WHO'S WHO LEGAL

Trade & Customs: Roundtable

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TRADE & CUSTOMS

Who's Who Legal brings together Daniel Moulis at Moulis Legal, Gary Horlick at Law Offices of Gary N Horlick, Christopher Kent at Cassidy Levy Kent and Anzhela Makhinova at Sayenko Kharenko to discuss issues facing trade and customs lawyers and their clients in the industry today.

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How has your trade and customs work been affected by worldwide geopolitical issues such as Brexit and the US administration's trade stance?

Daniel Moulis: Both of these events are side effects of a bigger phenomenon. They reflect the fear of the electorates of powerful Western economies for their job security and their personal security. The first is caused by the competitiveness of lower socio-economic countries, the second by people movement and terrorism. In Australia, Brexit and Trump have not had a specific and separable effect on our trade and customs work. But the general climate of fearfulness definitely has. Protection of local industries and their jobs is on the uptick, through increased anti-dumping and anti-subsidisation action, tough import monitoring and "Buy Australia" preferences. The pursuit of national security objectives, and the protection of the local citizenry, have been accompanied by elevated import and export controls, including trade sanctions.

Gary Horlick: Brexit and Trump have almost doubled my workload. I had expected to spend 2017 in TPP implementation, two WTO cases, and two NAFTA chapter 19 cases and compliance with them. I lost the TPP implementation when it was torn up, but I have all the other work plus: work to save NAFTA for a wide range of US farmer and rancher interests, including work on eventual possible constitutional litigation; one of the few trade actions I had never done, a section 232 national security investigation of steel imports; detailed Brexit planning work for one large US multinational and an association of exporters of wine to the UK; counsel to the government of the UK on several items; and I co-taught a course on Brexit with Jennifer Hillman in autumn 2016, possibly the first one, and we co-edited a book based on the course (second edition expected in spring 2018).

Christopher Kent: It would not be an understatement to characterise the impact of worldwide geopolitical issues on the practice of Canadian international trade and customs law as fundamental and unprecedented.

With the ongoing NAFTA negotiation increasingly showing signs of stalemate, we have received numerous requests for sectoral analyses of the legal implications of US withdrawal from NAFTA. Canadian companies are also finding themselves exposed to increased use of both traditional (ie, AD, CVD and safeguards) and less traditional (eg, section 232 of the Trade Expansion Act of 1962) trade remedy investigations in the US.

Anzhela Makhinova: Brexit and the US administration's trade stance have not yet changed the trade work handled by Ukrainian law firms – most probably because it is currently unclear when and how (by which legal instruments) they will be implemented in practice.

However, at present the main topic of debate between trade lawyers and scholars is whether and how Brexit will affect the Deep and Comprehensive Free Trade Area (DCFTA), being part of the Association Agreement between the European Union and Ukraine. Moreover, it is expected that after Brexit, Ukraine will need to renegotiate a new free trade agreement (FTA) with the UK, instead of the DCFTA, which is of a particular interest to Ukrainian agricultural producers.

As for the US trade policy "buy American, hire American", according to the publicly available information, Donald Trump is going to introduce some restrictions with respect to imports into the US of different steel products. It goes without saying that irrespective of the form of such restrictions (eg, additional tariffs, tariff-rate quotas, etc) it will have a significant negative impact on Ukrainian steel producers, whose exports comprised a major part of Ukraine's total exports to the US during recent years – especially in view of the fact that the US has already been applying anti-dumping duties against Ukrainian steel products for a long time. In particular, five out of six anti-dumping measures currently applied against Ukraine by the US are imposed on different steel products. Some of the above anti-dumping duties have been imposed since 1994 and the duty rates range from 7.47 per cent to 237.91 per cent.

Are you facing any current issues in trade and customs law particular to your jurisdiction? What are the effects of these?

Daniel Moulis: Economic instability has led to a hair-trigger attitude towards the imposition of anti-dumping and countervailing measures; increased industry and consumer costs; and degraded competition in the markets affected. In Australia, we are also seeing a lot more trade enforcement action. Targeted monitoring and compliance campaigns by Australian Border Force, for example, to seek evidence of cargo that could be subject to anti-dumping measures, or that might not enjoy trade preferences, have had deleterious effects on importers, traders and distributors, and on the end-user industries they service. Our trade defence team has been busy in these areas.

Gary Horlick: The section 232 proceeding is, I think, unique to the US, although it is based on article XXI of GATT. If it is imitated or repeated by the US it will pose a major legal challenge to the world trading system.

Christopher Kent: In addition to the points discussed above, Canada has introduced a number of significant changes to its trade remedy enforcement system, which will fully come into force in late 2017 or early 2018, and which will have a significant impact on interested parties in anti-dumping and countervailing duty cases.

These changes include the implementation of anti-circumvention provisions and a formal scope ruling process.

