

## There's More On USTR's Plate Than New Tariffs And NAFTA

By **Alex Lawson**

*Law360, New York (March 15, 2017, 6:53 PM EDT)* -- Most of the Trump administration's trade policy has focused on overhauling the North American Free Trade Agreement and imposing punitive tariffs, but Tuesday's hearing to consider a new U.S. trade representative brought to light the litany of other trade issues facing the White House.

As is often the case, the Senate Finance Committee's examination of USTR nominee Robert Lighthizer served as a sounding board for the trade priorities that the senators hold dear, peppering the former Skadden Arps Slate Meagher & Flom LLP partner with questions surrounding lumber trade, drug patents, food labels, export credit financing and more.

Near the end of the Finance Committee session, Lighthizer himself put a rather succinct bow on the workload that lies ahead of him at USTR if he is eventually confirmed by the upper chamber.

"The agenda is substantial," he told the committee.

### A WTO Tug of War

Lighthizer's appearance before the Finance Committee did little to clear up the administration's position on whether it will comply with adverse World Trade Organization rulings and the propriety of Geneva's dispute settlement system in general.

At one point, when pressed about Chinese unfair trade practices by Sen. Tim Scott, R-S.C., Lighthizer seemed to suggest that the WTO was an outdated forum for seeking relief.

"I don't believe that the WTO is set up to deal with ... a country like China and their industrial policy," he said. "I just feel it was never really intended to deal with those kinds of situations."

But Lighthizer also said that offensive use of the WTO system would be a part of the White House's broader commitment on trade enforcement. But if the U.S. isn't prepared to honor decisions in case that it loses, it will not have much leverage in attempting to secure compliance by other parties in cases that it wins.

The administration's relationship with the WTO has been under the microscope since the provisional release of its trade policy agenda earlier this month. USTR expects to submit another, more detailed

plan once Lighthizer is in place, and Mayer Brown LLP partner Timothy Keeler said he hoped that document would shed more light on the issue.

"[Bringing more WTO cases] hasn't been obvious to me, given the concerns with the WTO dispute settlement system and interpretations of the WTO agreements," Keeler said. "That is definitely news ... and the next trade policy agenda should definitely provide an answer as to where the administration comes out on all this."

### **Toeing the Line on GIs**

The Trump administration has been mostly quiet about any new trade initiatives with the European Union, but Lighthizer did make clear that he would uphold long-standing U.S. policy on one of the most fractious issues of that bilateral relationship: a hard line against the restrictive use of geographical indications for food and wine.

While the U.S. attempted to address GIs in the now-dormant Transatlantic Trade and Investment Partnership talks with the EU, Brussels consistently refused to put its policy on the table. Whether or not the TTIP is revived, Lighthizer's position on GIs is clear.

"It seems to me it's an organized effort on behalf of the European Union, and I think we have to take it head on," Lighthizer told the committee. "We want to discourage other countries from agreeing to ... these geographic indicators and resist them in the United States."

Squire Patton Boggs LLP partner Aline Doussin was struck by Lighthizer's vow to fight the proliferation of GIs in third-country markets. Given that the EU has enshrined its system in many of its regional trade deals and that the U.S. is resisting those types of deals, this could be a tough policy to maintain, she said.

"Even if the U.S. can use their leverage trading advantage at the WTO, my take on this is that it might make it more difficult to counter the EU policies pursued at regional level, especially as the U.S. is shying away from these deals," Doussin told Law360.

### **Tensions With India Over IP**

Finance Committee Chairman Orrin Hatch, R-Utah, pressed Lighthizer to take action on the various hurdles caused by India's intellectual property policies, which have most often afflicted U.S. drug manufacturers that have struggled to earn and retain patents from New Delhi.

Hatch has long rattled the saber on IP issues, and Lighthizer assured him that the matter would remain high on the Trump administration's list of priorities once he assumes his post at USTR.

"I think we need a policy that is as aggressive as we can have," he said. "There are a whole lot of areas where we are at risk in intellectual property protection, including with India. Slow and inefficient patent protection, theft of intellectual property, short patent protection, and insufficient property protection."

India last year floated an overhaul of its IP system, but the proposal has been met with skepticism in the U.S., given that India's drug industry is buttressed largely by companies that manufacture generic drugs that will always be at odds with the name-brand titans of the U.S. and Europe.

## **Anybody's Guess on Ex-Im**

Lighthizer also failed to shed any light on the administration's plans for the U.S. Export-Import Bank, which is currently without a quorum on its five-member board and therefore unable to finance transactions exceeding \$10 million.

While the bank is its own agency that operates independently of USTR, Lighthizer was somewhat noncommittal when pressed for his position on the role of the export credit agency, which has come under fire from conservative Republicans in recent years for providing corporate welfare.

"I appreciate the importance of the Ex-Im Bank to Boeing and to other companies, and to U.S. exports," he said. "Having said that, that's one of those issues that there's strong views on both sides. I expect to do what the president instructs me to do when he instructs me to do it."

President Donald Trump threw many of his Republican colleagues for a loop shortly after his inauguration by voicing his support for the bank, reversing his previous position.

But that support has been somewhat couched first by Treasury Secretary Steven Mnuchin and now Lighthizer, suggesting that the official White House line on the bank is still somewhat in flux.

"It sounds to me like it's an internal debate within the administration and the president still has to make a policy decision," Keeler said.

## **Holding Firm on China's Economy Label**

Among the most significant trade fights brewing right now is China's WTO challenge of the U.S. and EU's refusal to recognize Beijing as a "market economy," which has huge implications for the future of the nation's anti-dumping proceedings.

While the dispute is still in its early stages, Lighthizer gave a clear view of the administration's approach. When asked by Sen. Bob Casey, D-Pa., if he would continue to defend that view that China is a nonmarket economy, Lighthizer was unambiguous.

"Absolutely, senator," he told Casey. "I spent a lot of time thinking about that and I completely agree with you."

When dealing with nonmarket economies in anti-dumping cases, countries have more leeway to impose higher margins. China believes that the expiration passage of its 2001 WTO Accession Protocol requires other members to automatically deem it a market economy, a stance that the U.S. and EU have consistently opposed.

## **Canada Lumber Squabble 'at the Top of the List'**

After questions from Senate Finance Committee ranking member Ron Wyden, D-Ore., Lighthizer said that the long-percolating dispute with Canada over softwood lumber trade is "at the top of the list" at USTR.

The expiration of the most recent ceasefire between the U.S. and Canada has reopened the floodgates

of trade remedy litigation after years in stasis. Efforts to reach a resolution are underway at the U.S. Department of Commerce, but Lighthizer said he expects to be closely involved in the process.

"If this litigation goes forward and if we have ... another negotiation on this subject, I don't want to prejudge where the negotiation will come out," Lighthizer said. "I know ... that the last agreement really did not work the way it was supposed to work. And that we have to have a new one, either litigation or a new agreement, that does work."

--Editing by Katherine Rautenberg and Aaron Pelc.

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