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CLIENT ALERT

This Month in International Trade — September 2016

Oct.11.2016

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

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Brexit

Legal Considerations for the U.K.'s Investment and Trade Treaties after Brexit

The result of the United Kingdom referendum on membership of the European Union could potentially open up new possibilities and challenges for the country's external trade and investment position. Further, the prospect of disassociation with the EU has led to some discussion with regard to dispute resolution mechanisms. We have already published various bulletins on these subjects. See:

- International Trade Implications of Brexit – What Companies Should Do Now
- Post-Brexit London Will Remain a Pre-Eminent Arbitration Seat
- U.K. Faces Arduous Trade Negotiations Post-Brexit
- Rationale For TTIP Negotiations Remains Strong Despite Brexit

In this alert, we provide further updates on:

- The status of the U.K.'s existing bilateral investment treaty (BIT) network, both with (at least for now) fellow EU member states and elsewhere.
- The trade treaty network in the EU which the U.K. is set to leave, and how it could retain those relationships.
- Some reflections on the legal mechanisms involved and some implications of the U.K. pursuing new investment and trade treaties from without the EU.

Please click here for the full alert.

For more information, contact: Adrian Jones, Ian Laird, Charles De Jager, John Laird

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Negotiation of Trade Agreements by the U.K. Unlikely Anytime Soon

In September, U.S. Trade Representative Mike Froman repeated President Barack Obama's pre-Brexit vote warning that a decision to leave the EU would push Britain to the "back of the queue" in terms of striking a trade deal with the U.S. Froman confirmed that the focus of the U.S. is currently on the Transatlantic Trade and Investment Partnership (TTIP) with the remaining 27 EU Member States. "It's absolutely clear, we have a very special relationship with the U.K., we're going to want to find ways to maintain and strengthen and deepen that trade and investment relationship over time, but right now our priority is to get TTIP done," Froman said.

Australia showed initial enthusiasm for bilateral trade talks with the U.K. in July. However, on a recent visit to London to discuss trade relations with U.K. Trade Minister Liam Fox, Australian Minister of Foreign Affairs Steven Ciobo has injected a note of caution, stating: "We can certainly have preliminary discussions and that's part of what I'm doing here this week – preliminary discussions around what a post-Brexit Australia-U.K. trade deal might look like." But formal negotiations would have to wait for Brexit to complete.

The U.K. must first focus on defining and negotiating its future relationship with the EU, including whether it remains in a customs union with the EU or whether it regains control over its tariffs and regulations. Although U.K. government officials hope for greater autonomy in the negotiation of new trade agreements and are discussing informally trade deals with a range of Asian and Middle Eastern countries, approximately half of U.K. exports currently remain destined for the EU. For example, the proportion of British exports to India (population 1.3 billion) is much less than that to Belgium (population 11 million).

U.K. Prime Minister Theresa May has announced that Article 50 will be invoked by the end of March 2017, launching the two-year negotiating process on the terms of the U.K.'s withdrawal from the EU. However, beyond agreement on the terms of the U.K.'s legal separation from the EU, agreement must also be reached on the terms of the U.K.'s future trading relationship with the EU, which is likely to take more than two years. Therefore, actual trade negotiations involving the U.K. remain a ways off. Until the above questions are settled, Froman said, "…it's really impossible for anybody else to negotiate a free trade agreement with the U.K."

For more information, contact: Adrian Jones, Ian Laird, Charles De Jager, John Laird, Gordon McAllister

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MTB - OPPORTUNITY FOR TARIFF SUSPENSIONS AND REDUCTIONS

USITC Publishes Rule for Miscellaneous Tariff Bill (MTB) Petitions – Submissions Begin October 14

In a Federal Register Notice published on September 30, 2016, the U.S. International Trade Commission (USITC) announced it was adopting interim rules that will amend the Commission's Rules of Practice and Procedure and establish a new part governing the submission and consideration of petitions for duty suspensions and reductions under the American Manufacturing Competitiveness Act of 2016.

The USITC published a petition system overview with the following timeline for MTB on its dedicated MTB web page:

- October 14, 2016 – Opening of 60 day window for submitting petitions.
- January 2017 – Official publication of petitions on USITC's website and start of 45-day comment period.
- Mid-2017 – USITC delivers preliminary report to Congress.
- Mid-2017 – USITC delivers final report to Congress.