Anzhela Makhinova: Unfortunately, conflict between Russia and Ukraine caused by the annex of Crimea and the war on the eastern part of Ukraine has had a considerable negative impact on the trade relations between these countries, resulting in the application of huge range of different bans and trade restrictions (eg, suspension of the CIS Free Trade Area, import and transit bans, personal sanctions etc) against each other during 2014–2017.

Said "trade war" has also resulted in the joint application, by Russia and Ukraine, of trade defence instruments against each other. For instance, the Eurasian Economic Union (consisting of Russia, Belarus, Kazakhstan, Kyrgyzstan and Armenia) currently conducts three out of eight anti-dumping investigations and reviews against Ukraine, and applies seven out of 18 anti-dumping measures against imports of various products with their origin in Ukraine. Like night follows day, Ukraine is carrying out three out of three anti-dumping investigations and reviews against Russia, and imposing nine out of 16 anti-dumping measures against imports with their origin in Russia. The first countervailing duty in the history of Ukraine has also been applied against Russia.

These joint bans and restrictions have already been reflected in several dispute settlement cases initiated by Russia and Ukraine against each other in the WTO. Particularly noteworthy disputes that Russia has initiated with Ukraine are Anti-Dumping Measures on Ammonium Nitrate (DS493) and Measures relating to Trade in Goods and Services (DS525). Ukraine, meanwhile, has initiated the following disputes with Russia: Measures affecting the importation of railway equipment and parts thereof (DS499); Measures Concerning Traffic in Transit (DS512); and Measures Concerning the Importation and Transit of Certain Ukrainian Products (DS532).

We expect this trend to continue and the major part of workload of the trade lawyers in Ukraine will relate to addressing the above issues.

Another "modern" trend in Ukraine is conclusion of the FTAs with different countries. At present, Ukraine has concluded 16 FTAs, two of which entered into force in 2017, namely: DCFTA with the EU effective since 1 September 2017 and the Canada-Ukraine FTA effective since 1 August 2017. Now Ukraine is actively negotiating the conclusion of the FTA with Israel and Turkey. Moreover, in the near future, Ukraine is going to accede to the Regional Convention on Pan-Euro-Mediterranean Preferential Rules of Origin (the relevant draft law has already been submitted for the consideration of the Parliament of Ukraine). Needless to say, the Ukrainian trade lawyers are actively engaged in advising clients on preferences granted under the different trade regimes, rules of origin, etc.

A comprehensive reform of the trade defence instruments in Ukraine is now at the centre of all trade practitioners' attention as well. This year the Ministry of Economic Development and Trade (ie, a state agency responsible for conducting trade defence proceedings in Ukraine) has published new draft laws aimed at

considerable revision of the effective legislation in the field of trade defence remedies, which was adopted in 1998 and is now outdated and does not fully comply with the recent WTO approaches. It is expected that adoption of new legislation will allow the Ukrainian producers to more efficiently apply trade defence remedies to protect themselves from unfair practices and a surge in imports. On the other side, the draft laws will considerably facilitate the participation of foreign producers in the investigations, and diminish risks of the WTO cases against Ukraine.

What effect is China's growth and economic policies having on global trade? How is this affecting your practice?

Daniel Moulis: China's growth and rapid development have been guided and facilitated by a strongly nationalistic mindset and production-friendly financial and industrial policies. The scale of its industrial development has been massive. Global trade has become more competitive as a result. The sheer size and threat, in commercial terms, have led to an increase in trade defence under many different instruments – trade rules, standards, sanitary/phytosanitary, investment restrictions, labelling… you name it, domestic industries are using it to secure protection. New rules on state commercial enterprises are being introduced into trade pacts as a means of attacking what the negotiating parties consider unfair market practices. Economic and political systems, not just measures (and not only those of China) are now being interrogated for their trade effects, challenging previous notions of sovereignty and comparative advantage. Resultantly, we find ourselves quite busy!

Gary Horlick: There is a lot more of it. Trade law around the world is being redesigned in response to the growth of China, for better or worse – eg, the (mis)application of the "particular market situation" language in anti-dumping law.

Christopher Kent: The effect of China's growth and trade policies on Canadian trade and customs law practice has also been very significant. For manufacturing operations in Canada where Chinese goods compete (particularly in areas of steel and other commodities), the continued pervasiveness of Chinese government intervention and subsidisation is undermining market signals that would otherwise lead to cuts in production capacity. The Canadian economy is experiencing both direct and indirect "ripple effects" of China, as even if Chinese goods are subject to trade remedy measures, they are causing displacement of imports to Canada from other countries in which AD-CVD measures are not in place against China.

