ISSN 0276-8275

WTTLonline.com

A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Trade Laws and Export Controls

Washington Tariff & Trade Letter®

Publisher: Martin Kalin • Editor: Meredith Gilston

Vol. 39, No. 11 **March 18, 2019**

USTR Takes on Competition Practices Under KORUS

The U.S. Trade Representative's (USTR) office March 15 formally requested the first consultations with South Korea under the competition chapter of the U.S.-Korea Free Trade Agreement (KORUS). Specifically, USTR hopes to resolve concerns "regarding procedures in competition hearings held by the Korea Fair Trade Commission (KFTC)," the USTR's office said in announcing the request.

> "Some of these KFTC hearings have denied U.S. parties certain rights, including the opportunity to review and rebut the evidence against them," it added. Recently drafted amendments to Korea's "Monopoly Regulations and Fair Trade Act" fail to address U.S. concerns, the agency noted.

Industry representatives have long urged administration officials to certify that trading partners have "the necessary laws and regulations in place to implement its obligations before an agreement enters into force," a Qualcomm executive testified in March 2016 (see **WTTL**, March 7, 2016, page 4). The company previously was involved in a KFTC competition-related investigation.

EU Parliament Rejects Trade Negotiating Objectives

That was fun while it lasted. The European Parliament (EP) March 14 rejected a proposal to open European Union (EU)-U.S. trade negotiations by a vote of 198-223. While the actual text has a series of double negatives and contradictory amendments, observers note the vote signals there is no clear support to start trade talks in the current environment.

While the U.S. issued a comprehensive set of negotiating objectives, encompassing everything from soup to nuts, the EU published its narrower set of negotiating objectives in January, most notably excluding agricultural products, which the U.S. included (see

WTTL is published weekly 50 times a year except last week in August and December. Subscriptions are $697 a year. Additional users pay only $100 each with full-priced subscription. Site and corporate licenses are also available. Phone: 301-460-3060 Fax: 301-460-3086

WTTL, Jan. 21, page 2). The proposal would authorize the European Commission to negotiate with the U.S. in two areas: eliminating tariffs on industrial goods and harmonizing conformity assessment.

> "I note the vote in the European Parliament on the draft [negotiating] mandates. We will work with the Council as they take this forward. MEPs raised important concerns in the debate. We will continue to involve the EP throughout the process," EU Trade Commissioner Cecilia Malmstrom tweeted the day of the vote.

The Parliament's International Trade Committee adopted the draft resolution in February, which called on the European Council to: ensure a clear commitment in the EU mandate to include cars and car parts in the negotiations; exclude agriculture from the scope of the negotiations; and include a suspension clause in the negotiating mandate to be triggered at any time should the U.S. impose additional tariffs or other trade restrictive measures on EU products.

"There is clearly a majority in Parliament to start trade talks with the U.S. But obviously we cannot agree under which conditions. We in the EPP [European People's Party] cannot support pre-conditions that virtually make talks impossible. I hope Council sees the benefit of dialogue over trade conflict," Christofer Fjellner, a moderate EPP member of Parliament, tweeted.

One of those preconditions is the lifting of Section 232 steel and aluminum tariffs "before the conclusion of the agreement," the resolution noted. In addition, it required "a comprehensive consultation process with civil society and a sustainability impact assessment of the proposed agreement, and the taking into account of the impact assessments and studies already carried out in this field" as a minimum condition.

Court Affirms Departure from Substantial Transformation Test

Citing potential duty evasion, the Court of Appeals for the Federal Circuit (CAFC) March 12 affirmed Commerce's use of a new test to define the scope of countervailing (CVD) and antidumping duty orders in a case involving a remand determination where Commerce imposed CVD and antidumping duties on the import of solar cells and modules, laminates and/or panels (collectively, "panels"), containing solar cells from China.

"When defining the class or kind of merchandise within the scope of the orders, Commerce used a new test, rather than the typically-used 'substantial transformation' test, to determine the country of origin," Circuit Judge Kathleen O'Malley wrote for the three-judge panel in *Canadian Solar, Inc. v. U.S.*. "Rather, it concluded that the country of assembly confers origin regardless of whether the assembly process substantially transforms the merchandise ('the country of assembly test')," she noted.

"Commerce provided a reasoned explanation and that substantial evidence supports its findings," O'Malley wrote. Specifically, Commerce said the departure was necessary

because "its standard substantial transformation analysis would be insufficient for determining the country-of-origin of this specific product because relying on the substantial transformation analysis alone could result in failure to provide relief to the domestic industry for the alleged injury."

> "'Rote application' of the substantial transformation test would be inadequate to remedy the unfair pricing decisions and/or unfair subsidization because it would exclude the very imports found to injure the domestic industry," she wrote.

The ruling also pointed out potential Chinese evasion practices. "The Chinese solar industry— recognizing that the solar cells were defined as the origin-conferring component under the substantial transformation test—began sourcing the solar cells from other countries. In this way, the industry was using the substantial transformation test as a means of circumventing the duties imposed by the orders," O'Malley noted.

