

ALSTON & BIRD



Trump & Trade – What You Need to Know Now

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Overview of Today's Topics

- Trump Administration's Trade Policy and Evolving Agenda
- NAFTA Renegotiation and Potential Impact
- Ongoing Trade Cases

I. Trump Administration's 2017 Trade Policy Agenda

America first as trade policy



TPP “would have been a large-scale version of NAFTA. It would have been a disaster. It's a great honor to have – I consider that a great accomplishment, stopping that. And there are many people that agree with me. I like bilateral deals.”

President's 2017 Trade Policy Agenda

Overarching Purpose

Expand trade in a way that is freer and fairer for all Americans

- Increase economic growth
- Promote job creation in the United States
- Promote reciprocity with trading partners
- Strengthen manufacturing base and our ability to defend ourselves
- Expand agricultural and services industry exports

Means

- Focus on bilateral negotiations rather than multilateral negotiations
- Renegotiate and revise trade agreements when our goals are not being met

President's 2017 Trade Policy Agenda

Measures and Priorities

- 1) Defend U.S. national sovereignty
- 2) Strictly enforce U.S. trade laws
 - Antidumping (AD) and countervailing duties (CVD)
 - Section 201 “safeguard” action
 - Section 232 action
 - Section 301 action
- 3) Use all possible sources of leverage to encourage other countries to open their markets to U.S. exports of goods and services, and provide adequate and effective protection and enforcement of U.S. intellectual property rights
- 4) Negotiate new and better trade deals with countries in key markets around the world
 - Trade deficits in relation to NAFTA and KORUS

Robert Lighthizer, USTR

- Deputy USTR under Ronald Reagan
- Led international trade practice at a major US law firm for 30 years
- An expert on antidumping and countervailing duties (AD/CVD)
- Considers Permanent Normal Trade Relations (PNTR) with China to have been a mistake



Wilbur Ross, Secretary of Commerce

- Billionaire US investor in steel, coal and telecommunications
- In 2004, he combined bankrupt Cone Mills and Burlington Industries to form ITG, which he sold to a private equity firm in 2016. ITG had substantial operations in Mexico, taking advantage of NAFTA
- Opened a \$100 million denim mill in Nicaragua in 2008, then closed it at a total loss in 2009



U.S. Trade Policy Priorities

USTR Robert Lighthizer's Speech on September 18, 2017

- “There has been a growing feeling that the system that has developed in recent years is not quite fair to American workers and manufacturing, and that we need to change.”
- President Trump "has been critical of the prevailing U.S. trade policy of so-called free trade deals and of their effects on workers. So we will have change in trade policy."

President's Recent Interview With Forbes

October 2017

Reciprocal :

- "What I want to do is reciprocal. See, I think the concept of reciprocal is a very nice concept. If somebody is charging us 50%, we should charge them 50%. Right now they charge us 50%, and we charge them nothing. That doesn't work with me."

Bilateral Deals :

- "You can have it this way and do much more business. And if it doesn't work out with a country, you give them a 30-day notice, and you either renegotiate or not."
- "For me, it's America first. We've been doing that so long that we owe \$20 trillion, okay?"

II. NAFTA Renegotiation and Its Potential Impact

Background of the NAFTA Renegotiation

- NAFTA was implemented in 1994.
- U.S. – Mexico trade balance has gone from \$1.3 billion surplus to \$64 billion deficit.
- Market access issues in Canada with respect to dairy, wine, grain and other products.
- President Donald Trump: “NAFTA is the worst trade deal maybe ever signed anywhere” and requires “substantial change.”



NAFTA Negotiating Objectives

USTR July 17, 2017

Break down barriers to American exports:

- Unfair subsidies.
- Market-distorting practices by state owned enterprises.
- Burdensome restrictions of intellectual property.

Address America's persistent trade imbalances in North America

- More open, equitable, secure, and reciprocal market access.
- Trade agreement is effectively implemented and enforced.

NAFTA Negotiating Objectives

Key Topics on Textile and Apparel

Trade in Goods :

- Maintain existing duty-free access to NAFTA country markets for U.S. textile and apparel products and seek to improve competitive opportunities for exports of U.S. textile and apparel products while taking into account U.S. import sensitivities.

