please see Crowell's Client Alert.

For more information, contact: Evan Wolff, Carlton Greene, Maida Lerner, Kate Growley, J.J. Saulino

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FinCEN Renew Orders Requiring ID of High-End Real Estate Cash Buyers in Six Major U.S. Markets

On February 23, the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) announced the renewal of existing Geographic Targeting Orders (GTOs or Orders) to identify purchasers of luxury real estate in six major metropolitan areas in the United States. The GTOs require title insurance companies to identify and disclose information of individuals behind shell companies used to pay "all cash" for high-end residential real estate. The Order will be effective for additional 180 days beginning on February 24, 2017, and ending on August 22, 2017.

The renewed Order requires domestic title insurance companies to report on certain covered transactions. For purposes of the GTOs, "covered transactions" include any transaction in which (i) a legal entity (ii) purchases residential property (iii) for a sales price exceeding the following thresholds for each geographic area:

1. $500,000 or more in Bexar County, Texas, which includes San Antonio.
2. $1,000,000 or more in Miami-Dade, Broward, and Palm Beach Counties, Florida.
3. $1,500,000 or more in the Boroughs of Brooklyn, Queens, Bronx, and Staten Island, New York City, New York.
4. $2,000,000 or more in San Diego, Los Angeles, San Francisco, San Mateo, and Santa Clara Counties.
5. $3,000,000 or more in the Borough of Manhattan, New York City, New York.

Such purchases must also have been made (iv) without a bank loan or other similar form of external financing, and (v) using currency or a cashier's check, a certified check, a traveler's check, a personal check, a business check, or a money order in any form.

Pursuant to the GTOs, title insurance companies are required to collect and report certain identifying information about the beneficial owners behind the shell companies used to purchase residential real estate, including driver's license, passport, or other similar identifying documentation. For purposes of the GTOs, a "Beneficial Owner" means any individual who, directly or indirectly, owns 25% or more of the equity interests of the Purchaser. Title insurance companies must retain all records relating to compliance with the GTOs for at least five years from the last day that the GTOs were effective.

Financial institutions located in these geographic areas should be aware of the obligations imposed by the GTOs. In particular, title insurance companies and any of its officers, directors, employees, and agents may be liable for civil or criminal penalties for non-compliance with the Order.

Although the six GTOs have been in place since August 2016, FinCEN had already been targeting real estate transactions for over a year. The original GTO came into effect on March 1, 2016, when FinCEN started requiring title insurance companies to identify purchasers of luxury real estate in Manhattan and Miami-Dade County. These six areas have been specifically identified by FinCEN as vulnerable to money laundering.

For further details, please see Crowell's client alert on the GTOs issued in July 2016.

For more information, contact: Carlton Greene, Cari Stinebower, Eduardo Mathison

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AGENCY ENFORCEMENT ACTIONS

Bureau of Industry and Security (BIS)

- On February 9, BIS' Office of Antiboycott Compliance entered into a Settlement Agreement with Pelco, Inc., a U.S. company, to settle 66 alleged violations of the Export Administration Regulations (EAR). BIS charged Pelco with 32 violations of intent to comply with, further or support an unsanctioned foreign boycott by agreeing to refuse to do business with another person pursuant to an agreement with, a requirement of, or a request from or on behalf of a boycotting country. The office also charged the company with 34 violations of failure to report to the Department of Commerce receipt of request to engage in a restrictive trade practice or boycott.

Financial Crimes Enforcement Network (FinCEN)

- On February 27, FinCEN announced the assessment of a $7 million civil money penalty against Merchants Bank of California for will violations of the Bank Secrecy Act (BSA). The Office of the Comptroller of the Currency (OCC) simultaneously assessed a $1 million penalty for violations of previous consent orders. Merchant failed to establish and implement an adequate anti-money laundering (AML) program, conduct required due diligence on its foreign correspondent accounts, and detect and report suspicious activity.

Office of Foreign Assets Control (OFAC)

- On February 28, OFAC announced that United Medical Instruments, Inc. (UMI), a California-based company, agreed to settle its potential civil liability for 56 alleged violations of the Iranian Transactions and Sanctions Regulations (ITSR) for $515,400. UMI's obligation to pay the settlement with OFAC will be satisfied by: (a) its compliance with the terms of its September 24, 2013 Settlement Agreement with the U.S. Department of the Commerce's Bureau of Industry and Security; and (b) its payment of $15,400 to the U.S. Department of the Treasury.
    - OFAC alleged UMI violated the ITSR when it made sales of medical imaging equipment with knowledge or reason to know that the goods were intended specifically for supply or re-exportation to buyers located in Iran, and when it facilitated the sales of medical imaging equipment from a company located in the United Arab Emirates to Iran. The sales took place between 2007 and 2009.

