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CEOs Urge Obama to Push for China BIT When in Beijing

Add another agenda item for President Obama's visit to Beijing for this year's Asia-Pacific Economic Cooperation Forum (APEC) summit in November. In an Oct. 15 letter, 51 chief executive officers (CEOs) of major U.S. companies urged Obama to push for progress on a U.S.-China Bilateral Investment Treaty (BIT) in talks with Chinese leaders.

> "We urge you to make the prioritization of a high-standard BIT between the United States and China a visible part of your visit to China in November and bilateral meeting with President Xi. There are few other commercial outcomes that would gain as much support from business leaders in both the United States and China," the executives wrote.

"It is now time to move ahead to conclude the treaty text negotiations and begin work in early 2015 on ensuring China includes only a narrow list of excluded sectors (the 'negative list')," the letter said. "If China can significantly reduce its negative list and open markets to American manufacturers, agriculture producers, and service providers, you will find the business community fully engaged and supportive of your leadership to gain Senate approval of the treaty," the business leaders said.

The U.S. and China began technical talks on a BIT in 2008 but didn't agree to launch "substantive" negotiations until the July 2013 meeting of the U.S.-China Strategic and Economic Dialogue (S&ED) (see **WTTL**, July 15, 2013, page 5). At the S&ED, China agreed to base a treaty on pre-establishment, national treatment and a negative list of excluded sectors. Since then there has been no report of progress in those negotiations.

Bali Impasse Is "Paralyzing" WTO Work, Azevedo Says

A dire picture of the World Trade Organization (WTO) was painted in a report that Director-General Roberto Azevedo delivered Oct. 16 to the WTO Trade Negotiations Committee (TNC). The entire WTO agenda has been blocked by India's refusal to allow implementation the trade facilitation agreement (TFA) negotiated at the WTO ministerial in Bali until a permanent agreement is reached on government food stockholding, he warned. "As I feared, this situation has had a major impact on several areas of our negotiations. It appears to me that there is now a growing distrust which is having a

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paralyzing effect on our work across the board," Azevedo told the TNC. India's hardline stand, however, appears to be having some success at least as far as forcing the WTO to put the public stockholding issue on its agenda now instead of waiting until December 2017 as agreed in Bali. While no solution "is in the making," Azevedo urged WTO members "to keep working and keep looking for a solution."

> For now, talks on public stockholding "have ground to a halt," he reported. "It is my sense that there is a widespread positive disposition to negotiate an outcome — or a 'permanent solution' as it has been branded. Nonetheless, there also seems to be an overarching reluctance to put other issues on hold while that 'permanent solution' is sought," he said.

"I have promised to give you my frank assessment, and it is my feeling that a continuation of the current paralysis would serve only to degrade the institution — particularly the negotiating function," he said, according to his statement. He said reports that various committee chairmen delivered to the TNC on their work "were not encouraging."

Azevedo called for a broad discussion of the WTO's mission and future. "It is time to face up to the undeniable problems we have in this organization and have an open and honest discussion about how we can move forward," he said. The first issue that needs to be addressed is how to get over the impasse on the TFA and public stockholding. Then the WTO must decide what to do about the other agreements reached in Bali that are being held up due to the trade facilitation debate.

Members also have to respond to a Bali directive to come up with a "post-Bali work program" on other WTO issues, including the moribund Doha Round. "This task was mandated to us by ministers with a deadline of 31st December this year," Azevedo noted. "I am very sorry to say that, in my view, such a detailed and precise modalities-like work program is now very unlikely to be ready by the end of the year," he advised.

A broader final issue that needs attention is the WTO organization itself, he suggested. "Once again the negotiating track is stuck. Of course this is not new to us — deadlock has unfortunately become a familiar position," he said. Nonetheless, the result has been the disengagement of members from the multilateral approach to trade agreements and the pursuit of "other avenues" such as plurilateral and regional trade deals, he said.

