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

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Obama Confirms Shift in U.S. Trade Policy with Nominations

President Obama confirmed a major shift in trade policy for his second administration May 2 with his announcement that he will nominate Michael Froman, his deputy national security advisor for international economics, to be U.S. Trade Representative (USTR) and Penny Pritzer, a Chicago billionaire businesswoman and longtime Obama friend and backer, to be secretary of Commerce. Their appointments indicate a strong White House commitment to an aggressive trade policy in negotiations on trade deals with the Asian-Pacific region and the European Union (EU) and work with Congress on fast-track trade negotiating authority or Trade Promotion Authority (see **WTTL**, March 25, page 2).

> Froman, whose nomination was widely predicted, has served as a "shadow" USTR in the White House even during the term of USTR Ron Kirk, steering trade policy for Obama. He helped lay the groundwork for talks with the EU and fix trade deals with Colombia, Panama and South Korea to clear their way for congressional approval. Many believe he was the key negotiator in revising the U.S.-Korea Free Trade Agreement.

Froman will bring to the USTR's post something that has been missing for several years among recent incumbents in the job, a close personal relationship with the president. Besides his work in the White House for the last four years, he has been Obama's friend since they attended Harvard Law School together. Foreign negotiators – and members of Congress – will know that when he speaks, he is speaking for the president.

Pritzker, who was financial chairman for Obama's 2008 presidential campaign and a major donor, ranks 271st on the Forbes list of U.S. billionaires with an estimated worth of $1.8 billion, most of which came from being an heir to the founder of Hyatt Hotels. She serves on the Hyatt board but also is chairman/CEO of Pritzker Realty Group; chairman and co-founder of Vi (formerly Classic Residence by Hyatt), The Parking Spot and Artemis Real Estate Partners. For the past two years, she has been on the President's Economic Recovery Advisory Board.

Raytheon Pays $8 Million to Settle Hundreds of Export Charges

Raytheon in Waltham, Mass., agreed April 30 to pay $8 million in civil penalties and remedial expenditures to State to settle 125 charges that it violated the Arms Export

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Control Act (AECA) and the International Traffic in Arms Regulations (ITAR), State announced. The alleged violations included inaccurate tracking, valuation and documentation of temporary exports and imports of controlled hardware. The consent agreement also claimed the firm's foreign partners manufactured hardware in excess of the approved amounts on export licenses. It also charged Raytheon with failing to obtain and submit required documents on time.

> Under a four-year consent agreement, $4 million of the penalty will be suspended on "the condition that the funds have or will be used for Department-approved pre- and post-Consent Agreement remedial compliance measures," a State spokesperson said. In addition, Raytheon will hire an external Special Compliance Official to oversee the consent agreement, which also requires it to conduct two external audits of its compliance program, as well as implement additional compliance measures.

According to State's charging letter, Raytheon self-disclosed hundreds of ITAR violations over the course of many years. "However, … Respondent's record in effectively administering its agreements and temporary authorizations, and in effectively investigating and correcting related violations, has frequently been inadequate, thereby requiring repeated comprehensive reviews conducted at the behest of or in consultation with the Department," it noted. This is the third case Raytheon has settled in the last 15 years with State. It settled previous charges in 2003, paying $23 million in civil penalties and $2 million for remedial compliance measures. In 1999, it paid $550,000 in a settlement and agreed to remedial actions.

"Raytheon is heavily engaged in the export license process given our significant international business," a company spokesperson said in e-mail to WTTL. "Raytheon reported various administrative matters to the Department relating to licensing and export notifications over a period of several years. In addition, we have voluntarily taken a number of actions designed to eliminate administrative errors, including investments in automated technology systems, the expansion of employee training programs, and changes to our export operations and compliance organization. Raytheon will continue to work closely with the State Department to achieve our goals of full compliance and industry-leading practices," he said.

"Fresh Perspective" Needed, WTO Candidate Azevedo Says

The absence of low-hanging fruit in multilateral trade talks means a "completely different and fresh perspective" is needed to jump start the multilateral trading system so it can capture hard-to-reach fruit at the frontier of trade liberalization, Roberto Azevedo, the Brazilian ambassador to the World Trade Organization (WTO), said in an exclusive interview with WTTL. Azevedo and Herminio Blanco of Mexico are the two remaining candidates in the selection process to be the WTO's next director-general. The results of consultation in the selection process are expected to emerge around May 7 (see **WTTL**, April 29, page 3). Both men have been trying to convince WTO members why he would be the best choice for the job.

