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Under Tariff Cloud, NAFTA Partners Stand on Ceremony

With not a single day to spare, President Trump, Canadian Prime Minister Justin Trudeau, and Mexican President Enrique Peña Nieto Nov. 30 signed the new NAFTA in Buenos Aires on the sidelines of the G-20 meeting. Now comes the hard part. Containing 34 chapters, four annexes, and six side letters between U.S. and Canada, the agreement, now called by different acronyms in all three countries, moves to Congress, where nothing is guaranteed (see **WTTL**, Nov. 19, page 2).

Despite the hoopla and ceremony, the leaders of Canada and Mexico did not get everything they wanted in Argentina. During the signing ceremony, Trudeau mentioned the recently announced GM plant closures, including one in Canada. "It's all the more reason why we need to keep working to remove the tariffs on steel and aluminum between our countries," he said. Canada did succeed in preserving "the cultural exemption and the use of binational panels to resolve disputes on duties," Trudeau's government said in a press release.

Literally on his last day, Pena Nieto highlighted the deal's new provisions at the signing ceremony. "The inclusion of new provisions on e-commerce, information technologies, and trade-enabling practices are now part of the agreement. In fact, one third of the agreement includes topics that were not included in the current agreement," he said.

Never one for modesty, President Trump later tweeted: "Just signed one of the most important, and largest, Trade Deals in U.S. and World History. The United States, Mexico and Canada worked so well together in crafting this great document. The terrible NAFTA will soon be gone. The USMCA will be fantastic for all!" Whether this is the largest trade deal in history is up for debate.

U.S., Canada Resolve Disputes in Side Letters

In side letters to the USMCA deal the three leaders signed Nov. 30, the U.S. and Canada handled potential Section 232 tariffs on autos, future 232 measures, energy, wine and

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natural water resources. On autos, the U.S. agreed to exclude from any imposed tariffs: 2.6 million passenger vehicles imported from Canada on an annual basis; light trucks imported from Canada; and such quantity of auto parts amounting to 32.4 billion U.S. dollars in declared customs value on an annual basis.

On future measures, the U.S. will not impose any new Section 232 tariffs on Canada for at least 60 days after imposition of such a measure. “During that 60-day period, the United States and Canada shall seek to negotiate an appropriate outcome based on industry dynamics and historical trading patterns,” the letter said. Another side letter tackled disciplines related to energy regulatory measures and transparency.

British Columbia (BC) restrictions on wine sales have been the subject of a contentious WTO dispute. In the side letter, BC agreed to eliminate the measures that allow only BC wine to be sold on regular grocery store shelves while allowing imported wine only to be sold through a so-called “store within a store,” and “those contested measures shall not be replicated,” the letter said. In July the WTO Dispute Settlement Body established a panel on the issue (see **WTTL**, July 23, page 8).

The side letter on natural water resources noted, “Unless water, in any form, has entered into commerce and become a good or product, it is not covered by the provisions of the Agreement. Nothing in the Agreement would oblige a Party to exploit its water for commercial use, including its withdrawal, extraction, or diversion or export in bulk.”

Industry, Lawmakers Respond to Deal Signing

It was as if the responses were prepared beforehand. Within minutes of the leaders’ signing, business and trade groups and lawmakers responded to the new NAFTA deal. Business Roundtable commended the signing, but hoped to “see a prompt resolution that removes Section 232 steel and aluminum tariffs and retaliatory tariffs between all three countries.” In addition, the group said it would “review the final text” of the deal, address any issues and then work with the administration “along with Democrats and Republicans in Congress - to move USMCA across the finish line.”

Retiring Sen. Orrin Hatch (R-Utah) said he would also review the deal, but was “optimistic” the deal would “help to bolster our economy,” he said in a statement. “In the coming months, Congress will have the opportunity to debate the details of USMCA and consider how it will impact workers and job creators in this country. I encourage my colleagues to take the time to carefully review the agreement and engage in a meaningful dialogue with the administration as intended by Trade Promotion Authority.”

Even stalwart free trade advocates can still surprise. “As currently drafted this deal will put Florida seasonal vegetable growers out of business. It allows Mexico to dump government subsidized produce on the U.S. market. Going forward America will depend on Mexico for our winter vegetables. Unacceptable,” Sen. Marco Rubio (R-Fla.) tweeted.

