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Nonprofit Group Gets "Poor Excuse" on Section 232 Auto Report

A nonprofit that has spent the last four months trying to get Commerce's Section 232 report on the effect of imports of automobiles and automobile parts on U.S. national security finally got an explanation for why it has not yet been made public. Commerce is currently reviewing whether the report constitutes "a presidential record," in which case it would not be subject to disclosure under Freedom of Information Act (FOIA), the department wrote in a letter June 13 to Cause of Action (COA) Institute.

> Within hours of the statutory deadline to impose tariffs, the president in May gave the USTR six months to reach an agreement on auto imports with the European Union (EU), Japan and "any other country the Trade Representative deems appropriate" (see **WTTL**, May 20, page 3). Commerce Secretary Wilbur Ross in February formally submitted the results of the investigation, but never made it public.

Cause of Action first filed a FOIA request to get the report in February. "The report, if an agency record, would be exempted from disclosure under FOIA pursuant to the presidential communications privilege and/or the deliberative process privilege, until all actions deemed necessary to adjust the imports of automobiles and automobile parts so that such imports will not threaten to impair the national security have been completed," Commerce wrote in its letter.

"Although this correspondence provides the first substantive response from the government about why it refuses to release the 232 auto tariff report, it is a misguided and unfortunate attempt to withhold information from the public," James Valvo, counsel and senior policy advisor at COA Institute, said in a statement. "The government is grasping for any excuse to prevent access to the report, which will not go unchallenged," he added.

Walmart Pays $282 Million to Settle Bribery Charges

Global retailer Walmart agreed June 20 to pay more than $282 million to settle parallel Securities and Exchange Commission (SEC) and Justice charges of violating the Foreign

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Corrupt Practices Act (FCPA) in Brazil, China, India, and Mexico from around July 2000 through April 2011. During this time, Walmart subsidiaries in those countries "operated without a system of sufficient anti-corruption related internal accounting controls," the SEC noted. As a result, the subsidiaries "paid certain third-party intermediaries (TPIs) without reasonable assurances that certain transactions were consistent with their stated purpose or consistent with the prohibition against making improper payments to government officials," it added.

> Under the settlement, Walmart agreed to pay more than $144 million in disgorgement to settle the SEC charges and approximately $138 million under a non-prosecution agreement (NPA) with Justice. Under the NPA, the company "has committed to continuing to enhance its compliance program and internal accounting controls related to anti-corruption." Brazilian subsidiary WMT Brasilia pleaded guilty in Alexandria, Va., U.S. District Court to causing an FCPA violation.

"Specifically, Walmart Brazil falsely recorded $527,000 in payments to Brazil Intermediary as payments to certain Brazil construction companies even though Walmart Brazil employees intended that the payments would go to Brazil Intermediary and knew that the payments would go to Brazil Intermediary. These false records were then consolidated into Walmart's financial records and were used to support Walmart's own financial reporting. Walmart Brazil caused these payments to be falsely recorded in Walmart's books and records," the plea agreement noted.

"We're pleased to resolve this matter," said Walmart President and CEO Doug McMillon in a statement. "Walmart is committed to doing business the right way, and that means acting ethically everywhere we operate. We've enhanced our policies, procedures and systems and invested tremendous resources globally into ethics and compliance, and now have a strong Global Anti-Corruption Compliance Program," he added.

Mexico Ratifies USMCA, Congress Urged to Follow Suit

And then there were two. As soon as the Mexican Senate June 19 approved the new U.S.-Mexico-Canada (USMCA) trade agreement in a 114-4 vote, supporters and industry groups jumped in, arguing for a quick ratification in the U.S. Congress. The vote took place just two weeks after President Trump threatened to impose tariffs on all Mexican products, then hailed a deal to avoid the tariffs (see **WTTL**, June 10, page 1).

The Mexican Economy Ministry welcomed the approval of "this important instrument, which was the result of joint work carried out by the Government of Mexico, the private sector and society in general in order to consolidate the benefits of economic integration in North America and promote the well-being of all Mexicans," the ministry wrote in a blog post.

U.S. Trade Representative (USTR) Robert Lighthizer agreed. "The USMCA is the strongest and most advanced trade agreement ever negotiated. It is good for the United

States, Mexico, and Canada in a way that truly benefits our workers, farmers, and businesses. The USMCA's ratification by Mexico is a crucial step forward," he said.