At Senate WTO Hearing, Déjà vu All Over Again

While the Senate Finance Committee hearing March 12 was purported to tackle the future of the World Trade Organization (WTO), USTR Robert Lighthizer and committee members took every opportunity to question the elephant in the room: China.

For one, Lighthizer doubled down on his resistance to giving Congress ample time to consider and approve any trade deal with China, like it would under Trade Promotion Authority (TPA). This is not an agreement under TPA, he said. If the administration comes to an agreement, it would be settling a trade dispute under Section 301. "I'm happy to consult with members," he said nonchalantly. When asked if he'd be formally consulting with Congress, he answered: "I don't know what that means."

Lighthizer brought a similar argument to the House Ways and Means Committee in February (see **WTTL**, March 4, page 3). Again, when asked about details on a reported agreement on currency, he repeated that there is no formal agreement yet. "Nothing's ever done until everything's done," he noted.

The USTR also resisted calls to announce a schedule for the conclusion of talks with China. "I'm not setting a timeline," he said. The team is "working more or less continuously," Lighthizer added. In response to other questions, he said, "I can't predict success at this point." There are "still major, major issues," he added.

Senators brought up the delivered, but not yet public Section 232 report on autos and auto parts, especially how it could impact the updated U.S.-Mexico-Canada (USMCA) agreement. "The 232 car thing is complicated," Lighthizer noted. He added that there are USMCA provisions that could exclude Canada and Mexico from potential tariffs.

While much attention was given to China, the USTR also discussed ongoing trilateral effort with the European Union and Japan on WTO reform, as well as how to deal with

differential treatment of developing countries, especially those too developed to qualify. Lighthizer called the issue of self-designation "a fundamental problem," adding "If I knew the actual answer, I'd give it to you.

* * * Briefs * * *

RUSSIA: OFAC March 15 designated six Russian individuals and eight entities "in response to Russia's continued and ongoing aggression in Ukraine." Individuals include deputy director of Border Guard Service of Russia's Federal Security Service (FSB); head and deputy head of FSB Border Directorate; head of FSB Service Command Point for Crimea and Sevastopol, and two Ukrainian separatists. Entities include six Russian defense firms with operations in Crimea, one of Crimea's largest construction companies and private company that received oil and gas exploration license in region. Three firms collaborated on naval project at shipyard that OFAC designated in September 2016 (see **WTTL**, Sept. 5, 2016, page 11).

PASTA: In "sunset" votes March 12, ITC said revoking antidumping and countervailing duty orders on imports of certain pasta from Italy and Turkey would renew injury to U.S. industry. Italy vote was 5-0; Turkey was 4-1. Commissioner Meredith Broadbent voted no.

NOMINATIONS: Senate Banking Committee March 12 approved nominations of Jeffrey Nadaner to be Commerce assistant secretary for export enforcement and Claudia Slacik to be Ex-Im board member. Voice vote for Nadaner was unanimous. Vote on Slacik was 23-2; Sens. Richard Shelby (R-Ala.) and Pat Toomey (R-Pa.) voted no. Committee approved Ex-Im president and two board nominees in February (see **WTTL**, March 4, page 5).

VENEZUELA: OFAC March 14 issued amended Venezuela-related General License (GL) 7A extending authorization for transactions involving PDV Holding, Inc. (PDVH), CITGO Holding, Inc., and any subsidiaries until April 28…. Agency March 11 designated Moscow-based bank Evrofinance Mosnarbank, for supporting Petroleos de Venezuela S.A. (PdVSA), Venezuelan oil company that OFAC designated in January (see **WTTL**, Feb. 4, page 4). Evrofinance, which is "jointly owned by Russian and Venezuelan state-owned companies," emerged as primary international financial institution willing to finance Venezuelan cryptocurrency Petro, OFAC added.

COOL TOOL: User testing for updated, integrated DECCS Commodity Jurisdiction (CJ) application will run from March 20 through March 26, DDTC announced March 15. Visit pmddtc.state.gov on start date for instructions on how to participate.

USMCA: Sen. Chuck Grassley (R-Iowa) March 14 said out loud what had been hinted about Congress' approval of updated U.S-Mexico-Canada (USMCA) trade deal. On Senate floor, Grassley called on administration to lift Section 232 tariffs on steel and aluminum imports from Canada and Mexico. "This will help clear the path for USMCA ratification in all three countries," he said. "USMCA is supposed to be a free trade agreement. But we don't have free trade with these tariffs in place," Grassley added… On same day, AFL-CIO Executive Council announced it would oppose new deal "if the administration insists on a premature vote on the new NAFTA in its current form." Protecting worker rights and preventing outsourcing "will require the upfront guarantee of sufficient resources for enforcement. This must happen before Congress takes up any new NAFTA deal," union argued.