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After Delay, USTR Robert Lighthizer Confirmed Easily

At long last, Robert Lighthizer was confirmed May 11 as the new U.S. Trade Representative (USTR). Despite a last-minute critique by Sens. John McCain (R-Ariz.) and Ben Sasse (R-Neb.), Lighthizer sailed through the Senate in an 82-14 vote and met with immediate applause and praise from agriculture and industry groups.

A day prior, McCain and Sasse explained their opposition in a letter. “Unfortunately, your confirmation process has failed to reassure us that you understand [NAFTA’s] positive economic benefit to our respective states and the nation as a whole,” they wrote.

They further criticized his “vocal advocacy for protectionist shifts in our trade policies” and the current administration’s “incoherent and inconsistent trade posture.” Sen. Cory Gardner (R-Colo.) also voted no, along with 11 Democrats. Four Republicans did not vote.

Sen. Ron Wyden (D-Ore.) voted for Lighthizer while criticizing the current administration’s trade strategy, which “amounts to a muddle of 140-character tweets, mixed messages, and overhyped announcements that are backed by little substance,” he said from the floor. He further praised Sen. Joe Manchin (D-W.Va.), who used Lighthizer’s waiver as leverage to secure miners’ health benefits (see **WTTL**, May 1, page 5).

In the end, Lighthizer, a former deputy USTR, was not controversial. He “has a comprehensive grasp of trade law and trade policy, but is also steeped in the intricate processes by which both are established and implemented,” Tom Sneeringer, president of the Committee to Support U.S. Trade Laws, said in a statement.

U.S., Canada Finance Ministers Talk Softwood Lumber

While the ongoing softwood lumber dispute between their two countries features as much drama as middle school recess, Canadian Finance Minister Bill Morneau met with

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Treasury Secretary Steven Mnuchin on the sidelines of the G7 meeting in Italy May 12 and pressed him on trade issues. “Canada and the U.S. continue to engage in productive discussion,” the Canadian Finance Department said in a lengthy readout of the meeting.

“Minister Morneau defended Canada's position on open trade and recent trade issues such as softwood lumber. To that end, the Government of Canada disagrees strongly with the baseless duties applied to Canadian softwood lumber products, and remains committed to working with the U.S. Administration to achieve a durable long-term solution,” the department said. Other than a tweet confirming the two had met, there was no official readout from Treasury at press time.

Morneau and Mnuchin also “spoke about the importance of preserving and strengthening the Canada-U.S. trade relationship.” In addition to lumber, other issues such as dairy have soured in the last few months (see **WTTL**, May 8, page 6).

Just a week before the finance meeting, Canadian and U.S. officials accused each other of inappropriate actions in the lumber dispute. First, Canadian Prime Minister Justin Trudeau signaled May 5 he is considering a carbon tax on U.S. coal import in retaliation for Commerce’s decision to impose duties on softwood lumber products

The next day Commerce Secretary Wilbur Ross said that such threats of retaliation are “inappropriate.” Commerce believes “that a negotiated settlement is in the best interests of all parties and we are prepared to work toward that end,” Ross said in a statement.

U.S., China Unveil Initial Promises of 100-Day Plan

Administration officials hailed initial actions of the U.S.-China Economic Cooperation 100-day plan, especially deals on U.S. beef exports and credit card payments, while industry skeptics took a more wait-and-see approach on whether China will deliver. The ten-point list that Treasury Secretary Steven Mnuchin, Commerce Secretary Wilbur Ross and Chinese Vice Premier Wang Yang released May 11 also included agreements on financial services, investment and energy.

July 16 emerged as a hard deadline for several initiatives. By no later than that date China must begin allowing imports of U.S. beef (following one more round of technical consultations), and the two countries will resolve issues surrounding China-origin cooked poultry imports.

Also by July 16, China will issue guidelines and allow wholly U.S.-owned suppliers of electronic payment services (EPS) to begin the licensing process, leading to full market access. China will allow their banks to issue dual brand-dual currency bankcards so U.S. EPS suppliers can process foreign currency payment card transactions.

“This is more than has been done in the whole history of U.S.-China relations on trade,” Ross told reporters. But the truth is that China has promised several of these bullet points

for years. The ban on U.S. beef exports, for example, was lifted in September, but China has dragged its feet on negotiating technical terms of access (see **WTTL**, April 3, page 10).

Similarly, the World Trade Organization (WTO) Dispute Settlement Body (DSB) declared in 2012 that China needed to allow U.S. credit card companies to apply for licensing (see **WTTL**, July 23, 2012, page 2). The proof will be in the pudding.