House Ways and Means Committee Ranking Member Kevin Brady (R-Texas) said that the vote demonstrates "Mexico's solid commitment to serious reform and tough new rules to create fairer trade. Now it's time for the U.S. Congress to pass USMCA as soon as possible to unlock the benefits of this agreement for U.S. workers and our local businesses. The longer Congress delays, the more our country loses out on new jobs, more customers for Made-in-America goods, and a stronger economy."

> Software & Information Industry Association (SIIA) Senior Vice President for Global Public Policy Carl Schonander: "With its robust digital chapter that includes strong provisions on cross-border data flows, USMCA reinforces the importance of working with friends and allies to shape global trade rules that reflect the realities of 21st century trade."

The day after the Mexican vote, Sen. Ron Wyden (D-Ore.), who has argued for the need for stricter enforcement mechanisms in the deal, defended the digital trade obligations in the updated agreement, which "should become the model for future agreements." Specifically, "the agreement lays out digital rules of the road to ensure that e-commerce and digital services don't face unfair barriers to trade that impede the growth of the digital economy and the jobs it supports in the United States," he told the Internet Association (IA).

The deal "addresses many other trade topics -- from customs facilitation to safe harbors from copyright liability and content moderation -- that the digital economy and internet-enabled economy depend on. This opens the doors for small- and medium-sized internet-enabled businesses to enter new foreign markets," Wyden added.

Hundreds of Businesses Protest Proposed U.S Chinese Tariffs

In what is just a small taste of wide-ranging opposition to the administration's announcement of potential 25% tariffs on all remaining Chinese imports, Apple June 17 joined a long list of U.S. corporations calling on the Trump administration to back off its threat. In its formal comments to USTR's office, Apple argued that tariffs are not only bad for global competitiveness, but it gives its global competitors a leg up.

"U.S. tariffs on Apple's products would result in a reduction of Apple's U.S. economic contribution," the company wrote. "U.S. tariffs would also weigh on Apple's global competitiveness. The Chinese producers we compete with in global markets do not have a significant presence in the U.S. market, and so would not be impacted by U.S. tariffs. Neither would our other major non-U.S. competitors. A U.S. tariff would, therefore, tilt the playing field in favor of our global competitors," it added. Among the products Apple says would be affected include the iPhone, iPad, Mac, AirPods, AppleTV, batteries and replacement parts.

The administration proposed the additional tariffs in May and requested public comments on the move (see **WTTL**, May 20, page 4). At press time, USTR received more than 2700 public comments on regulations.gov in response to its call, in addition to holding seven days of hearing with 55 panels of more than 300 witnesses June 17-25. [Editor's note: WTTL will feature more comments and testimony in a future issue once all have been submitted.]

> One of those groups submitting testimony was the Footwear Distributors & Retailers of America (FDRA). FDRA President and CEO Matt Priest argued the additional tariffs on all footwear would be "catastrophic" to the industry. "Adding 25 percent on top of these already high duties would be a staggering cost that would be impossible for companies to absorb," he said.

"If this proposal goes through, prices will go up, jobs will be lost, and capital investments, made here in the United States, will come to a screeching halt. The numbers that our members are giving us in terms of increased tariff costs on their companies are staggering, making this one of the largest proposed tax increases in American history," Priest added. Right after the administration proposed the additional tariffs, 173 corporations, including footwear maker Clarks, Dr Martens and Converse, argued in a May letter to the president that tariffs have a disproportional impact on the U.S. consumers.

Appeals Court Affirms Commerce Steel Decision Despite Dissent

In a split decision, the Court of Appeals for Federal Circuit (CAFC) June 21 affirmed the Court of International Trade (CIT) decision on a Commerce finding of whether the Korean government had subsidized Korean corrosion-resistant steel products (CORE). "Commerce found no such electricity-sale subsidy, while finding some other subsidies," Circuit Judge Richard Taranto wrote for the three judge panel in Nucor Corporation v. U.S. CIT affirmed Commerce's finding as to electricity sales.

In Nucor's appeal, "we reject a broad legal position advanced by Commerce in defending its decision, but we find no reversible error in the Commerce decision," Taranto wrote. "In our analysis rejecting the government's broad position, we have decided that nonpref-erentiality of the sort the government stresses is insufficient to meet the statutory standard of adequate remuneration, which, along with its implementing regulation, requires ensuring that the government authority's price is not too low considering what the authority is selling," he added.