Rules of Origin :

- Update and strengthen the rules of origin, as necessary, to ensure that the benefits of NAFTA go to products genuinely made in the United States and North America.
- Establish origin procedures that streamline the certification and verification of rules of origin and that promote strong enforcement, including with respect to textiles.

Four Rounds of Negotiations

- 1st Round: August 16 - 20, 2017, Washington, D.C.
- 2nd Round: September 1 - 5, 2017, Mexico City
- 3rd Round: September 23 to 27, 2017, Ottawa, Canada
- 4th Round: October 11 to 17, 2017, Arlington, VA

Key priorities for the U.S.

- Rules of origin, particularly on autos and auto parts, requiring higher NAFTA content and substantial U.S. content.
- Labor provisions.
- Currency manipulation.
- Dispute settlement provisions.
- Government procurement.
- Agriculture.

Negotiation Progress?

Opening Statement of USTR at 1st Round

- “We cannot ignore the huge trade deficits, the lost manufacturing jobs, the businesses that have closed or moved because of incentives – intended or not -- in the current agreement.”
- President Donald Trump “is not interested in a mere tweaking of a few provisions and a couple of updated chapters. We feel that NAFTA has fundamentally failed many, many Americans and needs major improvement.”

Closing Statement of USTR at 4th Round

- “Frankly, I am surprised and disappointed by the resistance to change from our negotiating partners on both fronts.”
- “We have seen no indication that our partners are willing to make any changes that will result in a rebalancing and a reduction in these huge trade deficits.”

Some Controversial Issues

Tariff Preference Level (TPL)

- Yarn-forward rule of origin requires use of fabric made from yarn in the NAFTA countries in order to qualify for NAFTA tariff benefits.
- TPL, the yarn-forward rule of origin exception, allows a certain amount of specific yarn and fabric produced outside the NAFTA region to be used in NAFTA-region apparel production and be counted as originating as long as a substantial transformation occurs in the region.
- The U.S. proposed to eliminate TPL during the third round.
- The U.S. also proposed to add a short-supply list mechanism as a potential replacement for TPL. It is said that the list is similar to the current CAFTA short-supply list.
- Canada and Mexico oppose the proposals.

Some Controversial Issues

Tariff Preference Level (TPL)

Letter to the trade ministers of the NAFTA countries from 10 associations representing “all parts of the North American textile, apparel, and retail supply chains” on September 20, 2017 :

- TPL provides the ability to supplement NAFTA’s yarn-forward rules of origin with limited amounts of non-originating input.

Letter to the leaders of the Senate Finance and House Ways and Means Committees from 8 associations representing “the overwhelming majority of textile manufacturing in the United States” on October 2, 2017:

- TPL allows Mexico and Canada to export to the U.S. duty-free each year more than 235 million square meter equivalents of fabric and apparel made with specified third-party inputs, and 13 million kilograms of yarn made from third-party fiber.

Some Controversial Issues

Rules of Origin for Autos and Auto Parts

The U.S. tabled a proposal on auto rules of origin at the fourth round.

- Increase the NAFTA regional value content requirement from 62.5 percent to 85 percent and require 50 percent U.S. content to qualify for tariff-free treatment.
- Expand the tracing list to include steel, aluminum, copper and plastic resins
- Do away with tariff shift rules.

Some Controversial Issues

Rules of Origin for Autos and Auto Parts

U.S. Commerce Secretary Wilbur Ross :

- “The non-NAFTA content has been growing, and growing rapidly, and largely at the expense of the U.S., so that’s the reason we have rules of origin as a target.”

Canadian Foreign Minister Chrystia Freeland:

- “Proposed new U.S. national content requirements would severely disrupt ... supply chains, make North American producers and manufacturers less competitive relative to imports from outside the region, and put in jeopardy tens of thousands of jobs across North America.”

Some Controversial Issues

Investor-State Dispute Settlement (ISDS)

- ISDS allows foreign companies to arbitrate investment claims directly against a government through arbitration.
- The U.S. tabled a proposal that would allow NAFTA parties to opt in or out of ISDS rules.
- The proposal would also eliminate indirect expropriation and violations of minimum standards of treatment and due process as grounds for investors to bring cases.