National Foreign Trade Council (NFTC) applauded the governments for signing the deal, but raised concerns about its provisions, as well as “the precedent that these outcomes set for the negotiation of future trade agreements.” For example, the group cited the review and termination provisions, weakened investor-state dispute settlement (ISDS), and government procurement.

“In the area of customs and trade facilitation, while we are pleased to see that the informal entry provisions that the U.S. sought were obtained, we are very disappointed in the outcome regarding de minimis levels,” NFTC wrote in a statement. The group also pointed to the Section 232 steel and aluminum tariffs that were not immediately lifted.

The text of the deal “contains some improvements that progressives have long demanded, some damaging terms we have long opposed and some important unfinished business,” Lori Wallach, director, Public Citizen’s Global Trade Watch noted. President Trump “and commentators who don’t know better are likely to place undue significance on this ceremonial event, but the signing is simply the next step in an ongoing process that must produce a final deal that can win majority support in Congress,” she added.

Software & Information Industry Association (SIIA) specifically cited “the agreement’s cross-border data flow obligations, protections for source code/algorithms, and recognition that the APEC Cross-Border Privacy Rules system is a valid facilitator of cross-border data flows, including financial data, while protecting personal information” as cause for celebration.

Va. Company Settles Charges of Violating Ukraine Sanctions

In a case that would make Google cringe, Cobham Holdings, Inc. (Cobham) of Arlington, Va. agreed Nov. 27, 2018, to pay Treasury’s Office of Foreign Assets Control (OFAC) \$87,507 to settle charges that its former subsidiary Aeroflex/ Metelics, Inc. violated Ukraine sanctions. Charges involve the indirect export of components to be incorporated into commercial air traffic control radar to a person owned 50% or more, directly or indirectly, by a person identified on OFAC’s List of Specially Designated Nationals (SDN).

Cobham voluntarily self-disclosed the apparent violations on behalf of Metelics. Between July 2014 and January 2015, Metelics sold 3,400 LM 102202-Q-C-301 switch limiters, 6,900 MSW 2061-206 switches, and 20 silicon diode switch limiter samples through distributors in Canada and Russia to Almaz Antey Telecommunications LLC (AAT) in Russia, which was 51% owned by Joint-Stock Company Concern (JSC) Almaz-Antey, a blocked entity.

“Although OFAC had designated JSC Almaz-Antey and added it to the SDN List approximately two weeks before, and despite the inclusion of two uncommon terms in the names of both the SDN and the specific end-user for the subject transaction (‘Almaz’ and ‘Antey’), Metelics’ denied party screening produced no warnings or alerts for AAT,” OFAC noted.

“Cobham plc has a robust set of procedures in place for all export-related activities and the Department of Homeland Security, Homeland Security Investigations, has recognised Cobham for its diligence in identifying and reporting red flags in export transactions. Since the sale of Aeroflex Metalics [sic] in 2015, Cobham plc has invested significantly in new and enhanced procedures for export control, as recognized by OFAC,” a company spokesperson wrote in an email to WTTL.

Aeroflex Incorporated agreed in August 2013 to pay \$8 million civil penalty under a two-year consent agreement with State for what a department draft charging letter called “inadequate corporate oversight and a systemic and corporate-wide failure to properly determine export control jurisdiction over commodities” from 1999 to 2009 (see **WTTL**, Aug. 12, 2013, page 8). Cobham completed its acquisition of Aeroflex in September 2014.

Industry Outlines U.S.-Japan Trade Objectives

When the U.S. Trade Representative (USTR) asked for public comments on a proposed U.S.-Japan Trade Agreement “in order to develop U.S. negotiating positions,” it probably knew what it was asking for. And so U.S. industry responded with 159 comments containing a multitude of sometimes-contradicting requests.

For one, the Committee to Support U.S. Trade Laws (CSUSTL) outlined six areas that are “important to all, or some,” of its members: currency manipulation; customs enforcement; FTA rules of origin; state-owned enterprise rules; government procurement; and inclusion of non-tariff barrier provisions. USTR will hold a public hearing on the deal Dec. 10 (see **WTTL**, Nov. 5, page 7).

The Internet Association said an agreement with strong digital provisions is “a landmark opportunity for both countries.” Negotiators should prioritize key objectives for a new digital economy chapter, including promoting the free flow of information, preventing data localization and imposing no customs duties on digital transmissions. The association also cited important customs and trade facilitation issues such as information and communications technology (ICT) imports and de minimis thresholds consistent with U.S. level.

