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White House Touts NAFTA Win

It's been a point of contention since before the president was inaugurated in January 2017. When then Commerce Secretary nominee Wilbur Ross was asked about renegotiating the trilateral deal, at his confirmation hearing, he responded, "As to Canada and Mexico, the president-elect has made no secret in his public remarks, nor have I, that NAFTA is logically the first thing for us to deal with."

Five days later, the administration withdrew from the Trans-Pacific Partnership (TPP), also as promised. Now almost two years later, President Trump can add one to his win column: a renegotiated trade agreement among the U.S., Mexico and Canada (USMCA, formerly NAFTA). Just a few hours before a midnight deadline Sept. 30, the three partners announced they had come to deal.

A White House fact sheet highlighted "new rules of origin requiring 75 percent of auto content to be produced in North America," along with "the strongest labor provisions of any trade agreement." In addition, it touted new access to the Canadian market for American dairy products, eggs, and poultry, as well as "a modernized, high-standard chapter" on intellectual property rights and "the strongest measures on digital trade of any agreement."

Of course, the U.S. and Mexico had come to a deal weeks before (see **WTTL**, Sept. 3, page 1). For weeks, trade lawyers, reporters and observers wondered, will they or won't they come to an agreement in time for outgoing Mexican President Enrique Peña Nieto to sign before leaving office. Would Congress approve of deal between just two of the three original partners? That last question remains to be answered.

Administration Defends Deal-Making

Amid observations that the administration would have been better off just approving the Trans-Pacific Partnership (TPP), the text of the new trade agreement among the U.S.,

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Mexico and Canada (USMCA) clearly started from TPP text and moved from there. When the 12 partners finalized the deal, the provisions of the TPP were cited as ground-breaking, so the question becomes, how is this trilateral deal so much better?

In a briefing with reporters, a senior administration official was clearly prepared for that question. “We believe this deal has stronger labor provisions than TPP. We believe it has stronger IP provisions than TPP. We believe it has stronger environmental provisions than TPP. It has much stricter rules of origin with respect to automotive. It has a new review provision that wasn't in TPP. I mean, it really is a completely different -- in our opinion, much more innovative agreement,” the official said.

“In the area of digital trade, we’ve achieved a much stronger, more ambitious commitment on data localization, cross-border data flows, as well as intermediate liability. And the ag outcome is also better, particularly with regard to dairy,” another official noted. In case you were following along at home, digital trade was called electronic commerce in the final TPP text.

Another question had to do with existing steel and aluminum tariffs on Canada and Mexico. “There’s not any sort of agreement on that at this point. Obviously, there's been talk about potential discussions there, but that's on a completely separate track,” one official said. Regarding the ongoing 232 investigation on autos and potential, the official highlighted the accommodation reached among the partners.

“This is an issue ... that we’ve discussed with Mexico and Canada, and have reached an accommodation with them, particularly in light of the changes that are going to be made on the rules of origin that will ensure that anything that is done in the 232 space will at least ensure that we have an accommodation with Canada and Mexico as to their existing auto production.”

Much was also made of the drop-dead deadline of Sept. 30 that the U.S. pushed. “It’s helpful to have deadlines. But this was -- this deadline was real. It was something [USTR] Lighthizer was very clear about. And, you know, regardless of the role it played, we ended up in a good place that ultimately we think is a good deal for all three countries,” the official explained.

NAFTA Response Comes Quickly

As has become the norm, response to the deal’s announcement from lawmakers on both sides of the aisle and trade groups came quickly. Those groups that advocate for free trade applauded the deal, while unions and more progressive members of Congress were wary, waiting to see the final text and implementing legislation.

Sen. Orrin Hatch (R-Utah) was pleased with the deal. “Maintaining a trilateral North American deal is an important prerequisite to preserving and extending those gains and the Trump administration has achieved that goal. I look forward to reviewing this deal to confirm it meets the high standards of Trade Promotion Authority (TPA).”

Democrats were cautious. “The crucial test for a new NAFTA, or any new trade agreement, is whether it is enforceable, particularly with respect to promises to protect worker rights and the environment. Americans are sick of hearing speeches about the benefits of new trade agreements when the agreements in place aren't even enforced and their opportunities don't materialize,” Sen. Ron Wyden (D-Ore.) said.

“Several additional steps must take place after that before any votes take place in Congress and a final deal can be implemented. For example, Congress and the White House also still have to write what's called ‘implementing legislation,’” Sen. Sherrod Brown's office said in a statement: “Mexico must also pass laws to uphold its own commitments in the agreement,” it added.

