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China's Government Procurement Offer Falls Short

Participants in the World Trade Organization's (WTO) Government Procurement Agreement (GPA) complained Feb. 11 that China's latest offer of concessions to become a GPA member still is inadequate. Although the most recent proposal submitted in December was a significant improvement over earlier versions, GPA countries particularly faulted China's refusal to cover state-owned enterprises (SOE) under its offer, according to sources following the GPA Committee meeting.

> According to sources, Chinese representatives called the offer a "big Christmas gift." Among Beijing's new offers were proposed reductions in China's coverage thresholds, coverage of entities in five Chinese provinces not previously included, the addition of 14 other entities, including the China Post Group, the first state-owned enterprise, the inclusion of five more service sectors, and expansion of construction services. The Chinese said they have no room for further concessions, one source reported.

The lack of coverage of SOEs was one of the main complaints about China's offer because of the large role these entities play in the Chinese economy. Members also objected to Beijing's continued demands for exceptions for sectors that meet "important national policy objectives." U.S. officials also said the new offer still doesn't respond to Washington's previous requests for changes.

The meeting also became a platform for Canada to complain about U.S. "Buy America" legislation, including proposed federal and state measures that would add more localization requirements and proposals in President Obama's Feb. 2 budget for infrastructure spending. The Canadians complained that the budget proposal would transfer much of the money to state and local governments that maintain Buy America restrictions.

Bill to Lift Cuba Embargo Introduced in Senate

A clash between trade sanction hawks and doves is shaping up over President Obama's call for ending the trade embargo on Cuba. The president's position gained support in the Senate Feb. 12 where a bipartisan group of senators led by Sen. Amy Klobuchar (D-Minn.) introduced the Freedom to Export to Cuba Act (S. 491). The legislation would

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lift the embargo on Cuba and restrictions on transactions between U.S.-owned or controlled firms and Cuba, limitations on direct shipping between Cuban and U.S. ports, restrictions on remittances, and the prohibition on indirect financing of Cuba. In addition, it would amend the Trade Sanctions Reform and Export Enhancement Act of 2000 to remove Cuba from the list of state sponsors of terrorism,

> Several bills have already been introduced that would lift the embargo. Rep. Bobby Rush (D-Ill.) introduced H.R. 274 and Rep. Charles Rangel (D-N.Y.) introduced H.R. 403 in January. Both measures are nearly identical. Sen. Jeff Flake (R-Ariz.) introduced S. 299 to open U.S. tourism to Cuba.

"It's time to the turn the page on our Cuba policy," Klobuchar said in a statement. "There are many issues in our relationship with Cuba that must be addressed, but this legislation to lift the embargo will begin to open up new opportunities for American companies, boost job creation and exports, and help improve the quality of life for the Cuban people," she added. Previously, she had said that before passing any legislation, Congress also needs to see positive steps from Havana (see **WTTL**, Jan. 12, page 1).

Industry and agricultural groups immediately applauded the measure. "We have been previously able to sell our products to Cuba, but only under restrictions, so likely the most significant part of the bill is that it allows U.S. farmers, ranchers, and agribusinesses to have normal business and trade relationships with importers in Cuba, just like we do with almost every other nation, including normal banking, credit, and market development relationships," American Soybean Association President Wade Cowan said in a statement. "The bill would allow our industry to conduct market development activities in Cuba as well as make available credit guarantee programs," he added.

Ahead of legislation, companies are already introducing themselves to the Cuban market. MasterCard said Jan. 23 that it will let cardholders use their cards in Cuba after March 1. Streaming service Netflix announced Feb. 9 it will be available in Cuba. "Starting today, people in Cuba with Internet connections and access to international payment methods will be able to subscribe to Netflix and instantly watch a curated selection of popular movies and TV shows," it said in statement. Among "the premium and unique Netflix series available" will be *House of Cards* and *Orange is the New Black*.

Meanwhile, the Census Bureau has amended its Automated Export System Trade Interface Requirements (AESTIR) to add a new code to allow exporters to take advantage of License Exception Support for the Cuban People (SCP), which the Bureau of Industry and Security (BIS) added to the Export Administration Regulations (EAR) Jan. 16. The new code, C62, can be used for all SCP-qualified exports, including items under EAR99 plus 78 specifically identified Export Control Classification Numbers (ECCNs) listed in the AESTIR that must be cited on the Electronic Export Information. The required regulatory citation is "SCP." No license value is required.

Parallel Currency Bills Try to Force U.S. Hand in TPP Talks

If at first or second, you don't succeed, try try try again. While some members of Congress are pushing the Obama administration to include currency manipulation in talks on a Trans-Pacific Partnership (TPP), parallel retreaded bills were introduced in both chambers to amend countervailing duty law to allow Commerce to treat "fundamentally

undervalued currency" as a subsidy that can be countervailed. The legislation could be a stalking horse for getting currency manipulation included as a negotiating goal in a fast-track trade promotion authority (TPA).