Circuit Judge Jimmie Reyna dissented with the majority opinion. "I conclude that the use of the repealed standard incurably taints the entirety of the underlying countervailing duty investigation. Thus, I would vacate and remand on this basis," he wrote. "The majority, however, affirms Commerce's final determination that the Korean government does not extend a countervailable subsidy in its provision of electric power to Korean CORE producers. I dissent from this part of the majority opinion," Reyna added.

In addition, "the majority affirms the [CIT's] judgment that Nucor failed to exhaust its argument concerning Commerce's decision not to include certain costs in its subsidy analysis, such as the costs of nuclear power generation. The administrative record, however, is replete with evidence that Nucor raised and argued those issues before Commerce," the dissent noted.

USTR Tackles Thorny Trade Issues at Congressional Hearings

During two days of hearings at both the Senate Finance and House Ways and Means committees June 18-19, USTR Robert Lighthizer covered the waterfront of trade issues, with members' questions primarily targeted at the U.S.-Mexico-Canada (USMCA) and U.S.-China trade deals.

> Members were split on rushing to vote on USMCA without first making changes and taking the time to get it right. In his opening statement, Lighthizer took no sides. "I look forward to working with members to make it even better and to write implementing legislation which will earn large, bipartisan support." And later he joked, "I don't want to rush members, but I want to do it urgently."

On U.S.-China trade, the official was critical and introspective. "Our economic relationship with China has been unbalanced and grossly unfair to American workers, farmers, ranchers, and businesses for decades," Lighthizer said. In response to a later question, he admitted, "I don't know if [tariffs alone] will get them to stop cheating." If there's a better idea than tariffs, he said he'd love to hear it.

Lighthizer was nothing if not honest about his intentions. For example, when a member asked him to commit to consult with Congress under Trade Promotion Authority (TPA) on the China talks, he responded, "I don't think I'm going to use TPA at all with China." On whether there will be auto-renewal to exclusions to Section 301 tariffs, he said, "No."

On the proposed fourth tranche of tariffs on Chinese imports, which has been the subject of hundreds of public comments and hearing witnesses (see related story, page 3), Lighthizer said he didn't even know "if we're going to have tariffs." One member late in the hearing asked him point blank, what went wrong with the talks? While it was more or less speculation, he said some forces thought the Chinese had gone too far, had gone beyond their mandate. The "issues haven't changed," he added.

The chairs and ranking members of each committee made their opinions known early and often. Sen. Chuck Grassley (R-Iowa) urged the administration to "do everything it can to use tariffs as a last resort option, and to maintain timely and efficient exclusion processes for those that are already in effect."

Sen. Ron Wyden (D-Ore.) suggested the U.S. join force with allies. "Rather than chaos, what's needed is a well-coordinated, international effort led by the U.S. to crack down on China's abuses. Instead, the president's actions have driven away our allies, and there is

no discernible strategy guiding the way forward." In response to a later question on the subject, Lighthizer cited the trilateral effort with the European and Japan (see **WTTL**, April 8, page 1). Rep. Richard Neal (D-Mass.) argued for taking the time to get USMCA right, especially on enforcement. "The opportunity we have right now to improve the NAFTA is too important not to get right. We have a chance to set the American economy and American workers on a better course. We can ensure that labor standards are raised through this agreement, that protections for the environment are respected, and that affordable access to medicines is preserved – now and in the future. All of this is too important to rush," he cautioned.

* * * Briefs * * *

NORTH KOREA: OFAC June 19 designated Russian Financial Society for assisting North Korea in "evading sanctions to access the international financial system," agency said. Russian Financial Society provided bank accounts for blocked entity Dandong Zhongsheng Industry & Trade Co. Ltd, which is owned by Foreign Trade Bank (FTB), North Korea's primary foreign exchange bank. OFAC designated Dandong Zhongsheng and Russian bank Agrosoyuz Commercial Bank in August 2018 (see **WTTL**, Aug. 6, 2018, page 7).