Groups Want Congress to Clear Way for COOL Changes

In anticipation that a WTO ruling – perhaps the week of Oct. 20 – on whether the U.S. has changed its country-of-origin labeling (COOL) requirement for meat to comply with earlier WTO decisions, industry groups urged Congress Oct. 14 to enact legislation to make compliance possible. "We urge Congress to act as soon as possible to authorize and direct the Secretary of Agriculture to rescind elements of COOL that have been determined to be noncompliant with international trade obligations by a final WTO adjudication," said the letter sent to all members of Congress by the U.S. Chamber of Commerce and National Association of Manufacturers (NAM).

In September 2013 Canada and Mexico asked for a WTO compliance panel to review changes the Agriculture Department (USDA) made to its COOL regulations to come into compliance with a WTO ruling that the previous rules violated the WTO Agreement on

Technical Barriers to Trade (see **WTTL**, Sept. 30, 2013, page 9). The panel report was due in July 2014; then delayed until September and is still being awaited. Canada and Mexico have threatened to retaliate against U.S. exports if the U.S. doesn't come into compliance with the WTO ruling. According to the Chamber and NAM, USDA believes it cannot change its COOL regulations without authority from Congress, which imposed the rule in the 2002 Farm Bill and amended it in the 2009 bill.

> "We are especially concerned that, should the WTO litigation conclude with a ruling of noncompliance by the United States, Congress would be unable to amend the statute prior to Canada and Mexico, our two largest export markets, instituting WTO-authorized retaliation against U.S. exports. The history is clear. Buyer supply chain needs result in export markets being lost even before retaliation is authorized. More damaging, once export markets are lost, it takes years to regain the market," the Chamber and NAM wrote.

"We respectfully submit that it is essential that the U.S. government assure that there will be no period of knowing noncompliance with international trade obligations," they argued. "Such an action by Congress would not undermine COOL to the extent COOL is consistent with international trade obligations nor would it undermine the U.S. defense of COOL in WTO litigation," they added.

Froman Tries to Calm European Fears about TTIP

U.S. Trade Representative (USTR) Michael Froman used a speech in Rome Oct. 14 to try to answer European critics who claim a Transatlantic Trade and Investment Partnership (TTIP) would lower regulatory standards and reduce health and safety protections. In his speech, Froman claimed regulatory coherence would improve regulatory implementation, while a strong agreement on investor-state dispute settlement (ISDS) would not limit the ability of countries to protect public interests.

> Many of the concerns Froman addressed were raised by members of the European Parliament as they grilled European Union (EU) Trade Commissioner-designate Cecilia Malmström at her Sept. 29 confirmation hearing (see **WTTL**, Oct. 6, page 2). Froman's comments echoed arguments Malmström made in defending TTIP and appeared to accept ISDS provisions similar to those in the pending Canada-EU Trade Agreement that carve out health and safety regulations from ISDS coverage.

"Let me absolutely clear," Froman asserted. "Neither the U.S. nor the EU has any interest in doing anything in TTIP which would prevent governments from regulating in the public interest," he said. "In reality, investment protections are designed to promote standards of fairness, not protect profits. They're intended to safeguard against a host of abuses, including discrimination, repudiation of contracts, and expropriation of property without due process of law even as we fully preserve our ability to regulate, to protect public health and safety, the financial sector, the environment, and any other legitimate regulatory objective," he declared.

"That's why we've insisted in our trade agreements on the strongest possible provisions for ISDS – to ensure that governments can regulate in the public interest including a wide range of safeguards which express many of the concerns that have been raised, and

we look forward to this ongoing dialogue about these and other reforms to ensure that governments will continue to be able to regulate in the public interest even while providing appropriate investment protections," he added.

> "When it comes to regulation, neither of us would accept a race to the bottom," Froman argued. "We both want to maintain high levels of protection – health, safety, and environment – and we do not see TTIP as a mechanism for lowering such protections or for deregulation," he said.