Anzhela Makhinova: Unquestionably, the impact of China on the global trade cannot be underestimated. Taking the lead in the global trade, China is "famous" for its low-price exports, which makes it almost impossible for the domestic industry of any other country to compete effectively. Ukraine is not an exception and is also exposed to the impact of Chinese exports, which accounted for approximately 12 per cent of Ukraine's total imports in 2016. Even though there is only one pending investigation in Ukraine against products with their origin in China, anti-dumping measures are applied against imports into Ukraine of the following products from China: electric lightbulbs; certain ferrous metal products; citric acid; and seamless steel pipes. Another issue

of high concern is that Ukrainian producers are forced to compete with Chinese producers on the foreign markets and to decrease their prices. As a consequence, anti-dumping duties are applied against imports with their origin in Ukraine in lots of foreign countries. Some markets have been fully closed to Ukrainian products because of the impossibility to compete with very low Chinese prices. The worst-hit industries are steel and fertilisers, which are traditional Ukrainian exports.

What do you think will be the next major trend in WTO or other trade disputes?

Daniel Moulis: "Will there be any?" is probably the next major trend. Not "Will there be any disputes?" – of course there will – but "What will the forum for their resolution be, and will it be workable?" The present impasse over the selection process for new Appellate Body appointments, and the case logjam that confronts the Appellate Body caused by that impasse and other underlying reasons, are serious and regrettable.

Gary Horlick: If TPP is re-formed with the other 11 countries, and Korea and others join, the dispute settlement system in TPP – if it works in practice – could become the basis for the resolution of disputes outside the WTO, obviously especially for disputes over obligations not in the WTO.

Christopher Kent: In addition to the potential termination of NAFTA and Brexit, the effectiveness of the WTO dispute resolution process is in jeopardy as a result of US refusal to nominate Appellate Body members.

Anzhela Makhinova: Taking into account the recent geopolitical trends, and specifically from Ukraine's perspective, we believe that the following issues would be on the WTO's agenda. First, the application of new methodologies to calculate the dumping margin that allows one to efficiently counteract unfair practices of the exporting countries – first China, granted market economy status since December 2016, and then Russia with its "dual gas pricing system". We assume that many WTO members will try to improve their legislation to overcome the above challenges, similar to the EU and its new proposal on market distortions in the course of the anti-dumping cases. Second, most probably in the very near future, the WTO system will be forced to decide whether article XXI of the GATT is competent, and how it should be interpreted, as this argument has already been raised in the course of several recent disputes considered by the WTO. The last time it was raised was in the dispute DS526: United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights. The relevant decisions may open a Pandora's box, which stayed closed during the whole existence of the WTO and the GATT 1994. Needless to say, nobody can now predict the consequences of the relevant decisions of the panels and/or the Appellate Body to the global trading system.

Are WTO rules up to the task of handling global trade in today's world? What can be done if they are not?

Daniel Moulis: WTO rules are the legal bedrock upon which governments must base their trade regulations. It is difficult to develop those rules and to modernise them to deal with new developments and new areas of cross-border commerce within the WTO, because it is too hard to get that many countries to agree on a single text. This has led to the articulation of new modes of behaviour in FTAs and RTAs in areas such as e-

commerce, competition rules and state enterprises. That is not a bad thing. In my view the WTO will preserve both a baseline and a “golden thread” in terms of principle and precedent. Similarity in FTAs and RTAs with respect to the underlying principles they espouse should ultimately encourage new multilateral agreements at the WTO level, by way of a convergence of the practices and understandings of the members on issues of common relevance.

Gary Horlick: They are doing a pretty good job but it becomes clear that the lack of good faith by many major trading nations in applying the trade remedy rules as pure protection, and the failure to comply with panel/AB decisions, is reaching a point where the WTO will become discredited just as GATT was in the broader public.

Christopher Kent: The jury is out on this question and the combination of continued activism in WTO Appellate Body decision-making and protectionism/anti-globalism in a number of WTO member states could spell the demise of the WTO system – at least as we currently know it.

Anzhela Makhinova: Even though most of the WTO agreements were negotiated more than 20 years ago, the WTO continues to take the lead on governing global trade – although not as efficiently as before. In our view, there are two major reasons for the above trend. First, the WTO has recently faced lots of new challenges that are required to be addressed somehow (eg, climate change; technology developments that may lead to huge unemployment around the world; new types of protectionism, such as private standards, fair trade issues, etc). Second, “traditional” trade vehicles (ie, tariffs, anti-dumping measures, etc), unfortunately do not allow us to overcome all the above-mentioned new challenges. Therefore, the WTO should create new, efficient tools. However, under mounting economic and political pressure around the globe, it is now very difficult for the international community to agree on “new rules of the game”, which is confirmed by the recent results of the Doha Round. The situation is complicated by uncertainty around the appointment of Appellate Body members being blocked by the US. Given the situation, we believe that, in the short term, the WTO dispute settlement may be an efficient tool to solve the most urgent issues until WTO members agree on new rules – providing, of course, if the US unblocks appointment of the new Appellate Body members. If not, then all new challenges would most probably be addressed at the bilateral level, rather than multilateral.