Senator Heidi Heitkamp (D-N.D.) specifically cited a partial win in agricultural trade. “The new agreement is good news for wheat growers who would no longer face an unfair Canadian grading system ... but it's disappointing the concerns of cattle ranchers and potato farmers were not addressed,” she said in a statement. “Additionally, this agreement doesn't address the steel and aluminum tariffs, which are still putting North Dakota's energy industry and agriculture manufacturing equipment companies in jeopardy,” she added.

Software & Information Industry Association (SIIA) VP for Public Policy Mark MacCarthy said his group was “particularly pleased with the cross-border data flow obligations, the protections for source code/algorithms, and the recognition that the APEC Cross-Border Privacy Rules system is a valid mechanism to facilitate cross-border information transfers while protecting personal information.”

National Foreign Trade Council (NFTC) President Rufus Yerxa said his group was pleased to see the deal would “remain a trilateral agreement,” but added that “the text of this new agreement has hundreds of pages and includes numerous new provisions, so it will take some time for us to fully assess its effects for our member companies.”

American Soybean Association (ASA) President John Heisdorffer praised the deal in context of other trade fights. “Our soybean harvest this year is large, and we are facing great uncertainty in China, so a modernized NAFTA is timely and beneficial for our farmers and rural communities.” Heisdorffer also cited a recent deal to update the Korea-U.S. trade agreement (KORUS). “With USMCA, KORUS, and other agreements in sight, we are hopeful that a negotiated solution to the China tariffs could be in sight,” he said.

The National Pork Producers Council (NPPC) said the agreement would be designated as a “key vote” when it comes to Congress. “We urge Congress to quickly ratify the U.S.-Mexico-Canada trade agreement, and we'll closely monitor this as a key vote for our members, who have demonstrated incredible perseverance as the administration realigns U.S. global trade policy,” NPPC president Jim Heimerl said in a statement.

AFL-CIO Richard Trumka withheld quick judgment. The text “affirms that too many details still need to be worked out before working people make a final judgment on a deal.

Our history of witnessing unfair trade deals destroy the lives of working families demands the highest level of scrutiny before receiving our endorsement,” he said. “We still don’t know whether this new deal will reverse the outsourcing incentives present in the original NAFTA. It also is critical that we see what final labor enforcement, auto rules of origin and government purchasing provisions will look like,” Trumka added.

American International Automobile Dealers Association (AIADA) President and CEO Cody Lusk said the deal “allows the entirety of the auto industry, from manufacturers to hometown dealers, to once again plan for the future.” He remains “deeply concerned” over the administration’s ongoing Section 232 investigation on autos and parts. “Dealers will continue to urge the Trump Administration and Congress to pursue positive trade policies that keep the American auto industry open, dynamic, and competitive,” he said.

JPMorgan Chase Pays \$5 Million to Settle Sanctions Charges

Global financial institution JPMorgan Chase Bank (JPMC) agreed Oct. 5 to pay Treasury’s Office of Foreign Assets Control (OFAC) \$5.3 million to settle charges of violating U.S. sanctions, including on Cuba and Iran, between 2008 and 2012. Violations involve processing 87 net settlement payments of which approximately \$1.5 million (0.14%) “appears to have been attributable to interests of sanctions-targeted parties,” OFAC noted.

“Each of the transactions represented a net settlement payment between JPMC’s client and the non-U.S. person entity whose members included among its numerous airline industry participants eight airlines that were at various times on OFAC’s List of Specially Designated Nationals and Blocked Persons [SDN List], blocked pursuant to OFAC sanctions, or located in countries subject to the sanctions programs administered by OFAC,” the agency said.

“This enforcement action highlights the risks associated with a U.S. person failing to take adequate steps to ensure that transactions that it processes are compliant with U.S. economic sanctions laws — particularly in instances in which a U.S. person has actual knowledge or reason to know, prior to the transaction being effected, of an SDN’s past, present, or future interest in such a transaction,” OFAC said.

JPMC voluntarily self-disclosed the apparent violations. “We’re pleased to resolve this issue, which we self-identified and voluntarily disclosed more than six years ago. We have since upgraded our systems and made substantial enhancements to our sanctions compliance program,” Brian Marchiony, managing director, marketing & communications at J.P. Morgan, wrote in an email to WTTL.

Separately, OFAC has issued a Finding of Violation to JPMC for violating other sanctions programs, including Syria. From approximately 2007 to October 2013, JPMC processed 85 transactions totaling \$46,127.04 and “maintained eight accounts on behalf of six customers who were contemporaneously identified” on the SDN List. JPMC also voluntarily disclosed those violations.