One of the most likely results of closer regulatory coherence will be in the mutual acceptance of government inspections, he suggested. "Imagine the benefit if regulators on each side of the Atlantic could agree to accept each other's inspections in other areas," he said, citing inspections of medical device manufacturers.

"Regulators would benefit because their limited resources could be deployed to inspect facilities of greatest concern. Companies would benefit because they don't have to undergo duplicative inspections of their facilities. And consumers could benefit from more efficient implementation of our consumer safety precautions," Froman argued. In addition, a U.S.-EU deal on regulatory standards "positions us, collectively, to be standard-setters rather than standard-takers more generally in the global economy," he said.

U.S. Coos over WTO Ruling on Indian Poultry Ban

In what is getting to be a habit, administration officials applauded a WTO dispute-settlement panel finding Oct. 14 in favor of the U.S. over India's ban on various U.S. agricultural products – such as poultry, meat, eggs and live pigs – allegedly to protect against avian influenza. The decision was the fourth WTO ruling in favor of the U.S. in 2014, following panel rulings on China's duties on autos and rare earths and Argentina's import licensing requirements.

> "The WTO panel agreed with the U.S. case that India lacks any scientific basis to restrict U.S. agricultural products, including U.S. poultry products. Our farmers produce the finest – and safest – agricultural products in the world," said USTR Michael Froman. The U.S. claims India's restrictions cost U.S. poultry exporters approximately $300 million annually.

The WTO panel agreed with every U.S. claim against India's ban, which was imposed in February 2007. The U.S. first asked India for WTO consultations in March 2012 (see **WTTL**, March 12, 2012, page 2). The appeals process now gives India 60 days to either comply with the ruling or appeal the case.

This was the first time a WTO panel ruled on Article 6 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), which requires countries to consider application of SPS measures on a regional basis, one USTR official told reporters, calling it an "open and shut" case. "This was a situation where the U.S. challenged India's refusal to engage with the U.S. on the question of dividing the U.S. into areas," he said. "We wanted the ability to have regionalized consideration of our crops. India was not willing to engage on this," he added. Among other findings, the panel found India's measures were "significantly more trade-restrictive than required to achieve India's ALOP [appropriate level of protection]," the WTO said. The measures

also were "applied beyond the extent necessary to protect human and animal life or health," it found. In addition, India's measures are inconsistent with the SPS agreement "because they arbitrarily and unjustifiably discriminate between members where identical or similar conditions prevail," and "because they are applied in a manner which constitutes a disguised restriction on international trade," it added.

> At the same time as the WTO ruling, the USTR's office Oct. 14 said it was commencing an Out-of-Cycle Review (OCR) of India on intellectual property rights (IPR) issues. In a Federal Register notice, it asked for public comments "concerning information, views, acts, policies, or practices relevant to evaluating the Government of India's engagement on IPR issues of concern." The OCR will not revisit India's designation on the 2014 Priority Watch List, the agency said.

Treasury Criticizes Trading Partners' Dependence on Exports

Treasury again disappointed critics of Chinese currency policies Oct. 15 by not naming China a currency manipulator in its semiannual report to Congress on international economic and exchange rate policies. While the department didn't name any country as a manipulator, it criticized China along with Japan, Korea, Germany and the Euro area for their exchange rate policies.

> The report said China did allow gradual appreciation of the renminbi (RMB) in July and August and the "low apparent levels of intervention indicates some renewed willingness by the authorities to allow a stronger domestic currency and to reduce intervention in line with Strategic & Economic Dialogue (S&ED) commitments." At the last S&ED meeting in Beijing in July, China made general commitments about keeping its markets open and reducing intervention in currency markets (see **WTTL**, July 14, page 5).

A decline in China's current account surplus "was driven by RMB appreciation and by very rapid growth of domestic investment, currently at around 48 percent of GDP, a level that is unlikely to be sustained," the report said. "As China's reform strategy proceeds and investment as a share of GDP comes down, it is important that domestic consumption – and not a renewed dependence on external demand – drive China's growth."