Other agreements involve safety evaluations of all pending U.S. biotechnology product applications, potential export authorization of liquefied natural gas (LNG) and an invitation for direct investment from Chinese entrepreneurs including their participation at the June SelectUSA Investment Summit in Washington.

In addition, applicable U.S. federal regulatory authorities will apply the same bank prudential supervisory and regulatory standards to Chinese banking institutions as other foreign banks. China is expected to issue bond underwriting and settlement licenses to two qualified U.S. financial institutions.

China is also expected to allow wholly foreign-owned financial services firms in China to provide credit rating services, and the U.S. Commodity Futures Trading Commission (CFTC) will extend the current no-action relief to Shanghai Clearing House for six months, with further extensions up to three years. The People's Bank of China and CFTC will work toward a memorandum of understanding related to overseeing cross-border clearing organizations.

Tech industry groups warned that the “breakthrough” was a missed opportunity. “Rather than secure real concessions on the critical issues facing the U.S. economy—especially the rampant practice of “innovation mercantilism” that wrests away U.S. market share in advanced industries...—the plan instead opens up Chinese markets for some commodity-based and finance industries in return for giving China free rein to use its massive foreign reserves to buy up American companies in advanced industries,” Robert D. Atkinson, president of Information Technology and Innovation Foundation (ITIF), said in a statement.

Comments Show Mixed Feelings on Trade Deficits

With the calendar rapidly approaching June 29, the date on which Commerce and USTR must submit an “Omnibus Report on Significant Trade Deficits” per a March 31 executive order, public comments closed May 10. Predictably, labor and agriculture decried unfair trade practices, while targeted countries and professional trade groups defended existing trade relationships.

Commerce and USTR will hold a public hearing May 18, which is likely to be contentious (see **WTTL**, April 24, page 8). Trading partners with whom the U.S. had “significant” goods trade deficit in 2016 were: Canada, China, the European Union (EU), India, Indonesia, Japan, Korea, Malaysia, Mexico, Switzerland, Taiwan, Thailand and Vietnam.

In order to address the \$500 billion U.S. trade deficit, the AFL-CIO called for more “vigorous trade enforcement” and called on the government to hold China to its World Trade Organization obligations.

China had its defender in the U.S.-China Business Council (USCBC). “While the bilateral trade deficit with China is significant and must be reduced, it also needs to be viewed in context. First, the share of the U.S. global trade deficit held by East Asia (including China) is almost exactly the same now as it was twenty years ago, before China’s WTO entry,” the group wrote.

“Though China is frequently cited as the source of the United States’ largest bilateral trade deficit, value-added calculations of the trade deficit, pioneered by the WTO and the Organization for Economic Cooperation and Development (OECD), indicate that a significant portion of our imports from China originate elsewhere. If the U.S. trade deficit were calculated on a value-added basis, it would decrease by about 40 percent, putting it at about the same level as our trade deficit with the European Union, according to a recent study by Oxford Economics,” USCBC added.

U.S. Wheat Associations (USW) and the National Association of Wheat Growers (NAWG) called for a reduction of trade barriers, even with countries like Canada with which the U.S. has a wheat surplus. “NAWG and USW strongly support efforts to correct policy barriers that reduce potential wheat exports to foreign markets. Open markets and fair trade are critical to the U.S. wheat industry as roughly half of U.S. wheat production is exported on average,” NAWG President David Schemm said in a statement.

EU Ambassador to the U.S. David O’Sullivan pushed back on the metrics the current U.S. administration uses to measure successful trade relationships. “Taken on their own, deficits are not an accurate metric to evaluate benefits and consequences of trade, nor of a country’s openness. The roots of trade deficits usually originate in macroeconomic policies, and trade balances reflect differences between savings and investments,” commented O’Sullivan.

Caroline Freund, senior fellow at the Peterson Institute for International Economics, backed up the EU’s position in her comments. She noted that bilateral deficits “have more to do with country characteristics than unfair trade practices.” The U.S. has a large trade deficit with Germany but enjoys a surplus with the Netherlands. Both operate under the same EU trade policy, so what accounts for the difference?

“Germany makes a lot of goods Americans want, like cars and machinery, while Americans make a lot of goods the Netherlands wants, like medical equipment and pharmaceuticals. The United States tends to run bilateral deficits mainly with countries that produce things it likes or needs. For example, as long as the United States uses more oil than it produces, it will run a trade deficit with some oil producers,” wrote Freund.