The next opportunity to petition will not occur until 2019.

For more information, contact: John Brew, Frances Hadfield, Aaron Marx

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TOP TRADE DEVELOPMENTS

Cuba: Advancement of Diplomatic Relations and New Opportunities

September was a busy month for U.S. and Cuban bilateral relations. Two key meetings took place, advancing a number of issues being discussed between the two countries.

First, on September 12, the U.S. and Cuba held its Inaugural Economic Dialogue in Washington, D.C. to discuss long-term bilateral engagement on a variety of topics ranging from trade and investment, labor and employment, energy, small business, intellectual property rights, economic policy, regulatory and banking matters, and telecommunications and internet access.

Then, on September 30, the two countries held their Fourth Bilateral Commission, also in Washington. During the meeting, the U.S. and Cuba reviewed progress made since the last Bilateral Commission meeting in May 2016 on a number of shared priorities including public health, counter-narcotics, and the resumption of scheduled commercial flights between the U.S. and Cuba.

Also in September President Obama announced his nomination of Jeffrey DeLaurentis to serve as U.S. Ambassador to Cuba. DeLaurentis is a career foreign service officer who has served as chief of mission for the U.S. in Havana for the last two years. Although appointing an Ambassador to Cuba appears to be the next logical step in the Obama's Administration changes in U.S.-Cuba relations, detractors have criticized the nomination, arguing it will lack the necessary support for confirmation in the Senate. Beyond Congress, on the campaign trail, Republican Presidential nominee Donald Trump announced in Miami that he would reverse President Obama's changes if Cuba did not provide more religious and political freedom.

Meanwhile, Cuba is taking advantage of the momentum created by U.S. companies' interest in the island to reinforce economic and business relations with existing partners in Europe and Asia. For example, the Cuban Company for the Promotion of Renewable Energy Sources and Respect for the Environment (CUBASOLAR) and the Spanish Union of Photovoltaic Energy (UNEF) signed a framework agreement to cooperate on environmental matters. Cuba expects to see the installation of 700 MW of new electric power by 2030 with the help of Spanish companies. Cuba and China have also strengthened diplomatic relations with the visit to Cuba of the Chinese Prime Minister at the end of September and the conclusion of 12 cooperation agreements among the two nations.

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

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U.S. Steel Producers Allege Steel Imports from Vietnam Circumvent AD/CVD Orders on Chinese Steel

In late September, U.S. steel producers AK Steel Corporation, ArcelorMittal USA, California Steel Industries, Nucor Corporation, Steel Dynamics, and United States Steel Corporation filed petitions requesting the U.S. Department of Commerce (DOC) initiate investigations on whether imports of cold-rolled and corrosion-resistant steel from Vietnam are circumventing the antidumping and countervailing duty (AD/CVD) orders on imports of both types of steel from China to avoid the corresponding AD/CVD duties ranging from 238 to 456 percent of the value of the imports.

The U.S. steel producers have alleged that China Minmetals Corporation, a large state-owned Chinese metal trading firm, is arranging for Chinese hot-rolled steel to be cold-rolled, and in some cases galvanized, in Vietnam before exporting the steel to the U.S. They note that Vietnam has no installed capacity to produce hot-rolled steel and that imports from Vietnam surged into the U.S. market from zero before the AD/CVD petitions on China were filed to over 300,000 tons in the first half of 2016, more than replacing the pre-petition Chinese volumes. They argue the cold-rolling and galvanizing of the Chinese hot-rolled steel in Vietnam are "minor or insignificant" processing such that DOC should find that these Vietnamese exports to the U.S. circumvent the AD/CVD orders on Chinese steel and, thus, DOC should treat the steel imports from Vietnam as covered by the AD/CVD orders on Chinese steel.

DOC has until the week of November 7-11 to either issue a ruling based on the circumvention petitions or initiate a formal circumvention investigation, in which case DOC will request comments and factual information from interested parties and issue a final determination by early September 2017.