> House Ways and Means Committee Ranking Member Sander Levin (D-Mich.) joined other Democrats and Republican members Feb. 10 in introducing the "Currency Reform for Fair Trade Act of 2013" (H.R. 820). A bipartisan group of senators, including Sens. Sherrod Brown (D-Ohio) and Jeff Sessions (R-Ala.), introduced the "Currency Undervaluation Investigation Act" (S. 433).

If this feels like déjà vu, it is. The House measure is identical to a bill (H.R. 1276) introduced in the last session of Congress and also to one the House passed in 2010 by a vote of 348-79. "Unfortunately, the Senate did not take up the bill in that Congress, although the Senate eventually passed a similar bill. The Currency Reform for Fair Trade Act has been introduced in the last two Congresses with more than 150 bipartisan co-sponsors each time. This bill is consistent with all WTO rules," said a fact sheet issued by Ways and Means Democrats.

The legislation "by itself, may not end the practice of currency manipulation. We also need to include provisions in our trade agreements that would provide our trading partners with a strong deterrent from manipulating their currency in the first place," the fact sheet added, saying TPP provides such an opportunity (see **WTTL**, Feb. 2, page 2).

U.S. Trade Representative (USTR) Michael Froman consistently has referred currency questions to Treasury Secretary Jacob Lew. At a Senate Finance Committee hearing Feb. 5, Lew was non-committal. "I think the challenge in the context of a trade agreement is how to address the issue in a way that helps and doesn' hurt. I would be concerned that the effectiveness we have dealing through the existing channels could be diminished in some ways if some approaches were taken. I think that we need to make sure that we use every tool that we have to make sure the countries don't take the steps to intervene in ways that are unfair," he said.

CAFC Untwists Twisted Polyester Yarn Case

In a case of a supplier trying to help one of its customers, the Court of Appeals for the Federal Circuit (CAFC) vacated a Court of International Trade (CIT) ruling Feb. 3, saying the trade court should not have gotten involved in the matter because it lacked jurisdiction. In the long convoluted legal case, Best Key Textiles Co. LTD sought to reverse a Customs classification ruling that actually lowered the tariff on its yarn but ended up raising the tariff on sweaters imported by one of its customers.

Customs initially classified Best Key's yarn as metalized yarn under Harmonized Tariff Schedule of U.S. (HTSUS) 5605.00.90 dutiable at 13.2% ad valorum. The agency later revoked that ruling and reclassified the yarn as polyester yarn under HTSUS 5402.47.90 with a duty rate of 8% ad valorum. Good for Best Key but not its customers whose sweaters were now classified as polyester sweaters dutiable at 32% instead of manmade fiber with 6% rate (see **WTTL**, Dec. 23, 2013, page 6). In its first ruling the CIT dismissed Best Key's suit for lack of jurisdiction but in a second ruling accepted jurisdiction but still rejected its effort to get its product reclassified again. The case was

further complicated because Best Key was not importing the yarn into the U.S. and only selling it to sweater manufacturers abroad. "The CIT erred in reversing itself and 'presum[ing]' jurisdiction under Section1581(i)(4)," wrote CAFC Judge Evan Wallach for the three-judge appellate panel in *Best Key Textiles Co. Ltd. v. U.S.*

> "The CIT itself did not appear fully convinced jurisdiction was proper because Best Key is attempting to litigate on behalf of its customers who might be injured by the revocation of the Johnny Collar Ruling in an action challenging the Revocation of the Yarn Ruling. Best Key acknowledges the remedy it seeks is a reversal of the Yarn Ruling Revocation, which resulted in a more favorable duty rate for Best Key," Wallach wrote.

"However, the harm caused by the Yarn Ruling Revocation flowed to potential customers of Best Key who produce Johnny Collar pullovers, which might be subject to a lower duty rate if the Yarn Ruling had remained in effect," he noted. "Here, Best Key sought to have the CIT reverse the Revocation, favorable to Best Key, the effect of which would be to increase Best Key's own duty rate while benefitting manufacturers of products made from Best Key's yarn. The statute does not provide jurisdiction over such requests," Wallach ruled.

"The proper 'avenue of approach' to redress this harm is a challenge under Section 1581(a)," he advised. "That is, any producer who imports items made from Best Key's yarn and believes the merchandise should be subject to a lower duty rate should protest the classification and challenge any denial of its protest before the CIT. The present action, where Best Key seeks to undo an administrative decision made in its favor so that its customers might benefit from a lower duty rate, contemplates the creation of a new cause of action under Section 1581(i)," but that provision was not intended to create new causes of action nor was it meant to supersede more specific jurisdictional provisions, Wallach wrote, citing previous precedents.