"I couldn't have made it" to the final round of consideration without support "across the board," Azevedo said. He claimed his support crosses regions and levels of development because he comes "from inside the system." In response to concerns of some members

that he has been too close to the Geneva negotiating community, Azevedo said his experience at the WTO is "absolutely" a positive thing. People are "familiar with my work," and they "know my ability to help to find solutions," to bring consensus and to lead, he said. Those are the attributes people believe are most helpful for the WTO, he said. Azevedo also said his supporters believe he has the vision and attitude to move the WTO forward into the future. Anyone familiar with the WTO is "very skeptical" of "magic solutions," he said. The director-general has to know what he's doing to make the system work, find solutions, and spur members forward, he said. The job is about finding innovative approaches that are done in a precise, goal-oriented way, he said.

> Understanding trade and negotiations isn't sufficient for the person holding the WTO's top slot, Azevedo said. "In order to help the members, you have to understand the system, particularly a system that is in a critical stage of paralysis," he said. The situation is that the patient is "very ill," he said. Immediate treatment is needed now in the WTO, he said.

The idea that the race is between ideological camps is a "gross misinterpretation," Azevedo said. He denied the race is a competition between more liberal and protectionist trade visions. The same criticism could be made of the other candidate and his connection to one or two economies or trade blocs, he said. He said no candidate would be accepted if the approach was driven by ideological factors.

The "WTO doesn't have a lot of time," Azevedo said, referring to bilateral, plurilateral and regional agreements. "They're not a problem, but to the extent that the multilateral system is stuck, which should be the engine of trade liberalization, then we have a disconnect between the frontier of trade liberalization ... and the engine, which is the multilateral trading system," he said.

The first thing that needs to be done on the stalled Doha Round is to sit down around the table in a constructive and solution-finding mode, Azevedo said. An honest conversation is needed about the future of the negotiations and the WTO, he said. Negotiators need to recognize that what is on the table isn't going to be manageable under the same approach, he said. "There are no low-hanging fruits" in the WTO, Azevedo said. "If you shake the tree, nothing is going to fall," he added. One has to go up the tree, grab the fruit and bring it down, he said. To do that, one has to know where the fruit is and how to get up there and one has to know the tree, he said. "Just shaking things up in the WTO ... would be absolutely and utterly useless," he said.

Officials Say This Time Is Different for U.S.-Japan Trade Talks

American and Japanese officials say U.S.-Japan trade talks that will parallel negotiations on a Trans-Pacific Partnership (TPP) will be different from the failed efforts of the last 30 years aimed at opening the Japanese market. New policies announced by Japanese Prime Minister Shinzo Abe there have "changed the mindset of the Japanese people," Takeo Mori, economic affairs minister at the Japanese embassy, told a Global Business Dialogue conference May 1. His views were echoed by Assistant USTR for Japan and Korea Wendy Cutler, who said "things are really different; they have really changed." She said this was based not just on a sense that things have changed but "on agreements we have reached" (see **WTTL,** April 15, page 4). Mori and Cutler tried to dispel the skepticism that many in the trade community have about talks with Japan because of the

past experience and the difficulties the U.S. has faced in opening the Japanese market. Unlike previous bilateral negotiations that haven't produced results, these talks will be different because "obligations will be subject to dispute-settlement," Cutler said.

> Mori said Abe has identified three goals or arrows as part of what has been called Abenomics. The first is a more aggressive monetary policy aimed at stopping deflation. The second is a financial policy that will increase government spending. The third is a new growth strategy that includes domestic systemic and structural reforms, increase integration with Asian markets and lower trade barriers.

Abe sees "TPP as the catalyst for this change," Mori said. Another goal is to strengthen the security alliance with the U.S. and to be part of any regional rulemaking to make sure that any framework that is adopted is based on free markets and the rule of law, he said. Another difference in the talks this time is the creation of special team in Abe's office, which eventually will have a staff of 100, to coordinate and lead talks in the TPP among ministries.