In 2011, JPMC paid an \$88.3 million fine to settle OFAC allegations that it violated eight different trade sanctions programs (see **WTTL**, Sept. 5, 2011, page 4). OFAC claimed the bank violated sanctions targeting Cuba, Iran and Sudan, plus orders blocking the assets of various entities, including ex-Liberian leader Charles Taylor and vessels linked to the Islamic Republic of Iran Shipping Lines.

State Updates USML in Response to Comments

When government agencies request public comments on regulations, sometimes they listen to the feedback. In an interim final rule in the Federal Register Oct. 4, State revised several sections of its U.S. Munitions List (USML) and requested additional public comments on the changes. In general, State eliminated the requirement to return licenses for tech data, added notes to USML Category IV (launch vehicles) and V (explosives), and revised control text in categories VIII (aircraft), XI (electronics) and XV (spacecraft).

State originally requested comments in July 2017 “to assist the Department in identifying existing regulations, paperwork requirements and other regulatory obligations that can be modified or repealed.” In response, State added a note to Category IV(d) to clarify that it does not control certain thrusters. For controls on satellite and spacecraft thrusters, exporters should review USML Category XV(e)(12) and Export Control Classification Number (ECCN) 9A515, State noted (see **WTTL**, Sept. 3, page 1).

It also added a new note to Category V to clarify that for certain materials, approval from the Department is not required for any export, reexport, or retransfer when the defense articles are incorporated into an item subject to the EAR and classified under ECCN 1C608. The rule also revised Category XV(f) to achieve consistency between the provisions related to mission integration and launch failure analysis, to include the limiter “to a foreign person” and updated Category VIII(h)(12) to reflect the idea that “swarming requires the ability to adapt in real-time to changes in operational/threat environment or to deliver munitions on a target.”

State added a note to Category XI(a)(3)(i) to allow commodity jurisdiction reviews for radars, such as those meeting the criteria of forthcoming Federal Aviation Administration (FAA) standards to support sense and avoid operations of UAVs, and revised the note to Category XI(a)(3)(xii) to “increase the power threshold of articles that are not controlled by the paragraph,” it said.

The rule revised Category XI(c)(4) to “implement power thresholds that will exclude those components necessary for 5G wireless technology, but maintain control on those items” that do provide the U.S. a critical military or intelligence advantage.

The rule also highlighted comments that the department did not accept. These included eliminating: the Initial Export Notification, the notification of termination, the annual status letter on agreements, the requirement that purchase documents be submitted with

licenses in furtherance of agreements, the requirement that defense articles be U.S. origin to use the temporary import exemption, and certain recordkeeping requirement. Another rejected comment suggested streamlining the Canadian exemption by integrating the excluded technologies list (ETL). The rule also previewed potential future changes, including creating an exemption for temporary exports of defense articles for repair/replacement by foreign Original Equipment Manufacturer (OEM), continuing work on definitions, modernizing State's IT systems for export licensing.

Subsidies Reform to Tackle Modern Forms of Support

Nearly every country will have a stake in talks to box in subsidy practices increasingly untouched by World Trade Organization (WTO) rules, which have been watered down by dispute settlement over more than two decades, academic and industry experts said Oct. 3 during a WTO event in Geneva on ways to level the playing field for global trade by 2030.

An inability to discipline subsidies is the main substantive "failure" in trade rules, as it allowed "the buildup of tremendous overcapacity" and misallocation of resources, said Georgetown University Law professor Jennifer Hillman at the event on subsidies rules and their application, which was sponsored by the European Commission (EC), the U.S. Trade Representative (USTR) and Japan.

A failure to communicate the benefits of a rules-based trading system has contributed to a backlash against global trade, said Hillman, a former commissioner at the International Trade Commission, a former WTO Appellate Body judge and USTR general counsel and negotiator. "A really false narrative," particularly in the U.S., has allowed discontent to foment "at the feet of anything foreign," she noted.

Nineteenth-century approaches cannot be used to fix 21st-century problems, Harvard Law professor Mark Wu said. The days when allies can march into a capital and "threaten to burn down the house unless the rules are changed" is not a solution, he added. Shaming and trade policy review mechanisms to bolster transparency are not working, Wu noted.

