International Trade Currents

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What Will President Trump Find in His International Trade Inbox?

By Ted Posner

International trade figures prominently among the top priorities of the incoming Administration. Candidate Trump railed against U.S. trade policy during the campaign, promising to withdraw the United States from the recently concluded (but not yet entered into force) Trans-Pacific Partnership agreement, renegotiate the North American Free Trade Agreement (NAFTA) and ramp up enforcement of trade rules in various unspecified ways.

The incoming President appears to have big plans for revamping U.S. trade policy, as signaled by early decisions like his creation of a White House-based National Trade Council to coordinate the trade-related actions of various Executive Branch agencies. But in addition to launching his own trade initiatives, the new President will inherit some important matters from the outgoing Administration. In particular, as the Obama Administration gets ready to leave office, a number of significant trade disputes have gotten started or are about to get started. How the Trump Administration handles them will be a significant indicator of its approach to trade law and policy in general.

Among the dispute settlement proceedings on the U.S. docket, here are several that are at their very early stages and that we will be watching closely in the months ahead.

U.S.-Canada Softwood Lumber Dispute

Trade in softwood lumber has been a sore spot in the U.S.-Canada trade relationship for decades, with U.S. lumber producers alleging that Canada unfairly subsidizes Canadian lumber production in ways that harm the U.S. industry. The dispute has played out in multiple different *fora* over the years, including U.S. courts and NAFTA and World Trade Organization (WTO) tribunals. The most recent chapter in this saga closed in 2006 with the conclusion of an accord known as the Softwood Lumber Agreement (SLA). The SLA expired in October 2015. However, by its terms, new litigation could not be initiated until October 2016. With efforts to negotiate a new agreement at a standstill, a coalition of U.S. lumber producers filed new countervailing duty (CVD) and antidumping (AD) petitions with the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) in November 2016. In January 2017, the ITC is expected to make a preliminary determination as to whether there is a reasonable indication that allegedly subsidized and dumped Canadian imports have injured or threatened to injure the U.S. industry. If the ITC's preliminary determination is affirmative, Commerce then will make a preliminary

determination as to the existence and extent of subsidization and dumping. The administrative processes should conclude by the fall of 2017, with increased import duties imposed on Canadian lumber imports if both the injury and subsidization/dumping determinations are affirmative. Such determinations undoubtedly will lead to litigation in court and before NAFTA and WTO panels.

Dispute Over "Non-Market Economy" Methodology in Chinese Antidumping Investigations

When China joined the WTO in 2001, it was agreed that other countries could continue to treat it as a non-market economy (NME) for purposes of investigations into whether Chinese products were being "dumped" into other countries' markets (*i.e.*, sold in those markets at prices below home-market prices in China). As a result of this agreement, when countries investigate allegations of Chinese dumping they use methodologies – known as NME methodologies – that allow them to ignore Chinese price and cost data and use data from other countries as a proxy. This tends to increase the "margin of dumping" that investigating authorities (like the U.S. Department of Commerce) find and hence the import duties imposed to counteract the harmful effects of dumping. Arguably, countries' right to use NME methodologies was supposed to expire 15 years after China joined the WTO – *i.e.*, in December 2016. However, the agreement language is ambiguous, and the United States and the EU, in particular, have shown no sign of abandoning their use of NME methodologies in antidumping investigations involving Chinese goods. Accordingly, in December, China took the first step in WTO dispute settlement by initiating formal consultations with both the United States and the EU over their continued use of NME methodologies. Consultations likely will be held in January, and if they fail to resolve the dispute, a WTO dispute settlement panel could be established as early as March, with a decision by the end of the year or early in 2018 (which decision then could be appealed to the WTO's Appellate Body).

U.S. WTO Cases against China

In the second half of 2016, the United States initiated three new dispute settlement proceedings with China. One, initiated just days after China filed its complaint about the U.S. continued use of NME methodology, considers the way in which China administers so-called "tariff-rate quotas" (TRQs) for agricultural products. Under the TRQs, China allows imports of certain products at a relatively low duty rate, up to a specified annual quantitative threshold. Imports above the threshold are subject to a higher rate of duty. While the TRQs are legal under WTO rules, they must be administered in a transparent, predictable and fair way so as to avoid favoring some importers over others. The United States contends that China is not administering its TRQs in a transparent, predictable and fair way.

In a second dispute, the United States contends that China is subsidizing domestic producers of certain agricultural products even though, in the WTO's Agreement on Agriculture, China committed not to do so. In a third dispute, the United States contends that China is imposing export duties on certain raw materials (metals and minerals) in violation of WTO prohibitions on such duties.

Although each of these dispute settlement proceedings is separate from the others, when taken together with China's case against the United States over NME methodology, this may appear to be a particularly contentious time for U.S.-China relations in the WTO. Some even may look upon these cases and see the beginnings of a "trade war." What is notable, however, is that the grievances of these two major players in world trade are being addressed within the rules-based parameters of the WTO. Far more concerning would be an actual trade war played out through tit-for-tat retaliation outside of a rules-based system. As the new Administration takes office, we will be watching to see whether the United States and China remain committed to the rules-based system by channeling their disagreements with one another through that system.

TransCanada Corp. and TransCanada Pipelines Ltd. v. United States

Another case we will be watching closely arises under NAFTA's investment chapter (Chapter 11). Like most modern FTAs, NAFTA Chapter 11 sets forth certain basic protections that one country (the host country) is required to accord to investors and investments of another trade agreement Party. Such protections include the host country's commitment not to discriminate on the basis of nationality, to accord fair and equitable treatment and to compensate for expropriation of an investor's investment. Additionally, where an investor believes any of these obligations has been breached, it may challenge the host country's conduct in neutral, third-party international arbitration. Following President Obama's decision in November 2015 to deny a Presidential Permit for construction of the Keystone XL crude oil pipeline, the Canadian investor TransCanada initiated arbitration against the United States in June of 2016 under NAFTA Chapter 11, seeking more than $15 billion in damages for alleged breaches of NAFTA obligations. If the case goes forward, it is likely to be seen by some as a test of the ability of trade agreement investment provisions to protect investors' rights while preserving the prerogatives of governments to regulate in the public interest in areas such as environmental protection. However, given President-Elect Trump's comments suggesting that he would allow the Keystone XL pipeline to be constructed, it is possible that the litigation ultimately will be terminated.

U.S.-India WTO Dispute over Renewable Energy Incentives

A final case that we will be watching closely is a case that India brought against the United States in September 2016, challenging certain U.S. State and local laws that provide incentives for businesses and residents to use solar and other clean energy technologies. India challenges these measures, because in each case the financial incentives allegedly are greater to the extent that locally made goods and services are employed. India contends that such local content-based incentives are contrary to WTO rules pertaining to nationality-based discrimination and subsidies. Although the issues are different from those at play in the TransCanada dispute, this case is interesting for similar reasons, inasmuch as it highlights the interplay between trade rules on the one hand, and energy and environmental policy on the other.

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The above is just a sampling of what is in store for the new Administration in the trade dispute settlement arena. What these cases have in common is that each is at its inception, and the opportunity for the new Administration to put its stamp on how the case develops is relatively great. While there surely will be plenty of action in other parts of the U.S. trade policy portfolio, we will be particularly interested to see how the Administration prosecutes these recently commenced trade cases that it will find in its inbox on Day One.

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