Some Controversial Issues

Government Procurement

- The U.S. proposed at the third round of negotiations, a “dollar-for-dollar” scheme that would cap the market access for its contracts at the sum of Mexico and Canada’s market access over a certain time frame.

U.S. Commerce Secretary Wilbur Ross :

- “Our market is 10 times the size of either of those markets, so if you gave equal percentage market share we’d been giving them 10 for one.”

Some Controversial Issues

Sunset Clause

- The U.S. presented a proposal for a so-called “sunset clause” that would see the NAFTA expire after five years unless the parties can agree to extend it.

U.S. Commerce Secretary Wilbur Ross :

- "The forecast that had been made at the initiation of NAFTA and of the other trade agreements mostly had been wildly optimistic as to the result, and the results have been quite different from the proponents' sense."

Some Controversial Issues

Currency Provision

- Any session on currency has not been held even though the USTR highlighted the currency provision as one of its negotiating objectives.

USTR Robert Lighthizer at the first round of negotiations :

- A new NAFTA “should have effective provisions to guard against currency manipulation.”

NAFTA Renegotiation Going Forward

- In general, the U.S. focuses on trade balances and bringing back domestic manufacturing jobs while Canada and Mexico appear more focus on milder upgrades to the deal.
- The three countries repeatedly stated their goal was to finish the talks by the end of 2017 well in advance of Mexican presidential and U.S. congressional elections, but agreed to delay the fifth round of negotiations to work on bridging the “significant conceptual gaps” exposed during the fourth round.
- Fifth round of negotiations will be held November 17 -- 21 in Mexico City.
- They also agreed to schedule additional negotiating rounds through the first quarter of 2018.

NAFTA Renegotiation Going Forward **Withdrawal from NAFTA?**

Former USTR Robert Zoellick said on October 5 :

- There is “at least a 50 percent chance” that the president will pull out of the NAFTA.

President Donald Trump on October 10 :

- “I happen to think that NAFTA will have to be terminated if we're going to make it good.”
- “Otherwise, I believe you can't negotiate a good deal.”

NAFTA Renegotiation Going Forward **Withdrawal from NAFTA?**

U.S. Commerce Secretary Wilbur Ross said on October 11 :

- “We don’t hope it will, we don’t desire that it will, we don’t believe that it will. But it is at least a conceptual possibility as we go forward.”
- The U.S. is still open to bilateral agreements with Canada and Mexico if NAFTA collapses.

President Trump on October 11 sitting next to Canadian Prime Minister :

- “If we can't make a deal, it will be terminated and that will be fine.”
- “We'll decide over the next fairly short period of time. But I think it's going to work out well” for both the U.S. and Canada, as well as for Mexico.
- If the negotiations fail that bilateral deals could be made with Canada and Mexico.

NAFTA Renegotiation Going Forward

Congressional Disapproval?

- Even if U.S. negotiating positions are accepted by Mexico and Canada, it may be difficult to secure congressional approval.

Former USTR Michael Froman on October 16, 2017:

- “If you are going to alienate key sectors of the economy and their supporters in Congress, it is hard to see how you put together 218 votes in the House and 51 in the Senate for approval.”
- “I hope somebody in the administration is thinking this through – if they eliminate dispute settlement, if they change the rules of origin in a way that Detroit can’t live with, if they make all of these various changes – exactly how they’re going to cobble together the votes.”

Potential Impact of NAFTA Reform

- NAFTA renegotiation is the first major trade negotiation put forward by President Trump.
- The results of the renegotiation likely will affect other FTAs in line with President Trump's intention to reduce the trade deficit.

Potential Impact of NAFTA Reform

U.S.-Korea Free Trade Agreement (KORUS)

Background :

- KORUS was entered into force in March 2012.
- U.S. exports declined by 2.7 percent from \$43.5 billion in 2011 to \$42.3 billion in 2016.
- U.S. trade deficit in goods more than doubled, rising from \$13.2 billion to \$27.6 billion.
- U.S. deficit in the auto sector alone was \$24 billion in 2016, an increase of 77% since 2011.