For more information, contact: Edward Goetz

WEBINAR: INVESTIGATIONS 101 FOR IN-HOUSE COUNSEL – ISSUE SPOTTING AND AVOIDING PITFALLS

March 23, 2017 from 1:00 pm (EST) – 2:00 pm (EST)

Conducting an internal investigation is fraught with pitfalls for the unwary and unprepared.

This webinar is designed to alert you to those pitfalls and to discuss best practices in structuring and conducting internal investigations of any kind. There are many different circumstances under which a company will need to conduct an internal investigation. Sometimes an issue that warrants investigation to ensure statutory, regulatory or contractual compliance will arise internally or informally from a customer. Other times an investigation will be triggered by a request for information from the government.

In either case, it is important to structure and conduct the investigation to learn the necessary information while protecting the interests of the company.

In this webinar, we will discuss how to conduct an investigation to maintain the attorney client privilege — including recent case law on the role lawyers must play and the *Upjohn* warnings that must be provided to employees — and how to ensure that your investigation will be sufficiently robust to address both internal and external concerns.

Click here to register for this webinar.

Crowell & Moring Participants:

- Gail D. Zirkelbach
- Cari N. Stinebower
- Kelly T. Currie

For more information on Crowell & Moring's Investigation Practice, please click here.

OTHER AGENCY ACTIONS

Bureau of Industry and Security (BIS)

- On March 24, 2016, BIS published a final rule which created a temporary general license that restored, for a specified time period, the licensing requirements and policies under the Export Administration Regulations (EAR) for exports, re-exports, and transfers (in-country) as of March 7, 2016, to two entities (ZTE Corporation and ZTE Kangxun) that were added to the Entity List on March 8, 2016. On February 24, 2017, the U.S. Government extended the temporary general license until March 29, 2017.

International Trade Commission (ITC)

- Following the receipt of a request from the U.S. Trade Representative (USTR) under section 332(g) of the Tariff Act of 1930, the ITC has instituted investigation no. 332-561, *Global Digital Trade I: Market Opportunities and Key Foreign Trade Restrictions,* for the purpose of preparing the first of three reports requested by the USTR. The Commission will hold a public hearing in the investigation on April 4, 2017. For more information, please see the February 10 Federal Register Notice.

U.S. Customs and Border Protection

- On February 15, CBP expanded the period in which post-entry refund claims may be made under certain preference programs as a result of the decision issued by the Court of International Trade (CIT) in *Zojirushi America Corp v. U.S.A* memorandum was issued by CBP instructing Directors of Field Operations and Center Directors to grant importers the use of the protest mechanism set forth in 19 U.S.C. § 1514 to submit initial post-importation claims for preference programs which are not specifically provided for under the statutory post-importation mechanism of 19 U.S.C. § 1520(d). The memo was a divergence from the original guidance provided by the CBP in 2014 which directed to the ports to reject as non-protestable any initial preference claims made under 19 U.S.C. § 1514.
    - The memorandum, also requested importers to resubmit those protests that were rejected, as opposed to denied, as non-protestable initial post-importation preference claims made under 19 U.S.C. § 1514 to the appropriate field offices within 180 days of the issuance of the guidance.

For more information, contact: Edward Goetz

CROWELL & MORING SPEAKS

On February 10, Preetha Chakrabarti spoke at the Federal Bar Association's 2017 Fashion Law Conference at the Parsons School of Design in New York. Preetha on a panel entitled: "*Corporate Responsibility: Child Labor and Sustainability.* This panel provided an overview of international treaties and U.S. laws affecting child and or forced labor and environmental sustainability issues. Frances Hadfield moderated this panel and was a principal organizer of this annual conference.

On March 13, Chris Monahan will be speaking on a panel entitled “Export Voluntary Disclosures” at the International Compliance Professionals Association’s (ICPA) annual conference in Miami. Crowell and Moring will also be holding a reception on March 14. Space is limited. Please RSVP via email to Elizabeth Aghili (eaghili@crowell.com).

On April 5, Alex Schaefer will be speaking on “Trade Under the Trump Administration: Costs and Opportunities” at the International Fragrance Association of North America’s Regulatory Workshop in Hasbrouck Heights, NJ.

Jeff Snyder be presenting at the Inter-Pacific Bar Association’s Annual Meeting in Auckland New Zealand, April 6 – 10, 2017. He will co-moderate and speak on a two-part panel entitled, "Connecting and Converging Transfer Pricing, Customs Duty & BEPS - It's Not Getting Any Easier!" and speaking on a panel entitled, “Free Trade in Services – Or Not?: Efforts and Difficulties to Liberalize Trade in Services.”

On May 9, Jana del-Cerro will be speaking at AAEI’s Export Controls and Compliance Seminar in Washington, DC on a panel focused on technology controls in an increasingly digital world. Topics include cloud computing, encryption, deemed access, and processes to automate export control compliance.

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