The American Soybean Association (ASA) and U.S. Soybean Export Council (USSEC) highlighted reducing tariffs and increasing market access as key objectives. Under the Trans-Pacific Partnership (TPP), for example, Japan would have gradually eliminated its tariffs on soybean flour with oil residue, soy protein with protein content over 90%, and soy protein with protein content between 80-90%, the groups wrote. “As such the ASA and USSEC would expect the same deal or better” in a new deal, they added.

Along those same lines, the National Cattlemen's Beef Association (NCBA) cited the importance of addressing the current tariff rate of 38.5% on U.S. beef and “volume-based safeguard that can trigger a 50% snap back tariff.” It also underscored the potential tariff reductions in the TPP. “Considering the benefits this presents for U.S. beef producers and Japanese consumers alike, we expect nothing less under a U.S.-Japan Trade Agreement,” the NCBA wrote.

The American Apparel & Footwear Association (AAFA) echoed those sentiments. “An overarching goal of the negotiations should be to craft an agreement that expands trade between the United States and Japan, while reducing regulatory and market access costs currently associated with those trade links,” it wrote. Specifically, AAFA urged “immediate and reciprocal elimination of the high duties that both countries maintain on textiles, travel goods, footwear, and apparel; flexible rules of origin; facilitative customs procedures, regulatory harmonization or alignment, and strong intellectual property rights.

The National Association of Manufacturers (NAM) cited several challenges that manufacturers face in Japan, including: the country’s regulatory environment, competition policy rules, implementation of geographic indications (GIs) as part of its agreement with the European Union, complex and time-consuming customs processing, and preferential agreements with other countries.

Not surprising, the National Automobile Dealers Association (NADA) argued that a new U.S.-Japan trade agreement should clearly exempt automobiles and auto parts imported from Japan from any new Section 232 tariffs or quotas. In addition, a deal should address the Section 232 tariffs on steel and aluminum imported from Japan that were imposed earlier this year, it noted.

AFL-CIO urged the inclusion of a robust labor chapter. “Given that the U.S. and Japan have relatively high wages and labor standards, neither party should find it particularly difficult to agree to the robust labor obligations we propose. Moreover, these rules should be the common basis for Japan’s and the United States’ economic relationships with their other trading partners,” the union wrote.

“Any deal with Japan must include no negative lists, no ratchet clauses and no ‘Regulatory Impact Analysis’ requirements. The focus must be on trade, not on the efforts of multinational corporations to free themselves from the constraints that democratic societies may impose,” AFL-CIO added.

Environmental group Sierra Club wrote that a new trade agreement “must exclude national treatment for trade in gas. “In addition, “the deal must require each country to adopt, maintain, and implement robust climate, air and water, conservation, labor, Indigenous rights, and human rights protections, including policies that fulfill the Paris Climate Agreement,” the organization wrote.

Sierra Club also argued that any deal must not include any version of investor-state dispute settlement (ISDS), and “must exclude the broad substantive rights that corporations have used repeatedly to challenge environmental and health protections in ISDS tribunals.”

Unlike other groups, the Alliance for American Manufacturing (AAM) applauded the administration’s withdrawal from the TPP. “Withdrawing from the TPP was an important first step in a long road toward reforming the manner in which the United States approaches international trade policy. Thus, it is essential that the current administration

take a drastically different approach than that of the previous one and its approach to the TPP text on matters such as currency manipulation and rules of origin (ROO),” the group wrote. “We urge the inclusion of strong, enforceable rules that can be applied in a timely manner in trade agreements to deter and penalize currency manipulation. We also support utilizing existing CVD [countervailing duty] laws to address currency manipulation,” it added.

WTO Members Try One More Reform Proposal

After months of the U.S. rejecting proposals and letting the World Trade Organization (WTO) Appellate Body dwindle to its bare minimum, a dozen members led by the European Union (EU) and China Nov. 26 unveiled a proposal to break the deadlock in the body.

The proposal, which will be presented at the WTO General Council meeting Dec. 12, would: put in place new rules for outgoing Appellate Body members which make clear in which cases they can stay on to complete the appeal proceedings they are working on; and ensure that appeal proceedings are finished on time in line with the 90-day timeframe set out in the WTO rules, unless the parties in the dispute agree otherwise (see **WTTL**, Nov. 26, page 5).