Potential Impact of NAFTA Reform

U.S.-Korea Free Trade Agreement (KORUS)

Progress :

- KORUS was singled out in the President's 2017 Trade Policy Agenda for generating trade deficit.
- USTR Letter to South Korea of July 12, 2017.
- First special session in Seoul, South Korea, on August 22, 2017.
- Second special session in Washington, D.C. on October 4, 2017.

Potential Impact of NAFTA Reform

U.S.-Korea Free Trade Agreement (KORUS)

USTR Robert Lighthizer :

- “Too many American workers have not benefited from the agreement. USTR has long pressed the Korean government to address burdensome regulations which often exclude U.S. firms or artificially set prices for American intellectual property.”
- President Trump “will walk away in a heartbeat if he thinks it's a bad deal for America.”

Ministry of Trade, Industry, and Energy of the South Korean government:

- "The U.S. is not the only one who can use scrapping the FTA as a negotiation tactic.”
- "Even if the U.S. throws its weight and pressures to scrap the agreement and makes unreasonable demands, Korea will not give in to that.”

Potential Impact of NAFTA Reform

Other Free Trade Agreements

USTR Robert Lighthizer :

- Once the “NAFTA problem” is solved, the U.S. can shift its attention to updating free trade agreements with countries in the Latin American region if certain conditions are addressed.
- U.S. agreements with Peru, Colombia, Panama and Chile, as well as the Central America Free Trade Agreement all “need to be modernized, more or less.”
- The “driving principle” behind U.S. efforts to renegotiate NAFTA and amend KORUS will also frame our efforts to address trade issues throughout Latin America.

Potential Impact of NAFTA Reform

Central America Free Trade Agreement (CAFTA)

Difference between CAFTA and NAFTA:

- The U.S. has a \$5 billion trade surplus when dealing with the DR-CAFTA countries while the U.S. has a \$74 billion deficit when dealing with the NAFTA countries.

Gail Strickler, former assistant USTR for textiles:

- “I don’t think anyone is going to want to mess with a \$5 billion surplus.”
- He expects that CAFTA negotiations will focus on intellectual property protection and digital trade.

III. Ongoing Trade Cases

Increasing Antidumping and Countervailing Duty Cases

Overview

- Antidumping duty (“AD”) and countervailing duty (“CVD”) proceedings are designed to protect against injurious, unfairly traded imports.
- Imposition of additional duties to offset unfair pricing or subsidization.
- AD/CVD cases usually begin with a petition filed by member(s) of a U.S. industry or an association.
- But the law also provides for “self-initiation” by the Department of Commerce but this is rarely used.
- Investigations proceed in parallel before the International Trade Commission and the Department of Commerce. Affirmative determinations by both agencies will lead to imposition of AD and CVD orders, and additional duties on imports.

AD/CVD Proceedings

Overview

AD:

- Foreign manufacturer or exporter is selling in the U.S. at less than fair value and causing material injury or threat thereof to the domestic industry.
- Duties are calculated to offset unfair pricing.
- China is the primary target.
 - Considered a non-market economy.