Treasury criticized other trading partners' dependence on exports to fuel growth. "In Germany, domestic demand growth has been persistently weak, and its current account surplus remains at over 7 percent of GDP. Adjustment and demand compression in the euro area periphery has not been matched with accommodative policies in the euro area core," it said. The report also complained that all of Korea's 2.9% annualized growth in the first half of 2014 highlights its "continued dependence on external demand."

"The failure of Japanese exports to grow on the back of substantial yen depreciation has been a surprise to many observers," Treasury said. "Explanations that have been put forward include substantial outsourcing of Japanese production and the desire of exporting firms to raise profits on export sales by maintaining (i.e. not cutting) prices in destination markets," it noted. Treasury's decision to avoid naming China and Japan as currency manipulators "sends a clear signal to our trade partners that the welcome mat is out for mercantilism," said Alliance for American Manufacturing (AAM) President Scott

Paul in a statement. "The yuan and yen are clearly undervalued and manipulated, and this disparity in exchange rates is one of the largest impediments to real and meaningful growth in U.S. manufacturing jobs. Today's decision takes any pressure to play by the rules off of our trade partners," Paul added.

CAFC Gives Support to "Bra" Classification Ruling

Differences over the tariff classification of two garments known as the "Bra Top" and "Bodyshaper" caused cleavage among judges at the Court of Appeals for the Federal Circuit (CAFC) Oct. 16 where two members of a court panel agreed the garments should not be classified with products like brassieres, but one judge thought they should be. In a ruling in *Victoria's Secret Direct v. U.S.*, two CAFC judges affirmed a Court of International Trade (CIT) decision that upheld a Customs ruling classifying the garments under a heading for various knit garments (see **WTTL**, May 6, 2013, page 7).

> The CAFC ruling backed the opinion of CIT Chief Judge Timothy Stanceu, who found the garments should be classified under Harmonized Tariff Schedule of the U.S. (HTSUS) subheading 6114.30.10, which has a 10.8% duty rate, and not under 6212.90.00, which has a 6.6% duty rate, as Victoria' Secret and Lerner New York argued. The Bra Top and the Bodyshaper are one-piece garments that contain a "shelf bra" under a camisole.

"This is a matter of common-sense interpretation of the ordinary meaning of the terms of the heading, which confirms the limitation as well as the positive functionality," wrote Appellate Judge Richard Taranto for himself and Judge Kimberly Moore. "The Court of International Trade made findings that establish that the articles here did not have support as their paramount function, without a comparably important outerwear coverage function," he wrote. "The evidence supports the finding that the Bra Top and the Bodyshaper do not share the unifying characteristic of heading 6212," he ruled.

In a lengthy nine-page dissent, CAFC Judge Jimmie Reyna complained that the majority "reaches its decision by rewriting the fundamental principles of a long established doctrine of statutory construction and by invoking an approach for classification of articles that this court soundly overruled." The majority opinion "deviates from this statutorily-mandated method of classification by rewriting the canon of statutory construction known as *ejusdem generis*, which limits the scope of general terms or phrases to items that are similar to those specifically enumerated in the statute," he argued. "The majority misconstrues our precedent, which holds that additional but not inconsistent characteristics do not prevent the *ejusdem generis* classification of an article," Reyna asserted.

* * * Briefs * * *

EXPORT ENFORCEMENT**:** Hsien Tai Tsai, former resident of Taiwan, pleaded guilty Oct. 10 in Chicago U.S. District Court to conspiracy to violate U.S. restrictions on designated proliferators of weapons of mass destruction. He admitted he engaged in illegal export of U.S.-origin machinery used to fabricate metals and other materials. Tsai, also known as "Alex Tsai," was arrested in May 2013 in Tallinn, Estonia, and later was extradited to U.S., where he remains in federal custody (see **WTTL**, May 13, 2013, page 10). He and two companies -- Global Interface and Trans Merits -- were designated in January 2009 as proliferators of

weapons of mass destruction. Charges remain pending against Tsai's son, Yueh-Hsun Tsai, of Glenview, Ill., also known as "Gary" Tsai, who was released on bond after he was arrested in May 2013 and has pleaded not guilty.