Cutler noted that U.S. and Japanese negotiators spent 14 months discussing Tokyo's participating in the TPP before the U.S. formally said it would welcome Japan into the talks. The negotiators had "some detailed talks; some ups and downs," she said. Because of the experience in negotiating a free trade agreement with Korea we "have a better sense of how to approach the upcoming negotiations" with Japan, Cutler said. Nonetheless, "we have no illusions they will be challenging and difficult, but we look forward to having Japan at the table," she said.

CAFC Say Customs Must Explain NAFTA Entry Policy

For the second time, the Court of Appeals for the Federal Circuit (CAFC) has bounced back to the Court of International Trade (CIT) a long-running battle between Ford Motor Company and Customs and Border Protection (CBP) over duty refunds for imports under the North American Free Trade Agreement (NAFTA).

> In a split 2-1 decision May 3 written by Judge Jimmie Reyna, the court vacated and remanded the CIT's ruling that Ford had filed its Certification of Origin (CO) past the one-year deadline set under NAFTA rules. While agreeing with CIT Judge Judith Barzilay that Ford's CO was late, the CAFC told the CIT to require CBP to justify why it has a different policy for regular refund requests and those filed under a reconciliation program it created to deal with large-volume imports such as autos.

The court noted that Customs has promulgated regulations for filing post-entry claims for refunds of goods eligible for duty-free treatment under NAFTA and for requiring additional documentation. CBP also created the reconciliation program to facilitate trade in goods important to NAFTA trade.

Ford argued that Customs must waive the one-year deadline here because it has done so under the reconciliation program. "Ford contends that to do otherwise would impermissibly apply two different interpretations to § 1520(d). Customs responds that waiver for the reconciliation program is justified by the requirements that importers must satisfy

to be eligible to participate, which it contends are designed to satisfy Customs that covered goods qualify for NAFTA treatment," Reyna wrote. "The NAFTA and § 1520(d) require that COs be presented within one year of the date of importation. Customs has the power to waive this requirement, but did not do so in this case. Yet at the same time, Customs has waived the requirement to present COs for all participants in the reconciliation program," Reyna noted. "Absent a reasonable explanation, Customs may not exercise its waiver power in a manner that effectively interprets the statute in different ways for different types of post-entry refund claims. Because the Trade Court did not reach this issue, we vacate its judgment and remand for further proceedings in accordance with this opinion," he wrote for the majority.

> In her dissenting opinion, CAFC Judge Pauline Newman noted how the process for submitting proof documents varies from port to port. "Ford negotiated with Customs for nearly two years in an attempt to establish a mechanism to efficiently submit Certificates of Origin in support of electronically filed claims. Ford seems to have largely coped with Customs' uncertain and inconsistent duty-free refund process despite Customs' belated guidance on filing of Certificates," she wrote.

"It is clear that Ford acted reasonably and in accordance with precedent and custom. Although this court now remands to give Customs an opportunity to formulate a post-hoc reasonable explanation for its actions, Customs has had an opportunity to establish its actions as reasonable and has failed," she argued. "I would hold that Ford's Certificates were timely filed, and end this litigation," Newman declared.

WTO Members Offer Flexibility to Save Bali Ministerial

Nearly a dozen World Trade Organization (WTO) members said April 30 that they are willing to be more flexible in their positions in negotiations on agreements to be presented at the WTO ministerial in December in Bali, Indonesia. At a meeting in Geneva aimed at salvaging the Bali ministerial, "dozens" of "specific indications of new flexibility" were offered by more than 10 of some 30 countries at the meeting in the Australian mission, a trade official told WTTL following the meeting. This new flexibility includes proposals on an early-warning mechanism, a "single-window" obligation and a work program on food security for developing countries.

> The U.S. and other countries previously raised concerns about the impasse on talks on a so-called "small package" for Bali (see **WTTL**, April 15, page 1). Trade officials have been consulting with capitals to define what flexibility they had in negotiations to deliver such a packagei.