Court Upholds Commerce Export Price Calculation

It was reasonable for Commerce not to deduct antidumping duties when calculating export prices (EP), the Court of Appeals for the Federal Circuit (CAFC) ruled Feb. 5, upholding a similar conclusion that the Court of International Trade (CIT) reached. The appellate court rejected the appeal of the Ad Hoc Shrimp Trade Action Committee and the American Shrimp Processors Association, which protested duty rates Commerce had calculated during the fifth administrative review of the antidumping order on certain frozen warmwater shrimp from India.

> Because there had been no imports into the U.S. during the period of review Commerce used sales to the United Kingdom and Japan and made adjustments to compare the EP to the normal value (NV) price.

The two selected exporters Apex and Falcon ship merchandise to the UK and Japan on a cost and freight (C&F) basis, which means the seller only covers the costs necessary to deliver merchandise to the named port of destination. They shipped their shrimp to the U.S. on a delivery-duty-paid (DDP) basis, acting as both the exporters and importers of record and responsible for paying the costs associated with importation including import and export duties. In adjusting the level of trade to calculate a dumping margin,

Commerce had deducted costs, charges and expenses from the EP but not the antidumping duties. The two domestic shrimp associations claimed the department should have deducted those duties. "Congress did not address the specific question before this Court. The statute does not define 'any additional costs, charges, or expenses.' Moreover, nothing in the statute or legislative history instructs Commerce whether to deduct antidumping duties from EP as such a cost, charge, or expense," wrote Appellate Judge Raymond Clevenger III for the court in *Apex Exports v. U.S.*

"Since it is reasonable, consistent with the goals of the statute, and reflects Commerce's long-standing practice, we conclude Commerce's refusal to deduct antidumping duties from EP is entitled to deference," he wrote. "The CIT determined Commerce's approach works as intended to bring NV and EP into alignment. Moreover, if Commerce deducted antidumping duties as Ad Hoc suggested, importers such as Apex and Falcon" would pay more in duties than the antidumping statute intends, he added.

Trade Complaint Is Conveniently Good Politics as Well

Just in time to show Congress that it is as good at enforcing trade agreements as negotiating them, the Obama administration asked China for consultation Feb. 11 to raise complaints that a Chinese service program violates the World Trade Organization's (WTO) ban on export subsidies. If the political timing of case and its relationship to the White House push for fast-track trade promotion authority (TPA) weren't clear, U.S. Trade Representative (USTR) Michael Froman brought along seven House members – six Democrats and one Republican – to the press conference where he announced the launching of the WTO dispute-settlement process.

> "This enforcement action is the latest evidence that President Obama and his administration will be unwavering in standing up for our trade rights. When the United States negotiates trade rules and trade deals, we're adamant that our trading partners and competitors must stick to those rules," Froman said at the press conference.

The U.S. request for consultations, which could lead to a dispute-settlement panel if the complaints are unresolved, targets China's Demonstration Bases-Common Service Platform. The USTR's office claims the program has given more than $1 billion over three years to service firms that provide services to seven industrial sectors and dozens of subsectors on the condition that recipients of the services export their products.

The U.S. claims the program has aided Chinese exports of (1) textiles, apparel and footwear; (2) advanced materials and metals (including specialty steel, titanium and aluminum products); (3) light industry; (4) specialty chemicals; (5) medical products; (6) hardware and building materials; and (7) agriculture. It has identified 179 specific Demonstration Bases in China that have benefitted from the subsidies from 2010 to 2012. Subsidized services, which include information technology, product design and training, are provided free or at discount prices, the U.S. contends.

U.S. trade officials uncovered the program, which started in 2009, during their investigation into a separate complaint against Beijing's subsidies for auto parts in 2012. In their investigation of the Demonstration program they examined more than 350 documents containing more than 1,000 pages of Mandarin text and went through more than

5,000 pages of Chinese documents in all. U.S. officials, speaking on background, said they chose not to self-initiate countervailing duty (CVD) complaints against imports from the seven sectors because of the opaqueness of the Chinese programs. "It is not possible to determine lucidly at this point, to be able to draw a link specifically to a specific product coming out of the bases," one official said.

> Based on the information they have found, up to 50 separate CVD cases could be required to address the issues raised by the single WTO action. If any U.S. company wants to use the data the USTR has collected to bring a CVD complaint, "we're always open to talking to our stakeholders," another official said. Moreover, China's program also has an impact on Chinese exports to third-country markets where they compete with U.S. exports, and CVD cases wouldn't remedy that problem, he noted.