AD/CVD Proceedings

Overview

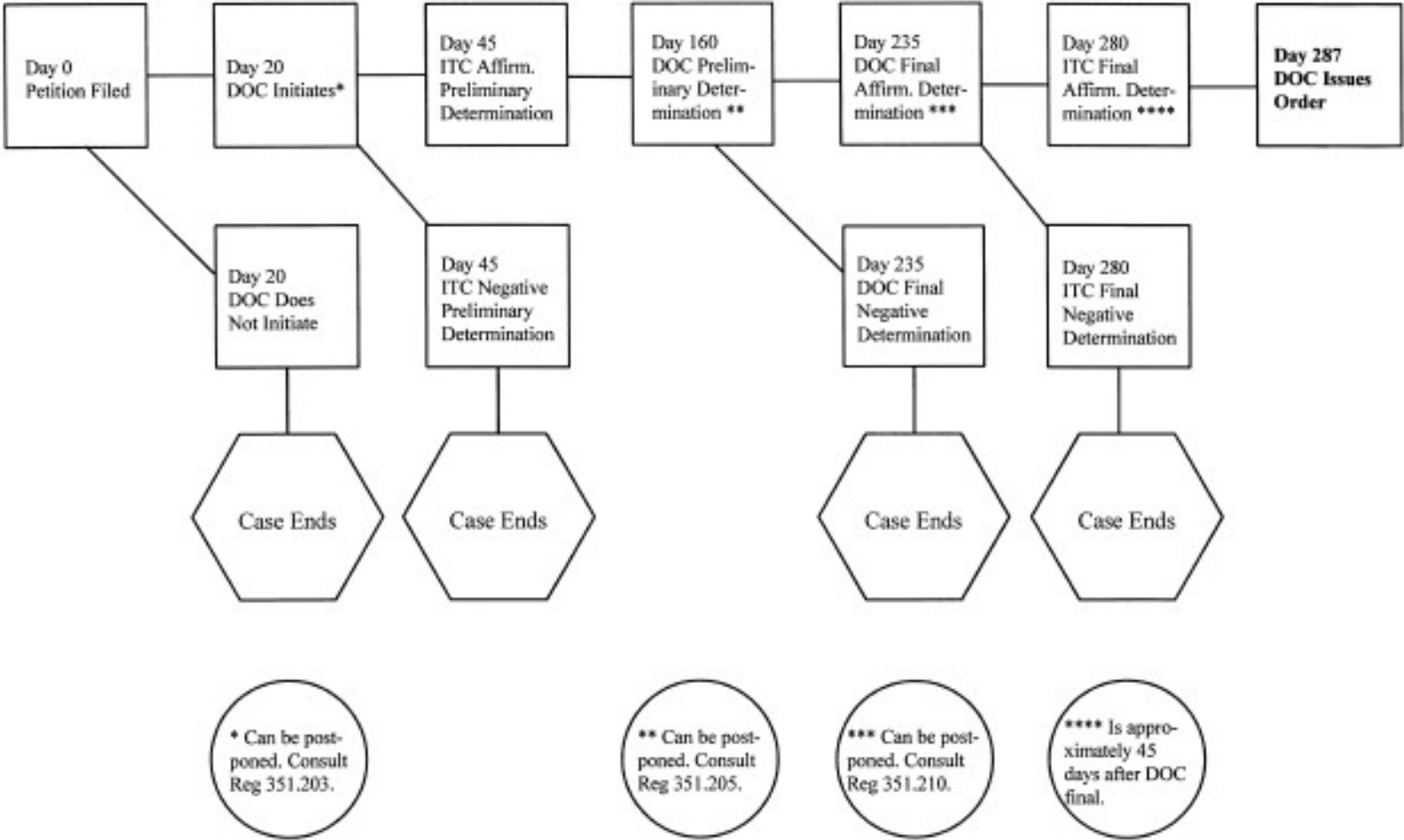
CVD:

- Foreign manufacturer or exporter is being improperly subsidized by its government and its imports are causing material injury or threat thereof to the domestic industry.
- Countervailing duties are imposed to offset subsidies.