For more information, contact: Dan Cannistra; Alex Schaefer; Bob LaFrankie; Ben Caryl

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Failure to Mark Country of Origin Can Give Rise to Reverse False Claim

In *United States ex rel. Customs Fraud Investigations LLC v. Victaulic Co.*, (Oct. 5, 2016), the Third Circuit held that a failure to mark country of origin can be actionable under the False Claims Act under the "reverse false claim" theory of liability if a company knowingly imports unmarked products in an effort to evade custom duties that are due the government. In a matter of first impression, the panel voted 2-1 to reverse the lower court's dismissal and remanded for further proceedings in this *qui tam* case brought by former industry insiders against a distributor of pipe fittings.

For more information, contact: Gail D. Zirkelbach, Jason M. Crawford

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Administration and Congress Aim to Resolve Substantive Concerns on TPP; Tough Path Ahead for Congressional Approval

The White House and Congressional leaders continued meeting this month with the hope of resolving substantive concerns over the Trans-Pacific Partnership (TPP) in time for a vote in the lame-duck session of Congress after the November elections.

Senate Finance Committee Chairman Orrin Hatch (R-Utah) and House Ways and Means Committee Chairman Kevin Brady (R-Texas) both indicated that Administration officials, including U.S. Trade Representative Michael Froman, have held meetings with Members of Congress to resolve substantive concerns over the agreement. Rep. Brady said the key outstanding issues for Republican leaders include the duration of intellectual property protections for biologic medicines, as well as implementation plans for the agreement.

Administration officials and congressional leaders have identified a pathway for resolving one of the major concerns—the exclusion of the financial services sector from TPP protections against data localization—via negotiations on the Trade in Services Agreement (TiSA), a separate, 23-country agreement focused exclusively on service industries. However, Rep. Brady noted that Congress will want assurances that four TPP countries not involved in TiSA – Brunei, Malaysia, Singapore, and Vietnam – are equally covered by commitments on data localization taken in their respective TPP implementation plans.

Despite continued work on the substance of the agreement, Members of Congress are overall pessimistic on TPP's chances for passage in the lame-duck session given the current political climate on trade. In an oft-used line of attack, Republican presidential nominee Donald Trump criticized his Democratic opponent Hillary Clinton during the first Presidential debate on September 21 for her support of TPP as Secretary of State, forcing her to reiterate her opposition to the current version of the agreement.

The political backlash against trade in the presidential race has echoed in the congressional races leaving many lawmakers politically vulnerable for voicing support for TPP. In the House, some of the 190 Republicans who voted in favor of Trade Promotion Authority (TPA) legislation last year have already declared opposition to TPP, which will likely force the Administration to pick up additional "yes" votes from Democrats who voted against TPA in order to pass TPP (only 28 House Democrats voted in favor of TPA, which narrowly passed the House 218-208). While the vote count could be more favorable in the Senate, Majority Leader Mitch McConnell (R-Kentucky) has said that TPP is "politically toxic" and that the Senate will not take up the current agreement this year.

Congressional approval of TPP in 2016 will thus require many factors to align in its favor, among them: resolution of the remaining substantive issues, the electoral outcomes for the President and new Congress, and the overall mood on Capitol Hill given other legislative priorities in the busy lame-duck session.

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

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Spotlight on the U.S.-Africa Trade and Investment Relationship

Business opportunities in Africa were prominently featured in September as the Obama Administration implemented a number of initiatives to draw the U.S.-Africa trade and investment relationship into sharper focus.

The Department of Commerce and Bloomberg Philanthropies co-hosted the biennial U.S.-Africa Business Forum in New York on September 21, 2016. The Forum was attended by delegations from 44 countries, including 29 heads of State, and featured keynote addresses from Nigerian President Muhammadu Bahari and President Obama, both of whom emphasized Africa as a prime destination for U.S. investment. The President also highlighted the marked shift in U.S.-Africa engagement from aid to trade, and announced the mobilization of more than $9 billion in new trade investment deals inked in the margins of the Forum, including a number of public-private partnerships in infrastructure, energy, women's empowerment, and anti-corruption. During the Forum, Secretary of Commerce Penny Pritzker announced the establishment of the second President's Advisory Council on Doing Business in Africa, a body of senior U.S. executives tasked with advising the President on ways to strengthen commercial engagement between the U.S. and Africa.