China Loses Appeal Against U.S. in WTO Antidumping Case

China's attempt to win a tougher ruling against U.S. antidumping rules at the World Trade Organization (WTO) was thwarted May 11 when the Appellate Body dismissed all of China's claims. The panel report will now go to the Dispute Settlement Body (DSB) for formal adoption.

Back in October 2016, a dispute panel found that the Commerce acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement (ADA) in its use of the weighted average-to-transaction (WA-T) comparison methodology, particularly "zeroing" (see *WTTL*, Oct. 24, 2016, page 1).

The U.S. chose not to appeal, but China did, focusing on the panel's dismissal of some of its claims regarding Commerce's application of the WA-T methodology and that the panel's claim that China failed to demonstrate that adverse facts available was a norm of general and prospective application that could be subject of an "as such" challenge in WTO dispute settlement.

The Appellate Body rejected China's first issue and reversed the previous panel's finding of the second, but declined China's request to find adverse facts available norm as inconsistent with the ADA due to insufficient facts to complete an analysis.

Court Returns Boomerang, U.S. Steel OCTG Appeal

In vacating what it calls an "abuse of discretion" by the trade court, the Court of Appeals for Federal Circuit (CAFC) May 8 remanded Boomerang Tube and U.S. Steel's appeal of a Court of International Trade (CIT) decision, which affirmed Commerce's final antidumping determination on oil country tubular goods (OCTG).

"Because Boomerang and U.S. Steel failed to exhaust administrative remedies before Commerce, the Trade Court should have dismissed this appeal without reaching the merits. Its failure to do so was an abuse of discretion," Circuit Judge Jimmie Reyna wrote for a three-judge panel in *Boomerang Tube LLC v. U.S.*

Boomerang, U.S. Steel and seven other producers originally filed antidumping petitions against OCTG imports from nine countries, including Saudi Arabia, in July 2013 (see *WTTL*, July 8, 2013, page 5). Commerce selected Duferco SA, the largest of 14 known Saudi Arabian OCTG exporters, as the sole mandatory respondent in the investigation. Duferco is the exporter of record for OCTGs produced by Jubail Energy Services Company (JESCO), Reyna noted.

The judge noted the CIT decision constitutes "an abuse of discretion" for two reasons. "First, the decision is legally erroneous to the extent it stands for the proposition that Commerce must expressly notify interested parties any time it intends to change its methodology between its preliminary and final determinations, despite the inclusion of the

relevant data in the record and the advancement of arguments related to that data before Commerce. There is no support for such a requirement,” he wrote.

“Second, the decision is based on a clearly erroneous finding of material fact that the parties did not have an opportunity to raise their single entity objection to using the Colombian transactional data before Commerce,” Reyna noted. JESCO responded to Commerce’s information request “by providing data of sales made in Colombia to an unaffiliated customer and an affiliated distributor,” the judge wrote.

According to CIT, “Boomerang and U.S. Steel did not have notice that Commerce might use data relating to JESCO’s third party transaction with the affiliated Colombian distributor to calculate CV [constructed value] profit. We disagree,” Reyna added.

“In its case brief, JESCO suggested using those data to calculate CV before Commerce. At that point, Boomerang and U.S. Steel had notice of the potential that Commerce might use the Colombian data to calculate JESCO’s CV profit. Indeed, Boomerang’s rebuttal brief to Commerce reveals that it recognized JESCO’s suggestion to use the Colombian data for CV profit and that Boomerang objected to that approach,” he wrote.

Everyone Agrees on China Market Economy Status, Except China

In response to a Commerce request for public comments on China’s status as a nonmarket economy (NME), industry executives, labor unions and even U.S. senators pulled no punches. However, whether or not the public opinion matters under World Trade Organization (WTO) rules remains to be seen.

Commerce announced in April it would examine China’s NME status under antidumping (AD) and countervailing duty (CVD) laws as part of the less-than-fair value investigation of certain aluminum foil from China (see **WTTL**, April 3, page 4).

“China’s continuing limits on market access have coerced major investments by U.S. companies in China, ostensibly to access Chinese consumers, even though such access does not always materialize. Instead, those investments are often directed at producing for the U.S. market under labor, environmental, and health and safety conditions that fail to meet international standards and that disadvantage U.S.-located producers,” AFL-CIO Trade Policy Specialist Celeste Drake wrote.

