Curtis Washington Trade Update – April 2017

This update provides the latest from Washington concerning changes in U.S. trade law and policy.

Commerce Department Receives 83 Comments on How to Formulate Enhanced Buy America Approach for Pipelines

Just four days after taking office, President Donald Trump issued a memorandum to the Secretary of Commerce regarding the construction of American Pipelines. The memorandum instructed the Commerce Department to "develop a plan" (within 180 days) under which all new pipelines use materials and equipment produced in the United States to the extent possible, and to the extent permitted by law.

As part of its effort to respond to the President's Order, the Commerce Department soliticed comments from all interested parties. On Monday April 10th, the Department posted the 83 comments that it received regarding the construction of pipelines using domestic steel and iron – 37 of which support the Department mandating a domestic content requirement, 39 opposing it, and 5 that are neutral.

Those that provided comments include: (1) large U.S. steel/pipe manufacturers (largely in favor, but with some significant dissenters), (2) large energy companies (largely opposed), (3) powerful trade associations (split; opinion depended on their constituents), (4) foreign governments (e.g., Canada, Mexico, EU, etc.) (vehemently opposed), and (5) an assortment of smaller sector-related companies (split; opinion varied).

We note that the President's order directed the Department to use domestic materials and equipment in "all new pipelines, as well as retrofitted, repaired, or expanded pipelines, inside the borders of the United States, including portions of the pipelines" to *the extent permitted by law*. In order to comply with the law, the final plan from the Department will need to consider the United States' international obligations. The United States is a signatory of the WTO's Government Procurement Agreement (GPA) and has many Free Trade Agreements (FTAs) in which it has made commitments not to have domestic content requirements and to provide foreign entities with an equal opportunity for covered government procured activities.

However, after the U.S. Government Accountability Office (GAO) released a report in March on government procurement, Senators Tammy Baldwin (D – WI) and Jeff Merkley (D –OR) wrote to Trump and a number of his senior staff requesting that he make good on his "Buy American" pledge by suspending the procurement provisions of trade deals until they are renegotiated. The GAO's report demonstrated that under the GPA, and other pacts that cover procurement, the U.S. has opened its door to foreign

firms far more than others have. While the report's authors note that more data is needed, the top line is that the U.S. has opened procurement to foreign firms twice as much as the next five largest WTO signatories to the GPA combined. According to Commerce Secretary Wilbur Ross, addressing "Buy American" provisions, particularly as they relate to transportation issues, are among some of President Trump's top trade-related priorities.

President Trump Signs Two New Executive Orders Relating to Trade

On Friday, March 31st, President Trump tried to showcase his intent to fulfil campaign promises, and signed two executive orders relating to trade: one to examine the causes of trade deficits with China and other major U.S. trading partners, and another to stop under collection of anti-dumping and countervailing duties on unfairly traded foreign products.

Pursuant to the first Executive Order, the President ordered a 90-day study of abusive trade practices that contribute to the United States' trade deficit. The executive order directs the Commerce Secretary and U.S. Trade Representative to "identify those foreign trading partners with which the United States had a significant trade deficit in goods in 2016" and for each of these identified trading partners, the Report shall, inter alia, "assess the major causes of the trade deficit." Commerce Secretary Wilbur Ross said that the findings from the 90-day study would "form the basis for decision-making by the administration" on how to approach trade deficits in the future, including in a renegotiation of NAFTA.

Ross went on to say that the analysis will assess whether a bilateral trade deficit is caused by one of seven reasons: cheating or other inappropriate behavior; free trade agreements that have not produced their forecasted benefits; a lack of enforcement by the U.S.; policy decisions made by previous U.S. administrations; currency misalignment in relation to the U.S. dollar; constraints put in place by the World Trade Organization on U.S. behavior, particularly in the area of tax policy; systemic overcapacity in one or more industries; and asymmetrical trade barriers.

The study will look at the countries primarily responsible for the U.S. trade deficit, Ross said. These will include China, Japan, Germany, Mexico, Ireland, Vietnam, Italy, South Korea, Malaysia, India, Thailand, France, Switzerland, Taiwan, Indonesia and Canada.

The second directive is aimed at increasing the collection of duties from countries whose companies American officials believe are selling products in the U.S. below their cost of production. The order instructs the Department of Homeland Security, which oversees the Customs and Border Protection, to design and implement a strategy for combating violations of U.S. trade and customs law and allows for "enhanced" measures to curtail

the flow of counterfeited and pirated goods in to the U.S, according White House National Trade Council Peter Navarro. Specifically, the order mandates that the Secretary of Homeland Security shall "develop a plan that would require covered importers that, based on a risk assessment conducted by CBP, pose a risk to the revenue of the United States, to provide security for antidumping and countervailing duty liability through bonds and other legal measures, and also would identify other appropriate enforcement measures."

White House Sends Congress a Draft Letter of Notification to Renegotiate NAFTA

The Trump administration has provided a draft letter of notification to Congress on how it will renegotiate NAFTA. The objectives outlined in the letter, prepared for the signature of acting USTR Stephen Vaughn, are not much different from what Congress has mandated in trade promotion authority legislation. In many ways, the outlined objectives reflect what the Obama administration negotiated for in TPP. For example, negotiated principles secured in the TPP, such as enforceable labor and environmental obligations, data free flow requirements and disciplines on state-owned enterprises are included.