The U.S. is **"**prepared to offer additional flexibility both in Advance Rulings (Article 3) and in Penalties (Article 6.2) where we are the proponent of specific text**,"** Deputy U.S. Trade Representative (USTR) Michael Punke said in a statement prepared for the April 30 meeting. He said the U.S. is also willing to agree to some proposals on the early warning mechanism by the African, Caribbean, and Pacific Group "even where these proposals are a stark departure from existing and well-functioning WTO procedures on extending implementation periods," he noted. The new U.S. flexibility "is a direct response to least developed country (LDC) concerns on implementation," Punke said. The U.S., Japan, New Zealand, Mexico, the EU, and Colombia also supported the idea of

giving additional flexibility on implementation to LDCs, the trade official said. The early warning mechanism is designed to allow countries that are having difficulty implementing the agreement additional time. The U.S. backed a proposal to give LDCs an additional automatic three years to implement agreements if they have problems meeting existing deadlines, he said. That's "important" for encouraging LDCs to participate and take on binding obligations, the official added.

> South Korea also signaled important flexibility on the "single window" obligation, the trade official reported. A single window is a system that allows users to submit information with a single body to fulfill all government regulatory requirements. Developing countries have said the existing provision is "particularly difficult to implement," especially on a binding basis, he said. South Korea said it might consider it a non-binding obligation, he said.

Punke said the U.S. also is open to a work program on food security "to be agreed by Bali." The U.S. agreed with India and other proponents that enhancing food security in developing countries is an important issue and should be a top priority for future WTO work on agriculture, he added. Work can and should include examination of public stockholding, administered prices, better-functioning markets, plus further liberalization in agriculture trade, reductions in trade-distorting domestic support, elimination of export restrictions, improved transparency and efficient distribution systems, Punke said.

"This was a very good day," Punke said after the meeting. The types of flexibilities suggested during the meeting should be very helpful in making a course correction, he said. The question now is whether working in the coming weeks begins to build results for Bali, he said.

USTR Designates Ukraine Priority Foreign Country... Again

It's déjà vu all over again. In its annual Special 301 report on foreign intellectual property rights (IPR) protection released May 1, the USTR's office designated Ukraine a Priority Foreign Country (PFC), the first such new designation since 2001 of the highest level of concern under Special 301 rules. The last country to earn that designation was Ukraine, which was removed from that list in 2005 (see **WTTL**, May 7, 2012, page 3).

> "I regret that the Government of Ukraine has earned the first new Priority Foreign Country designation in 11 years due to its severely deteriorating climate for IPR protection and market access, and call upon that government to reverse recent backsliding and swiftly resolve the problems identified today," Acting USTR Demetrios Marantis said in a statement.

Ukraine and the U.S. agreed to an IPR Action Plan in 2010. "During intensive bilateral engagement, Ukraine has made a series of commitments to make specific improvements in the areas of government use of pirated software, nontransparent administration of royalty collecting societies, and online piracy," the report noted. "Unfortunately, the situation has continued to deteriorate," it added. Ukraine was previously named a PFC in 2001. At that time, the country lost its eligibility under the Generalized System of Preferences, but was reinstated in 2006 when "grounds were ameliorated," a senior USTR

official said. With the report, USTR also added Barbados, Bulgaria, Paraguay, and Trinidad and Tobago to the Special 301 Watch List. Canada moved from the Priority Watch List to the Watch List; Brunei Darussalam and Norway were taken off the Watch List.

Shelf Bra is No Bra, CIT Judge Stanceu Decides

In two closely tied rulings that might be considered R-rated in a family newspaper, CIT Judge Timothy Stanceu ruled May 1 that women's garments that have a built-in shelf bra don't qualify for customs classifications as bras. The cases, which were argued together and had common factual evidence, show how narrowly written Harmonized Tariff Schedule (HTSUS) descriptions can lead to sharply different classifications by Customs and Border Protection (CBP) and widely different tariff rates. For these products, the difference meant a tariff of 28.2% v. 10.8%.

> In *Lerner v. U.S.* (slip op. 13-56), Stanceu agreed with Customs that the firm's Bodyshaper garment is a knitted garment under HTSUS 6114.30.10 with a tariff rate of 28.2% and not as a brassiere under HTSUS 6212.90.00 with a rate of 6.6% as Lerner argued. In *Victoria's Secret Direct, LLC v. U.S.* (slip op. 13-55), however, he disagreed with CBP's classification of an almost identical garment as a T-shirt or tank top under HTSUS 6109.10.00 with a rate of 16.5% and agreed with the importer that the garment, marketed as the Bra Top, while not a bra, was an "other knitted garment" under HTSUS 6114.20.00, with a rate of 10.8%.