NOMINATIONS: Senate Banking Committee June 18 approved by voice votes nominations of Thomas Peter Feddo to be assistant Treasury secretary for investment security; Ian Paul Steff, to be assistant Commerce secretary and director general of U.S. and Foreign Commercial Service; and Paul Shmotolokha to be Export-Import Bank first VP. All had hearing in June (see **WTTL**, June 10, page 3). Conspicuously absent from committee vote was BIS under secretary nominee Nazak Nikakhtar, who missed deadline to submit written responses to member questions for record.

EXPORT ENFORCEMENT: Juan Carlos Rodriguez Espinoza of Miramar, Fla., owner of freight forwarding company, pleaded guilty June 12 in Miami U.S. District Court to smuggling 13 containers of alcohol and cigarettes to Dominican Republic in May 2016. Rodriguez instructed employees at exporter to change description on outgoing bills of lading to "the following commodities: paper, raw material, synthetic textiles or hospital supplies (as opposed to cigarettes and alcohol)," court documents noted. Sentencing is set for Aug. 13.

PRIVACY SHIELD: Senate June 20 confirmed by voice vote former DocuSign CEO Keith Krach to be under secretary of State for economics and EU-U.S. Privacy Shield ombudsperson. Second annual review of program in October revealed two major fissures: lack of permanent U.S. official as ombudsperson and fallout from recent privacy breaches by firms certified under program (see **WTTL**, Oct. 22, 2018, page 3). Krach was nominated in January. Ombudsperson is "dedicated to facilitating the processing of requests from EU and Swiss individuals relating to national security access to data transmitted" from EU or Switzerland to U.S., State website notes.

FCPA: Roger Richard Boncy, dual U.S. and Haitian citizen who resides in Spain, and retired U.S. Army colonel Joseph Baptiste of Fulton, Md., were convicted June 20 after two-week jury trial in Boston U.S. District Court of conspiracy to violate Foreign Corrupt Practices Act (FCPA) and other charges in connection with planned $84 million port development project in Haiti. Boncy and Baptiste solicited bribes from undercover agents, with Baptiste saying he would funnel payments to Haitian officials through his nonprofit. Two were charged in October in superseding indictment (see **WTTL**, Nov. 5, 2018, page 7). Sentencing is set for Sept. 12.

ENTITY LIST: In Federal Register June 24, BIS adding five Chinese entities to Entity List for "acting contrary to the national security or foreign policy interests" of U.S. Agency also modifying entry of National University of Defense Technology (NUDT) to add one alias (Hunan Guofang Keji University) and four locations. NUDT was added to list in February 2015.

ATMs: CAFC June 17 affirmed-in-part, vacated-in-part, dismissed-in-part, and remanded ITC decision that various automatic teller machine (ATM) models imported by Hyosung infringed claims of two Diebold patents. "Because the appeal has become moot as to the '616 patent, we dismiss the appeal as to the '616 patent, vacate the ITC's decision as to that patent, and remand with instructions to revise the applicable orders. We affirm the ITC's decision and orders as to the '631 patent," Circuit Judge Timothy Dyk wrote for three-judge panel in *Hyosung TNS Inc. v. ITC.* "There is substantial evidence supporting the ITC's finding that Diebold's earlier substantial investment in research and development relating to the '631 patent was relevant based on the ongoing qualifying and meaningful expenditures exploiting that technology, and that there was a sufficient nexus between the earlier investment in research and the continuing expenditures," he noted. CAFC in August 2018 reversed ITC ruling that Diebold violated Section 337 by importing ATM components that infringe '235 patent (see **WTTL**, Aug. 20, 2018, page 5).

NICARAGUA: OFAC June 21 designated four Nicaraguan government officials, including president of Nicaraguan National Assembly (NNA), general director of Institute of Telecommunications and Postal Service (TELCOR) and health and transportation ministers, who "perpetuate oppression or prop up the Ortega regime at the expense of the Nicaraguan people," Sigal Mandelker, Treasury under secretary for terrorism and financial intelligence, said in statement. Agnecy in April designated son of Nicaraguan president and VP, along with Nicaraguan bank Banco Corporativo SA (see **WTTL**, April 22, page 7).

REPORTING: OFAC in Federal Register June 21 revised its Reporting, Procedures and Penalties Regulations (RPPR) to "provide updated instructions and incorporate new requirements for parties filing reports on blocked property, unblocked property, or rejected transactions," it said in interim final rule and request for comments. Agency also revised licensing procedures section to include information on electronic license application procedures and made "numerous technical and conforming edits" in regulations. Comments are due July 22.