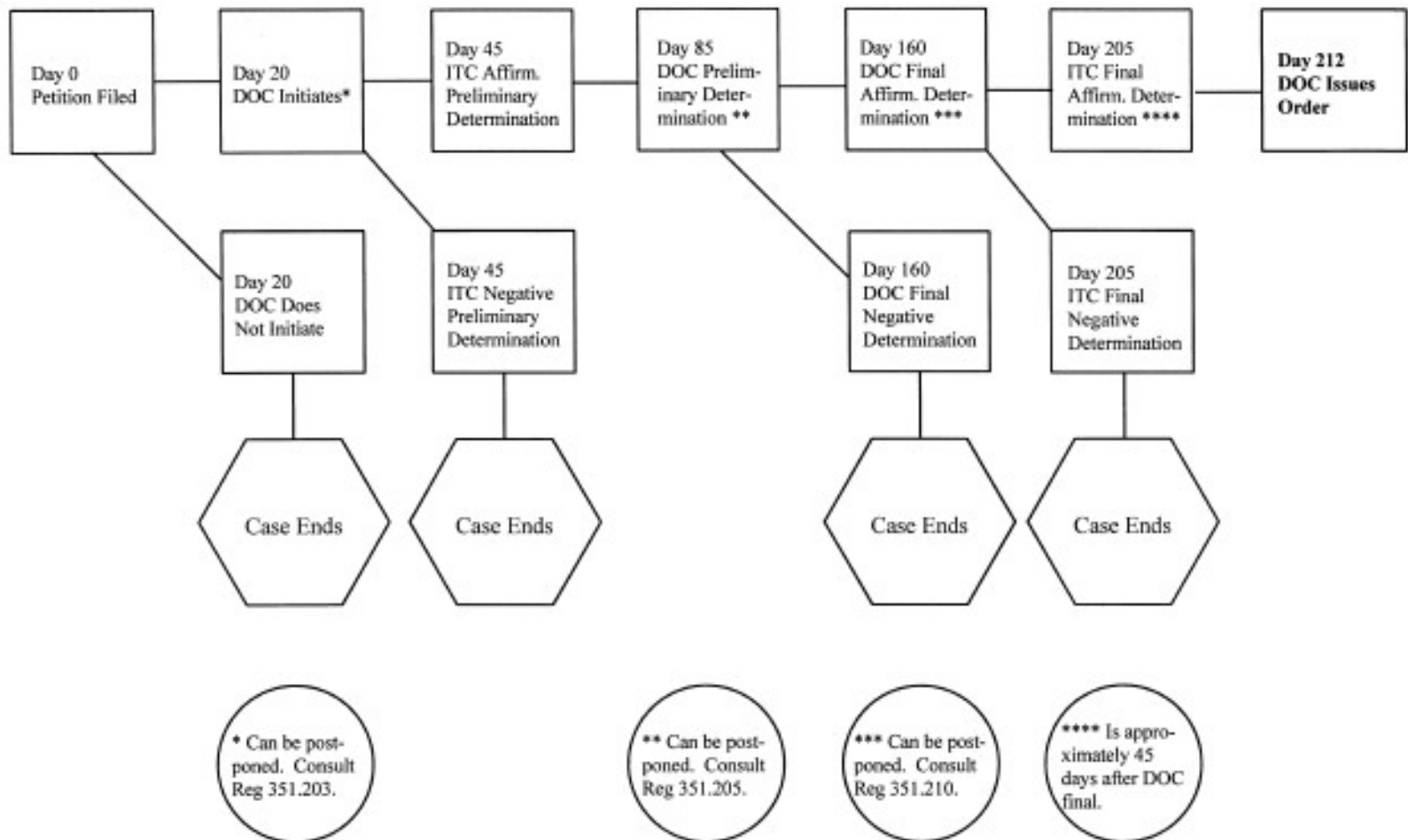
Examples of subsidy programs:

- Provisions of steam, coal, electricity, and land for LTAR;
- Policy loans;
- Tax incentives: income tax deductions; VAT exemptions on imported equipment;
- Government grants.

AD Investigations Timeline



CVD Investigations Timeline



AD/CVD Investigations

Fine Denier Polyester Staple Fiber from China, India, Korea, and Taiwan

Petitioners:

- DAK Americas LLC, Charlotte, NC
- Nan Ya Plastics Corporation, America, Lake City, SC
- Auriga Polymers Inc., Charlotte, NC

Scope

- Fine denier polyester staple fiber (fine denier PSF), not carded or combed, measuring less than 3.3 decitex (3 denier) in diameter.
- The scope covers all fine denier PSF, whether coated or uncoated.

AD & CVD Investigations

Fine Denier Polyester Staple Fiber from China, India, Korea, and Taiwan

Status

- Petition was filed on May 31, 2017
- The International Trade Commission preliminarily found injury on July 14, 2017.
- AD and CVD investigations are ongoing before the Department of Commerce.
- Commerce's CVD preliminary determination will be issued on October 30, 2017. CVD will kick in shortly upon publication of the determination.
- Commerce's AD preliminary determination will be issued on December 27, 2017. AD will be applied to subject imports shortly afterwards.
- The International Trade Commission will resume final injury investigation end of 2017 or beginning of 2018.