STEEL REBAR: In 6-0 final vote Oct. 14, ITC determined that U.S. industry is materially injured by dumped imports of steel concrete reinforcing bar from Mexico and subsidized imports from Turkey.

CHUCK TAYLOR: Converse Inc. filed Section 337 complaint with ITC Oct. 14 against dozens of companies, including Skechers U.S.A., Wal-Mart, Aldo Group, Ed Hardy, Kmart, Ralph Lauren Corporation and Tory Burch LLC, claiming imports by those companies violate its "common law and federally registered trademark rights in the appearance of the midsole and outsole designs" used in connection with its classic Chuck Taylor sneakers.

SANCTIONS: OFAC Oct. 10 consolidated sanctions list into one set of searchable data files. Consolidated list now includes Non-SDN Palestinian Legislative Council List, Part 561 List, Non-SDN Iran Sanctions Act List, Foreign Sanctions Evaders List and Sectoral Sanctions Identifications List, agency said. "In the future, if OFAC creates a new sanctions list where the action required of a U.S. person does not necessarily entail blocking, the office will add the new data associated with that list to these consolidated data files if appropriate," OFAC noted. Search is available on OFAC website: https://sdnsearch.ofac.treas.gov/

BURMA: USTR Michael Froman Oct. 10 met with officials from Myanmar, Australia, European Commission, Japan, Netherlands, Norway and Sweden, as well as International Labor Organization, World Bank and International Finance Corporation to review Myanmar labor initiative. Officials "discussed how it supports broader efforts to promote responsible trade and investment practices and sustainable economic development," USTR's office said. Froman announced labor initiative Aug. 28 during visit to country (see **WTTL**, Sept. 1, page 7). "There was a great deal of agreement and interest around the table," Froman said in latest statement.

FOKKER: D.C. U.S. District Court Judge Richard Leon will hear oral arguments in case of Fokker Services settlement on export charges Oct. 29. Justice defended settlement based on voluntary disclosure in status report filed in September (see **WTTL**, Oct. 6, page 1).

LINE PIPE: ACIPCO, Energex, Maverick Tube Corporation, Northwest Pipe Company, Stupp Corporation, Tex-Tube Company, TMK IPSCO and Welspun Tubular LLC USA filed anti-dumping and countervailing duty petitions Oct. 16 with ITA and ITC against imports of welded API line pipe from South Korea and Turkey.

TPP: In phone call mostly about Ebola outbreak, President Obama and Japanese Prime Minister Abe Oct. 15 "agreed on the economic and strategic importance of the Trans Pacific Partnership, and the President stressed the need to be bold in order to achieve their shared vision of a more prosperous and integrated Asia-Pacific region," White House reported. Call came as Acting Deputy USTR Wendy Cutler and Japan's deputy chief TPP negotiator Hiroshi Oe held four days of talks in Tokyo. "We were encouraged by the meetings this week and got our talks moving again," USTR spokesperson said in email to WTTL. "These talks come at an important time and kick off an intensive work period where we have the opportunity to make considerable progress. Chief negotiators will meet next week in Australia, ministers the week after, and then leaders will meet at APEC in early November," he added. "Our hope is that Japan will heed the words of the prime minister to 'be bold,' consistent with the high level of ambition of TPP that we agreed to at the start," he said. Chief Agriculture Negotiator Darci Vetter will meet in Canberra, Australia, with Oe, and USTR Michael Froman will meet with TPP trade ministers in Sydney, Australia, Oct. 24 (see **WTTL**, Sept. 29, page 2).