The formal letter of intent to negotiate, which is required under the Trade Promotion Authority legislation that gives authority to the President to enter negotiations on NAFTA, is expected to be sent to Congress in the beginning of April. However, the confirmation of Robert Lighthizer as USTR could affect and slow down the process.

The letter does include some policies more aligned with President Donald Trump's economic nationalist views, such as tightening rules of origin, respecting domestic procurement preferences, putting in place a general safeguard mechanism and eliminating NAFTA chapter 19 that allows Mexico or Canada to challenge U.S. trade remedy decisions. The proposed safeguard mechanism would allow tariffs to be raised temporarily when imports from a NAFTA partner harm or threaten to harm domestic industries. The draft also suggested efforts to "level the playing field" on tax treatment, which could be alluding to the Trump administration's belief that Mexico uses its value-added tax as a tariff that puts the United States at a disadvantage. However, the document is silent on the issue of currency manipulation – an objective that President Trump has been touting for quite some time now.

The letter also mentions a prominent theme of the Trump administration's trade policy: trade deficits. "The persistent U.S. deficit in goods trade with Canada and Mexico demands that this administration take swift action to revise the relationship to reflect and respond to 21st-century challenges." However, the letter does not ever mention threats to pull out of the agreement in the event of unfavorable terms or trade deficits, as President Trump has mentioned on several occasions.

USTR Issued its 32nd Annual Report on Foreign Trade Barriers, Prominently Featuring China

On Friday, March 31st, the office of the U.S. Trade Representative (USTR) released its annual National Trade Estimate Report (NTE) on Foreign Trade Barriers, which prominently features China in its 500 pages. The NTE is an annual report on significant barriers to American exports; the report "helps identify and address major roadblocks for American goods and services in markets around the globe." It covers 58 countries, the European Union, Taiwan, and Hong Kong.

This year's report is identical in format to recent years, but USTR also provided a list of what it considered the most notable changes in the last year in the U.S. export market. The list of major developments begins by stating "President Trump has been clear: his Administration will aggressively enforce U.S. trade laws and defend American workers form harmful trade barriers to promote free and fair trade that benefits all Americans. USTR is dedicated to identifying and addressing such barriers to American exports around the world to help level the playing field for American workers, job-creators, farmers, and ranchers."

Among the list of eleven countries where "notable changes" occurred in the last year were Canada, Mexico, and China. The list included seven changes in China: excess capacity of steel and aluminum, an overly restrictive cybersecurity regime, forced technology transfers, online piracy, delays in approval of agricultural biotechnology products, a continuing ban on U.S. beef imports, and persistent obstacles facing U.S. providers of electronic payment services despite a U.S. victory on the issue at the WTO.

Mexico was included because of major energy and telecommunication reforms implemented over the past several years. The report states: "[i]n 2016, regulations were completed to implement the law passed in 2013 making sweeping reforms in Mexico's energy sector, paving the way for new investment by U.S. companies in deep and ultra-deep water exploration. Energy reform legislation opened Mexico's oil and gas sector to private participation for the first time since 1938 and allows greater private investment in power generation." USTR also listed developments in Canada to be among the most notable changes: Canada increased its threshold for review for foreign investment, and the U.S. initiated WTO dispute settlement over the sale of wine in British Columbia grocery stores.

Commerce Department Announces Intent to Undertake Review of Whether China Should Graduate to "Market Economy" Status

As part of its ongoing AD case *Certain Aluminum Foil from China*, the Commerce Department announced an inquiry into whether the PRC should continue to be treated as a nonmarket economy (NME). The Commerce Department's notice says U.S. law allows it to review China's non-market economy status "at any time." As part of its inquiry, the Department is seeking public comment and information with respect the factors that are to be considered under the law for graduating from NME to market economy status.

The fact that Commerce is effectively self-initiating an NME graduation inquiry is rather unusual. According to the Commerce Department's own "Antidumping Manual," in order "for the Department to conduct a review of a country's NME status, the country's government must make a formal request for a review, or support a respondent's claim in an antidumping case, that the country has a market economy. After the Department receives a request, the Department begins an analysis of the six factors …".

The United States last reviewed China's non-market economy status in 2006 (which was pursuant to a request from the Chinese exporters). At that time Commerce determined that China failed on all six determining criteria, which are: (1) the extent to which the country's currency is convertible into other currencies; (2) the extent to which wage rates are determined by free bargaining by labor and management; (3) the extent to which joint ventures or other investments by foreign firms are permitted in the country; (4) the extent of government ownership or control of the means of production; (5) the extent of government control over allocation of resources and over price and output decisions of enterprises, and (6) other factors the administering authority considers appropriate.[1]

The announced review comes as China has decided to forge ahead with its dispute with the European Union at the WTO over the treatment of China as a non-market economy. China has held off for now in its dispute with the U.S. over the same issue.

[1] David Lawder, *U.S. Commerce Department to Launch China Market Economy Review*, REUTERS (Mar. 30, 2017) http://www.reuters.com/article/us-usa-trade-china-idUSKBN17132Q.