Many of the other comments were similar, in fact almost identical. Nearly half of the 52 comments from U.S.-based manufacturers and industry groups referenced law firm Wiley Rein’s submission of more than 100 attachments and over 240 pages of comments and attached brochures.

For example, Nucor wrote, “Since [2006], China has continued to fail to take steps towards becoming a market economy. Rather, the current state of China’s economy reflects a conscious rejection of market forces. The Department should therefore continue to find

that China is not a market economy under U.S. law.” Several other U.S. steel firms and industry coalitions echoed those exact sentiments.

For their part, China’s Ministry of Commerce (MOFCOM) submitted a paper, reiterating its position that its WTO accession protocol necessitates the change in status no matter what Commerce finds. “Under the WTO Agreements, it is irrelevant whether the Department considers that China is a ‘non-market economy’ under the criteria set forth” in the Tariff Act of 1930,” MOFCOM wrote.

“In no event would such a determination allow the United States to determine normal value in investigations of Chinese products other than in accordance with the applicable provisions of the anti-dumping Agreement and the GATT 1994. This NME review that the Department has announced therefore has no bearing upon the compliance of the United States with its WTO commitments,” it added.

“For this reason, China will not submit comments in response to the department’s notice of inquiry. China calls upon the United States to comply immediately with the expiration of Section 15(a) (ii) of the Protocol.”

Sens. Al Franken (D-Minn.), Sherrod Brown (D-Ohio), Amy Klobuchar (D-Minn.) and Tammy Baldwin (D-Wis.) also weighed in. “China should not be granted market economy status because its economy does not reflect free market principles with respect to most - if not all - of the relevant factors the Department of Commerce is required to consider in determining whether to grant market economy status,” the senators wrote.

“Because the calculation of antidumping duties relies closely on how prices are determined in a producer’s home country, treating China as a market economy could undermine the effectiveness of antidumping duties and place thousands of U.S. jobs and businesses at risk,” they added.

More Complex WTO Disputes Exacerbate Uncertainties

Increasingly numerous and complex World Trade Organization (WTO) disputes and appeals are compounding uncertainties over the use of legal remedies when implementation of panel rulings is perceived to be lagging, trade officials and executives said May 11 during a Geneva conference on WTO dispute settlement.

The high water mark on the use of WTO dispute settlement in 2016 reflected both the level of trust and confidence in the system and new challenges, Xavier Carim, chair of the WTO Dispute Settlement Body in 2016, said. Last year was “challenging” both for the WTO dispute settlement system and international trade, said Carim, who is South Africa’s ambassador to the WTO. Disputes and appeals have become more numerous and complex, other speakers said (see **WTTL**, Nov. 28, 2016, page 6).

Implementation problems emerged in WTO disputes between the U.S. and Mexico, and recently between Colombia and Panama over textile-related measures, Carim said. The cases highlight the known problem between the structure and sequencing of compliance proceedings and arbitration, he added. Citing the six compliance panels that were active at the end of 2016, Carim said the higher number of compliance proceedings is a sign that implementing WTO rules is not always straightforward.

Systemic problems in the implementation phase of WTO disputes are emerging, said panelist Giorgio Sacerdoti, a former WTO Appellate Body member. Uncertainty over implementation of WTO rulings has prompted “general confusion” about how well the system is working, said Sacerdoti, a senior professor of international law at Bocconi University. The trend toward longer implementation periods also may be reducing satisfaction, he added.

Another worry is that more cases deal with implementation of dispute rulings under Article 21.5 compliance proceedings of the WTO Dispute Settlement Understanding (DSU), Sacerdoti said. That provision allows countries in a dispute to form a panel on implementation of WTO rulings when they disagree over whether the losing party has complied with a WTO dispute panel or Appellate Body decision. Each party in a dispute can ask to reconvene the original panel to decide the matter, he noted.

The perceived value of winning a WTO case may be reduced if implementation takes a long time, and involves one or more compliance panels and further consultations, Sacerdoti said. Problems of implementation have also appeared in WTO disputes between the U.S. and India over solar subsidies, and between Panama and Colombia over restrictive measures on textile imports, which Colombia justified as part of the fight against money laundering, he added.

A third concern relates to the understanding on “sequencing,” which appears to be coming apart, Sacerdoti suggested. Usually countries involved in such disputes agree through a sequencing agreement that retaliation will be possible only after a compliance panel under Article 21.5 has determined that compliance has not been affected, he said.