In both cases, Stanceu disagreed with the importers that the products were support garments. While the two garments compete against each other, they fall under different tariff subheads because of a narrow distinction based on the fact that the Bodyshaper is cut straight across the back with a U-shaped front, whereas the Bra Top has a U-shaped back and front. "The Bodyshaper provides bust support, but it would be inconsistent with facts the court found in this case to conclude that body support is *the* essential characteristic or purpose of this garment," he wrote (his emphasis).

Stanceu said his detailed discussion of the differences in the garments was based on "*in camera* inspection" of the garments. An attorney in the case noted the inspection was of samples and were not warn by a model, although a bra model did testify at the trial. "The court also finds, from a preponderance of the evidence produced at trial, that a Bodyshaper, style number 9843233, provided a certain degree of such support when worn at the fitting of Ms. Trainer, the fit model, and that this fitting involved a Bodyshaper in Ms. Trainer's correct garment size," Stanceu observed.

Lerner New York, Inc. is now known as New York & Company, but up until 2005 it was a subsidiary of Limited Brands, the parent company of Victoria's Secret. Alan Klestadt of Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, which represented both companies in the two suits, told WTTL that his clients are considering an appeal but no decision has been made yet.

Many products like the two in this case are still imported, which makes the two garments "symbolic of a class of a lot of shelf bras," he said. Klestadt said he disagreed with Stanceu's legal analysis. "The judge is halfway there," he said. But the opinion "misinterpreted" the meaning of 6212, he argued.

* * * Briefs * * *

ENVIRONMENTAL SERVICES: In publication released May 1 (Pub. No. 4389), ITC finds few trade barriers that apply specifically to provision of core environmental services, but it said removal of barriers affecting "related" services, including architectural, engineering and construction services, could increase trade in sector. "Although few trade barriers specifically target environmental services, measures that affect all service industries (e.g., restricting commercial presence) or related services (e.g., not recognizing foreign licenses) may restrict trade in environmental services," ITC notes.

AES: Edits to Automated Export System (AES) to implement new export control reform rules will be implemented weekend of Oct. 12, 2013, Gerry Horner, director of BIS Office of Technology Evaluation, told BIS webinar May 1 (see **WTTL**, April 22, page 1). Changes include adding new 600-series ECCNs to reference table and checking eligibility for certain license types and exceptions. Superstitious exporters beware: error type for mismatch will be 666, Horner noted.

TPP: USTR asked ITC April 30 to investigate "probable economic effect of providing duty-free treatment for imports of products from Japan and the other ten countries" currently participating in Trans-Pacific Partnership (TPP) negotiations on: (1) U.S. industries producing like or directly competitive products and (2) consumers.

FCPA: Another former Alstom Power executive, William Pomponi, was indicted May 1 in New Haven, Conn. U.S. District Court for conspiring to violate and violating Foreign Corrupt Practices Act (FCPA) and laundering money. Charges relate to his alleged participation in scheme to pay bribes to Indonesian government officials, including member of Indonesian Parliament and high-ranking members of state-owned electricity company. Alstom VP Frederic Pierucci was indicted April 16 on related charges (see **WTTL**, April 22, page 9).

TRADE FIGURES: U.S. merchandise exports in March decreased 1.2% from year ago to $130.3 billion, Commerce reported May 2. Services exports increased 2.3% to $53.9 billion from year ago. Goods imports went down 6.5% from March 2012 to $186.5 billion, as services imports lost 0.76% to $36.6 billion.

FLAT-ROLLED STEEL: WTO arbitrator determined "reasonable period of time" for China to implement recommendations and rulings of dispute-settlement body (DSB) decision on countervailing and antidumping duties on grain oriented flat-rolled electrical steel from U.S. is July 31, 2013, 8 months and 15 days from adoption of Panel and Appellate Body Reports. Appellate Body upheld ruling against China in October 2012 and DSB adopted ruling at November meeting (see **WTTL**, Oct. 22, page 4).