Hillman cited three reasons that subsidy disciplines haven't worked: the subsidy source is viewed too narrowly on the function of the provider, namely whether a government or public body conferred a financial contribution. Second, the remedy "is not very good," as a subsidy provides years of benefits before a case is raised, she said. Finally, obtaining evidence in any subsidy analysis is increasingly difficult, especially when it needs to prove adverse effects, Hillman noted.

The "vast majority" of disciplines over subsidies have been brought under the counter-vailing duty regime, Hillman said, referring to 154 measures currently in place. Counter-vailing duties are more common because they're quicker and can be done unilaterally, but they will never solve the underlying subsidy problem, she said. The remedy pushes those goods into other markets without addressing the underlying overcapacity, she said.

The semiconductor industry began sharing more information in response to the significant recent rise in government subsidies, Jimmy Goodrich, vice president of global policy at the Semiconductor Industry Association, told the event. Subsidy notification at the WTO-level is “severely insufficient,” he added. Over \$21 billion in government investment programs have not been notified to the WTO, he said.

The WTO Agreement on Subsidies and Countervailing Measures (SCM) also is insufficient, Goodrich said. Higher standards, greater transparency and incentives for governments to share information are needed in the provision of equity and capital, he said. Six semiconductor regional groups are discussing 25 government subsidy programs totaling over \$50 billion, he said. Nearly none have been notified to the WTO, he said.

Hillman said one possible solution would be to expand the definition of a prohibited subsidy. The evidentiary burden would be lower, the remedy is clearer and more immediate, she said. A prohibited subsidy would have to be immediately withdrawn, she said. Talks in the trilateral group -- the EC, USTR and Japan -- are advancing, she said (see **WTTL**, Oct. 1, page 5). The trilateral group appears to have teed up work first on technology transfer, then subsidies later on, said Hillman.

Solving trade problems by negotiating new or revised rules has a terrible reputation in Washington, moderator John Magnus said. The U.S. government does not appear ready “to quid-pro-quo away” some portion of its response to China in exchange for updated WTO rules, said Magnus, who is president of TradeWins LLC. The U.S. likely thinks a better set of subsidy rules were in place when the Uruguay Round ended, and that those rules were “hacked back a fair bit” through dispute settlement, Magnus said. Any set of subsidy rules that did not capture what the U.S. government did on autos would be a “laughing stock,” he added.

*** * * Briefs * * ***

TRADE FIGURES: Merchandise exports in August jumped 8.0% from year ago to \$138.9 billion, Commerce reported Oct. 5. Services exports gained 5.35% to \$70.5 billion from August 2017. Goods imports increased 11.1% from August 2017 to \$215.6 billion, as services imports gained 3.1% to \$47.0 billion.

EXPORT ENFORCEMENT: Si Chen, also known as Cathy Chen, Chinese national living in Pomona, Calif., was sentenced Oct. 1 in Los Angeles U.S. District Court to 46 months in prison for conspiring to procure and illegally export sensitive space communications technology, including amplifiers and components commonly used in military communications “jammers,” to China from 2013 to 2015 without Commerce licenses. She pleaded guilty in July to conspiracy to violate IEEPA. Chen has been in custody since arrest in May 2017 (see **WTTL**, May 29, 2017, page 9).

MORE EXPORT ENFORCEMENT: Bryan Singer was sentenced Sept. 27 in Key West, Fla., U.S. District Court to 78 months in prison, followed by three years’ supervised release, for attempting to export items including Ubiquiti Nanostation M2 network modems, TP Link modems, and cable box circuit boards to Cuba without BIS or OFAC licenses. He was indicted in April (see **WTTL**, April 16, page 3). Ubiquiti modems are classified under ECCN 5A002; TP Link modems under ECCN 5A992; and cable box circuit boards EAR99.

ZTE: Dallas U.S. District Court Judge Ed Kinkeade Oct. 3 extended term of court-appointed monitor to March 22, 2022, “because [ZTE] furnished the monitor with false statements” and violated condition of probation, order said. In addition, court required ZTE to provide monitor “with the same access to personnel, books, records, systems, documents, audits, reports, facilities and technical information as it provides to the Special Compliance Coordinator [SCC] under Superseding Settlement Agreement,” it said. Commerce Secretary Wilbur Ross in August named Roscoe Howard, Jr. to be SCC for ZTE deal (see *WTTL*, Sept. 3, page 10).

NORTH KOREA: OFAC Oct. 4 designated Turkish company SIA Falcon International Group, its CEO and general manager for attempts to circumvent UN sanctions on weapons and luxury goods trade with North Korea. OFAC also designated Ri Song Un, economic and commercial counselor at North Korean embassy in Mongolia.

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