AD Investigation

Low Melt Polyester Staple Fiber from Korea and Taiwan

Petitioner:

- Nan Ya Plastics Corporation, America, Livingston, New Jersey

Scope

- Synthetic staple fibers, not carded or combed, specifically bi-component polyester fibers having a polyester fiber component that melts at a lower temperature than the other polyester fiber component (low melt PSF). The scope includes bi-component polyester staple fibers of any denier or cut length.
- The subject merchandise may be coated, usually with a finish or dye, or not coated.

AD Investigation

Low Melt Polyester Staple Fiber from Korea and Taiwan

Status

- Petition was filed on June 27, 2017.
- The International Trade Commission preliminarily found injury on August 10, 2017.
- AD investigations are ongoing before the Department of Commerce.
- Commerce's current deadline for the AD preliminary determination is December 4, 2017. That deadline may be postponed to January 23, 2018.
- The International Trade Commission will resume final injury investigation in early 2018.

Section 201

(Safeguard)

- At the request of domestic industry, the President or Congress, the International Trade Commission investigates whether an article is being imported in such quantities as to be a substantial cause of serious injury, or the threat thereof, to domestic industry.
- If the Commission finds injury, the President can impose a tariff, a quota or other remedy for four years, which can be extended for another four years.
- Remedy is temporary and global.
- Special treatment to FTA countries

Section 201 Investigation

Crystalline Silicon Photovoltaic Cells, Whether Or Not Partially or Fully Assembled Into Other Products

The case

- Brought by Suniva and SolarWorld on imports of crystalline silicon photovoltaic (“CSPV”) cells and products incorporating CPSV cells.

Progress :

- Petition was filed on May 17, 2017
- ITC determined injury on September 22, 2017
 - FTA countries: Negative with respect to Canada and Singapore; affirmative for Mexico and Korea
- USITC will vote on remedy on October 31, 2017
- USITC will recommend remedy to the President by November 13, 2017

Section 201 Investigation

Large Residential Washers

The Case:

- Brought by Whirlpool against large residential washers (“LRWs”)
- South Korea-based Samsung and LG are the primary targets

Progress:

- Petition was filed on June 5, 2017
- USITC found injury on October 5, 2017
- Public hearing on remedy was held on October 19, 2017
- USITC will submit its report to the President by December 4, 2017

Section 232 (National Security)

- Requires Commerce, at the request of a federal agency or a private party, to investigate the impact on national security of imports of specific articles.
- If Commerce finds an adverse impact, the president “shall” impose “import restrictions.”
- Last threatened against machine tools from Japan and Taiwan in the 1980s.

Section 232 Investigation Imports of Steel

Summary :

- Determine the effects of steel imports on the national security

Progress :

- Secretary of Commerce initiated the investigation on April 19, 2017
- President memorandum directing the Secretary to proceed expeditiously on April 20, 2017
- Public hearing was held on May 24, 2017
- Under the Act, the Commerce will submit a report until January 14, 2018 although the President set June 30, 2017 as the deadline.

Section 232 Investigation

Imports of Aluminum

Summary :

- Determine the effects of aluminum imports on the national security

Progress :

- Secretary of Commerce initiated the investigation on April 26, 2017.
- President memorandum directing the Secretary to proceed expeditiously on April 27, 2017
- Public hearing was held on June 22, 2017.
- Under the Act, the Commerce will submit a report until January 22, 2018 although the President set June 30, 2017 as the deadline.

Section 301

(addressing unfair acts, policies and practices of foreign governments)

- Allows the president to retaliate against a country that denies US rights under an FTA or carries out practices that are unjustifiable, unreasonable or discriminatory and burden or restrict US commerce.
- Rarely invoked since the adoption of dispute resolution mechanisms under the WTO.

Section 301 Investigation

China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation

Summary:

- Determine whether acts, policies, and practices of the Government of China related to technology transfer, intellectual property, and innovation are actionable under the Trade Act.

Progress :

- President Memorandum to USTR on August 14, 2017
- USTR initiated the investigation on August 18, 2017
- Public hearing was held on October 10, 2017
- Post-hearing rebuttal comments by October 20, 2017

Thank You.

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