It would also: clarify that the legal issues that are subject to appeal by the Appellate Body do not include the meaning of domestic legislation; indicate that the Appellate Body should only address issues necessary to resolve the dispute; and introduce annual meetings between WTO members and the Appellate Body to discuss in an open way systemic issues or trends in jurisprudence.

“The appellate body function of the WTO dispute settlement system is moving towards a cliff’s edge,” EU Trade Commissioner Cecilia Malmström said in a statement. “I hope that this will contribute to breaking the current deadlock, and that all WTO members will take responsibility equally, engaging in good faith in the reform process,” she added.

In a separate press conference Nov. 24, Chinese Vice Minister of Commerce Wang Shouwen outlined three basic principles and five propositions for WTO reform. One proposition clearly had Beijing’s best interests at heart. “The reform should address the excessive agricultural subsidies of some developed members which has [sic] caused the long-term and serious distortions for the international agricultural trade. The abuse of trade remedy measures should be corrected, especially the surrogate country approach in the antidumping investigation,” the minister said.

In another, China urged that “WTO reform should respect the respective development models of its members. Reforms should eliminate some members’ discrimination against specific state enterprises in investment security review and anti-monopoly review, and correct some developed members’ abuse of export control measures to obstruct normal technical cooperation,” Wang said.

* * * **Briefs** * * *

YARN: In 5-0 preliminary vote Nov. 30, ITC found U.S. industry may be injured by allegedly dumped and subsidized imports of polyester textured yarn from China and India.

COMMERCE: Senate Nov. 28 confirmed Karen Dunn Kelley to be deputy Commerce secretary in 62-38 vote. President sent Senate nomination in June (see **WTTL**, June 11, page 8). Kelley was confirmed in August 2017 to be under secretary for economic affairs, performing nonexclusive duties of deputy secretary. Before joining Commerce, Kelley served as senior managing director of investments at Invesco, according to Commerce bio.

WHISTLEBLOWERS: SEC's Whistleblower Office received 202 FCPA-related complaints during fiscal year (FY) 2018, out of 5,282 total tips, according to report released Nov. 14. During FY 2017, office received 210 FCPA-related tips, 238 in FY 2016, and 186 during FY 2015. In addition to FCPA, other tips involved offering frauds, such as Ponzi, or Ponzi-like, schemes, false or misleading statements in company's offering memoranda or marketing materials, false pricing information, accounting violations, and internal controls violations. Whistleblower rules became effective in August 2011.

DIGITAL CURRENCY: For first time, OFAC Nov. 28 identified digital currency addresses associated with two Iranian entities agency added to list of Specially Designated Nationals (SDN). "We are publishing digital currency addresses to identify illicit actors operating in the digital currency space. Treasury will aggressively pursue Iran and other rogue regimes attempting to exploit digital currencies and weaknesses in cyber and AML/CFT safeguards to further their nefarious objectives," said Treasury Under Secretary for Terrorism and Financial Intelligence Sigal Mandelker in statement....At same time, OFAC posted two new FAQs on blocking digital currency. "Once it has been determined that your institution is holding digital currency that is required to be blocked pursuant to OFAC's regulations, you must ensure that access to that digital currency is denied to the blocked person and that your institution complies with OFAC regulations related to blocked assets," it wrote.

AUTOS: USTR Nov. 28 threatened to impose tariffs on Chinese auto imports, unrelated to Section 232 investigations on autos and auto parts. "At the President's direction, I will examine all available tools to equalize the tariffs applied to automobiles," USTR Robert Lighthizer said in statement. Lighthizer cited 40% tariffs China imposes on U.S. autos, while U.S. imposes 27.5% tariffs on Chinese cars. "We are continuing to raise these issues with China. As of yet, China has not come to the table with proposals for meaningful reform," he added.

IRAN: Abul Huda Farouki of McLean, Va., CEO of Anham FZCO, defense contractor based in UAE; his brother Mazen Farouki of Boyce, Va., president and founder of Unitrans International Inc.; and Salah Maarouf of Fairfax, Va., were indicted Nov. 27 in D.C. U.S. District Court on charges of violating Iran sanctions, fraud and money laundering. All were arrested two days later and released on \$50,000 bond. Defendants allegedly conspired to increase Anham's profits in connection with Defense contract by shipping warehouse building materials to Afghanistan via Iran.