In recent cases, such as between Mexico and the U.S. over tuna labeling, this practice was not followed, Sacerdoti said. Three distinct, parallel proceedings arose from a single dispute in that case. The U.S. and Mexico initiated distinct Article 21.5 compliance proceedings before the same panel, he added. Lacking a sequencing agreement, the U.S. at the same time asked that same panel to decide -- under a different DSU article -- whether the level of countermeasures Mexico immediately sought to apply was appropriate, even though the question of U.S. implementation had not yet been conclusively determined, he said. If implementation were deemed consistent under the Article 21.5 procedure, the countermeasures would be “wholly illegitimate,” Sacerdoti added.

*** * * Briefs * * ***

STEEL WIRE ROD: In 4-0 preliminary vote May 11, ITC found U.S. industry may be injured by allegedly dumped imports of carbon and certain alloy steel wire rod from Belarus, Italy, Korea,

Russia, South Africa, Spain, Turkey, Ukraine, UAE and United Kingdom and subsidized imports from Italy and Turkey. Commissioner F. Scott Kieff did not participate.

BRAZIL: First U.S. beef shipment arrived in Brazil May 4, Agriculture Secretary Sonny Perdue announced. Brazil opened market to U.S. beef and beef products in August (see **WTTL**, Aug. 8, page 6). “With Brazil’s large market reopened to the United States, U.S. beef exports are poised for new growth. I look forward to Brazilians getting the opportunity to eat delicious American beef, because once they taste it, they’ll want more of it,” said Perdue.

CENSUS: Census Bureau May 9 announced retirement of Director John H. Thompson. His last day will be June 30. Thompson was sworn in as director in August 2013 and had previously worked at Census from 1975-2002. “My tenure at the Census Bureau has been a richly rewarding capstone to my federal career. As I pursue opportunities in the private sector, please be assured that I will continue to be supportive of the administration’s priority to have a complete and accurate 2020 Census,” Thompson said in statement.

TREASURY: Sen. Ron Wyden (D-Ore.) May 10 placed hold on nomination of Sigal Mandelker to be Treasury under secretary for terrorism and financial intelligence until Treasury provides Senate committees “information and documents related to Russia and its financial dealings with President Trump and his associates,” he said in statement. Senate Intelligence Committee Vice Chairman Mark Warner (D-Va.) made request to FinCEN May 9. “We have to follow the money if we are going to get to the bottom of how Russia has attacked our democracy,” said Wyden. Mandelker’s nomination was sent to Senate April 4 (see **WTTL**, April 10, page 5).

TPP: New Zealand’s Cabinet ratified Trans-Pacific Partnership (TPP) May 11. Ratification comes in advance of Asia-Pacific Economic Cooperation (APEC) trade ministers meeting in Vietnam May 20-21. “Following the U.S. withdrawal from TPP, our export sector and business community sent a clear message to find a way forward for this valuable agreement and that’s what we have been working hard to do,” Trade Minister Todd McClay said in statement. New Zealand’s implementing legislation and regulations take effect on date TPP enters into force.

TRADE DEALS: As TTIP talks are on pause awaiting new USTR, EU and Mexico have committed to concluding trade talks before end of 2017. Two partners “agreed to accelerate the pace of negotiations even further, increasing the frequency of our negotiators’ meetings,” EU Trade Commissioner Cecilia Malmström said during visit to Mexico City May 8. “Mexico is a friend, a partner and an ally. And I will say to you what I am saying to partners around the world: even if other doors are closing, know that the EU’s will remain open,” Malmstrom said at Mexican business event next day. At same time, EU and Canada are in final stages of approving trade deal.

USDA: Newly minted Agriculture Secretary Sonny Perdue May 11 announced creation of under secretary for trade and foreign agricultural affairs – per 2014 Farm Bill – and reorganization of under secretary positions. New structure will see Foreign Agricultural Service (FAS) report to as-yet-to-be-named under secretary for trade. Reduction of USDA workforce not expected. Agriculture industry groups such as American Soybean Association (ASA) applauded move. In contrast, Institute for Agriculture and Trade Policy argued reorganization “puts global agribusiness first by further orienting the agency’s mission toward expanding exports,” group said in statement.

TRADE PEOPLE: With Lighthizer now confirmed as USTR, rumors are swirling about potential deputies. One name mentioned is multi-titled Kevin M. Dempsey, senior vice president, public policy, general counsel and secretary at American Iron and Steel Institute, which represents U.S. steel interests. Before joining AISI, he was partner at law firm Dewey & LeBoeuf and its predecessor Dewey Ballantine LLP.