The Office of the U.S. Trade Representative (USTR) released *Beyond AGOA*, the Administration's vision for a deepened trade and investment relationship with the African continent. The report aims to build on the increasing dynamism of the U.S.-Africa trade and investment relationship, and looks ahead to the eventual expiration in 2025 of the Africa Growth and Opportunity Act, which currently provides unilateral market access preferences for some 38 sub-Saharan African countries exporting to the U.S. With an emphasis on finding new structural approaches to boosting balanced bilateral trade, USTR calls for commitments on a number of policy "building blocks", including trade facilitation, intellectual property, labor, sanitary and phytosanitary measures, market access, services, investment, environment, technical barriers to trade, and transparency and anti-corruption. This represents an important engagement opportunity for U.S. businesses wishing to position themselves for a growing trading relationship with fast-growing African economies, as well as a chance to shape the discussion around reducing barriers to existing trade with the continent.

The release of the report coincided with the 15th annual U.S.–Sub-Saharan Africa Economic Cooperation Forum (otherwise known as the AGOA Forum), hosted in Washington, DC shortly after the U.S.-Africa Business Forum. The main focus of the Forum, comprising trade ministers across the AGOA region, is to improve AGOA utilization and identify new policies to strengthen the commercial linkages between the U.S. and the 28 AGOA beneficiary countries.

For more information, contact: Danie Beukman

BIS Parallels Latest Russian OFAC Designations, Adds 81 to Entity List

On September 7, the Bureau of Industry and Security (BIS) paralleled action taken on September 1 by the U.S. Treasury's Office of Foreign Assets Control (OFAC) and amended the Export Administration Regulations (EAR) by adding eighty-one entities in the Crimea Region of Ukraine, Russia, Hong Kong, and India to the Entity List.

This action imposes licensing requirements for all items subject to the EAR to:

- One entity based on activities that are described in Executive Order 13660, *Blocking Property of Certain Persons Contributing to the Situation in Ukraine*.
- Eleven entities based on activities that are described in Executive Order 13661, *Blocking Property of Additional Persons Contributing to the Situation in Ukraine*. These companies operate in Russia's arms or related materials sector.
- Eighteen entities based on activities that are described in Executive Order 13685, *Blocking Property of Certain Persons and Prohibiting Certain Transactions with Respect to the Crimea Region of Ukraine*.

Additionally, because the Entity List does not automatically apply to unlisted subsidiaries (in contrast to OFAC's 50 percent rule), BIS added 51 subsidiaries of Gazprom to its Entity List. As a result, these entities are now subject to a licensing requirement for all items subject to the EAR when the item will be used directly or indirectly in exploration for, or production of, oil or gas in Russian deep water, Arctic offshore locations, or shale formations in Russia.

For more information, contact: Cari Stinebower, Chris Monahan, Dj Wolff

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AGENCY ENFORCEMENT ACTIONS

Bureau of Industry and Security (BIS)

- On September 28, BIS entered into a Settlement Agreement with Technoline SAL of Beirut, Lebanon to settle seven (7) alleged violations of the Export Administration Regulations (EAR). The company caused, aided, and/or abetted exports or re-exports to Syria of mass spectrometers, gas chromatographs, and consumables used by both products without a license. Technoline was assessed a civil penalty of $475,000 with $275,000 suspended for a period of two years.

Office of Foreign Assets Control (OFAC)

- On September 7, OFAC announced World Class Technology Corporation (WCT) of Portland, Oregon, agreed to pay a $43,200 settlement for alleged violations of the Iranian Transactions and Sanctions Regulations (ITSR). The alleged violations involve WCT's exportation of seven shipments of orthodontic devices, collectively valued at $59,886, from the U.S. to Germany, United Arab Emirates, and/or Lebanon, with knowledge or reason to know that the shipments were intended specifically for supply, transshipment, or re-exportation to Iran.
- On September 13, OFAC announced PanAmerican Seed Company of West Chicago, Illinois, agreed to pay a $4,320,000 settlement for alleged violations of the Iranian Transactions and Sanctions Regulations (ITSR). The alleged violations involve the indirect export of seeds, primarily of flowers, to two Iranian distributors on 48 occasions between 2009 and 2012.