* * * Briefs * * *

CATFISH: In report (GAO-15-290) released Feb. 11, Government Accountability Office (GAO) warned of potential duplication due to recent provisions moving regulatory responsibility for catfish import inspection to USDA Food Safety and Inspection Service (FSIS). "The 2014 Farm Bill instead modified these provisions to require the Secretary of Agriculture to enter into a memorandum of understanding (MOU) with the Commissioner of FDA that would ensure that inspection of catfish conducted by FSIS and FDA are not duplicative. We maintain that such an MOU does not address the fundamental problem, which is that FSIS's catfish program, if implemented, would result in duplication of activities and an inefficient use of taxpayer funds. Duplication would result if facilities that process both catfish and other seafood were inspected by both FSIS and FDA," GAO said.

AGOA: Countries eligible for benefits under African Growth and Opportunity Act (AGOA) "fared better than ineligible countries on some economic measures" since act's enactment, Government Accountability Office (GAO) found in report published Feb. 12 (GAO-15-300). However, other factors, including share of AGOA exports, role of petroleum exports, increasing energy prices, quality of government institutions and differences in levels of foreign aid and investment "make it difficult to isolate AGOA's contribution to overall economic development," report said.

FALSE CLAIMS: Three importers agreed Feb. 12 to pay total of $3 million to settle government complaint in Jacksonville, Fla., U.S. District Court under False Claims Act. Suit claimed their companies made false declarations to avoid paying antidumping and countervailing duties on aluminum extrusions imported from Tai Shan Golden Gain Aluminum Products Ltd. in China. Companies allegedly claimed products were manufactured in Malaysia. California-based C.R. Laurence Co. Inc., agreed to pay $2.3 million, Florida-based Southeastern Aluminum Products Inc. $650,000, and Texas-based Waterfall Group LLC $100,000. Whistleblower James Valenti will receive $555,100 as his share of settlements, Justice said.

GOVERNMENT PROCUREMENT: At Feb. 11 meeting of WTO Government Procurement Agreement Committee, members reviewed new offers from Moldova and Ukraine to become GPA participants. According to sources, the offers from those two countries are far enough along to set the stage for their joining the agreement this summer.

SUGAR: Sens. Jeanne Shaheen (D-N.H.), Mark Kirk (R-Ill.) and Pat Toomey (R-Pa.) Feb. 12 reintroduced Sugar Reform Act (S. 475), which would "reform domestic supply restrictions and lower price support levels in order to save taxpayers money, all while still ensuring adequate sugar supplies at reasonable prices," said statement from Shaheen's office. Bill was introduced

in 2013 but defeated (see **WTTL**, June 10, 2013, page 7). Coalition for Sugar Reform (CSR) applauded measure. "This legislation calls for modest reforms that will give the Secretary of Agriculture the flexibility to adjust marketing allotments and import quotas as needed to stabilize the U.S. sugar market – ensuring the program works for all stakeholders not just one," said CSR Chairman John Downs, president of National Confectioners Association, in statement.

LOW-VALUE IMPORTS: Sens. John Thune (R-S.D.) and Ron Wyden (D-Ore.) introduced bill (S. 489) Feb. 12 to raise current *de minimis* exemption level on imported items up to $800 from $200. Measure is same as introduced in last session of Congress. "Current import policies on low-value shipments are outdated and need to be modernized for the benefit of American consumers and for small businesses, which increasingly use the Internet to access global markets. Goods shipped to American consumers should be treated the same way as goods carried on a plane to the United States by American travelers. Senator Wyden and I look forward to working with our colleagues to get this bill through the Finance Committee and across the Senate floor," Thune said in statement.

TAPERED ROLLER BEARINGS: CIT Chief Judge Timothy Stanceu Feb. 3 affirmed Commerce remand determination on 23rd administrative review of antidumping duty order on tapered roller bearings from China (slip op. 15-10). "As the court has discussed, the decision to choose the Indian import data over the SKF market-economy-country purchase data on the limited evidentiary record is supported by the breadth of the Department's discretion and the stated reliance on 19 U.S.C. Section 1677b(c)(4)," he ruled.

BEARINGS: CIT Chief Judge Timothy Stanceu Feb. 3 affirmed in part and remanded in part set of Commerce administrative reviews of antidumping duty orders on ball bearings from France, Germany, Italy, Japan, and the United Kingdom (slip op. 15-12). He upheld department's use of zeroing in administrative review. "The court affirms the department's use of zeroing in this case. *Union Steel II* settled definitively the question of whether it is statutorily permissible for Commerce to apply the zeroing methodology in an administrative review of an antidumping duty order," Stanceu wrote. He remanded department's application of 15-day rule to Custom notifications. "The court concludes, on the basis of collateral estoppel, that the application of the fifteen-day rule in the twentieth administrative was unlawful as applied to NTN," he ruled.