Securities and Exchange Commission (SEC)

- On September 12, the SEC announced the former chairman/CEO of Harris Corporation's subsidiary in China agreed to pay a $46,000 penalty for violating the Foreign Corrupt Practices Act (FCPA) by facilitating a bribery scheme that provided illegal gifts to Chinese government officials in order to obtain and retain business for the company.
- On September 20, the SEC announced that Nu Skin Enterprises, Inc. agreed to pay $765,688 to settle charges that it violated the internal controls and books-and-records provisions of the FCPA. The violations arose from a payment its Chinese subsidiary, Nu Skin (China) Daily Use & Health Products Co. Ltd., made to a charity to obtain the influence of a high-ranking Chinese Communist party official to impact an on-going provincial agency investigation.
- On September 28, the SEC announced Anheuser-Busch InBev agreed to pay $6 million to settle charges that it violated the FCPA and stopped a whistleblower who reported the misconduct through a separation agreement that prevented the employee from continuing to voluntarily communicate with the SEC. An SEC investigation found that the company used third-party sales promoters to make improper payments to government officials in India to increase the sales and production of company products in that country.

SEC and Department of Justice (DOJ)

- On September 29, the SEC announced Och-Ziff Capital Management Group agreed to pay nearly $200 million to settle civil charges for violations of the FCPA. Och-Ziff CEO Daniel S. Och also agreed to pay nearly $2.2 million to settle charges that he caused certain violations along with CFO Joel M. Frank, who also agreed to settle the charges. The SEC detected the misconduct while proactively scrutinizing the way that financial services firms were obtaining investments from sovereign wealth funds overseas. The SEC's subsequent investigation of Och-Ziff found that the fund used intermediaries, agents, and business partners to pay bribes to high-level government officials in Africa.

- In a related action, Och-Ziff entered into a three-year Deferred Prosecution Agreement (DPA) with the DOJ. Additionally, its wholly-owned subsidiary, OZ Africa Management GP LLC, pled guilty to conspiracy to violate the FCPA and agreed to pay a criminal penalty of more than $213 million.

For more information, contact: Edward Goetz

OTHER AGENCY ACTIONS

Bureau of Industry and Security (BIS)

- Registration is open for the Bureau of Industry and Security's Update 2016, scheduled for October 31 – November 2, 2016 at the Washington Hilton Hotel in Washington, D.C.
  - Please click here for details.
- On September 20, the Bureau of Industry and Security (BIS) published a Final Rule that, among other things, made significant changes related to Information Security in the Export Administration Regulations (EAR).

Office of Foreign Assets Control (OFAC)

- On September 14, the White House issued an Executive Order entitled, "Termination of Emergency with Respect to the Situation in or in Relation to Côte D'Ivoire.

State Department

- The Directorate of Defense Trade Controls (DDTC) will be hosting a webinar to demonstrate its new Commodity Jurisdiction (CJ) (DS-4076) interface on Friday, October 14, 2016 from 2:00 p.m. (EST) to 3:00 p.m.
  - To join the webinar, click here, enter your Name and click Enter Room.
  - Registration is not available for this event. The webinar will allow for 100 participants, but if you are unable to join the session there is a teleconference line you may use. That number is 1-877-336-1829 with Access Code: 730 766.

U.S. Customs and Border Protection (CBP)

- In a Federal Register Notice published on October 3, 2016, CBP announced a delay to the Automated Commercial Environment (ACE) becoming the sole CBP-authorized Electronic Data Interchange (EDI) system for processing electronic drawback and duty deferral entry and entry summary filings. A new transition date has not been announced.
- CBP launched a Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) webpage, as well as a webpage dedicated to TFTEA Implementation Updates.

- TFTEA was signed into law on February 24, 2016 and is the first comprehensive authorization of CBP since the Department of Homeland Security was created in 2003 with the overall objective to ensure a fair and competitive trade environment.

For more information, contact: Edward Goetz

CROWELL & MORING SPEAKS

Cari Stinebower spoke at the American Bar Association's 2016 Business Law Section Annual Meeting in Boston on September 8. She discussed Anti-Money Laundering, Sanctions, and Terrorist Financing Laws and Regulations.

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

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