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U.S. Clucks over WTO Ruling Against China on Chicken Feet

China acted "inconsistent" with World Trade Organization (WTO) rules when it imposed antidumping and countervailing duty orders on imports of broiler parts, mostly chicken feet, from the U.S., a WTO dispute-settlement panel ruled Aug. 2. The ruling earned a joint press conference by three Obama administration Cabinet officials, U.S. Trade Representative Michael Froman, Commerce Secretary Penny Pritzker and Agriculture Secretary Tom Vilsack. "This is an important victory today for the U.S. poultry industry, and for American farmers and ranchers," Vilsack said.

> Some have claimed Beijing launched the cases against the U.S. chicken parts in retaliation for the U.S. safeguard action in 2009 against Chinese tires. The Chinese market ballooned before 2009 for U.S. chicken feet and other parts, that have small sales in the U.S. and are often discarded. China is expected to appeal the decision to the WTO Appellate Body.

The WTO panel agreed with almost every U.S. complaint against the procedures China's Ministry of Commerce (MOFCOM) followed in undertaking its investigation into the U.S. imports. For example, the panel said MOFCOM violated Article 6.2 of the WTO Antidumping Agreement when it failed "to provide opportunities for interested parties with adverse interests to meet and present opposing views and offer rebuttal arguments, there being no evidence on record that other interested parties with interests adverse to those of the United States Government declined to attend the meeting."

In another example, MOFCOM violated the WTO Subsidies and Countervailing Measures agreement when it "failed to disclose 'in sufficient detail the findings and conclusions reached on all issues of fact and law considered material' or 'all relevant information on matters of fact' with respect to its calculation of the 'all others' countervailing duty rate in the Final Countervailing Duty Determination," the panel said.

"Bright Line" Hard to Find for Thermal-Imaging Controls

Representatives of the thermal-imaging industry concede that they can't find "bright line" parameters to distinguish between military and commercial uses for many of their products. Because many of these components are found in both military and commercial products, the real distinction only comes in how the end-item is used, members of the

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BIS Sensors and Instrumentation Technical Advisory Committee (SITAC) said July 30. For many products, the new definition of "specially designed" added to the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR) is the best way to make the distinction, they said (see **WTTL**, July 29. page 7).

> The difficulty in deciding whether products should be on the U.S. Munitions List (USML) or the Commerce Control List (CCL) has stymied government efforts to revise USML Category XII for many years. BIS and DDTC officials have finally begun to review Category XII as part of the Obama administration's export control reform process, BIS Assistant Secretary Kevin Wolf told the committee. A proposal could come this fall, he said.

In an effort to help BIS, State and Defense decide on moving many Category XII items to the CCL, SITAC created 10 subcommittees to examine each of the major product categories currently subject to ITAR controls. Wolf demonstrated his interest in the details of their work by sitting through an hour of presentations examining the technologies used in these products, their military and commercial uses and foreign availability. Before leaving, Wolf said he might invite SITAC members to attend in person or via teleconference the next interagency meeting where Category XII will be discussed in mid-August. "I want to get this information into our brains," he said.

"We want to provide facts and data and get rid of emotions," SITAC Chairman Steve Tribble, vice president for global trade compliance at FLIR Systems, said at the start of the meeting. As subcommittee members made their presentations, they repeatedly noted the difficulty in finding bright lines between military and commercial products, while also citing the increasing competition they face, even in the U.S., from foreign firms that make these products without the same export controls.

U.S. export controls on thermal-imaging products have fostered the development of foreign competition, including in countries such as China, Russia, Israel, France, Germany, the Netherlands and Japan. The controls are doing to this industry what similar controls did to the machine tool, computer and encryption industries, one member told WTTL.

"The bright line has to be drawn at the application level, how it is used," Greg Hill, director of licensing for DRS Technologies, told the SITAC in a presentation on uncooled focal plane arrays. Some products, such as readout integrated circuits (ROICs), are found in billions of commercial devices, such as cellphones and digital cameras, noted Roger Stettner, president of Advanced Scientific Concepts, Inc. Members also wanted to make sure that electro-multiplying charge coupled devices (EMCCDs), which are made by only one company in Japan, are controlled on the CCL. "EMCCDs are not a crown jewel of the United States...they are not even a jewel," said Manjul Shah, product manager at Princeton Instruments.

EU, China Deal on Solar Panels Puts Pressure on U.S.

The U.S. will have to pick up the pace of its negotiations with China on a deal to restrain exports of Chinese solar panels to the U.S. in the wake of an agreement the European Union (EU) reached with Chinese panel makers July 27 to restrict their exports to the EU. Without a U.S.-China deal, American solar panel makers are likely to face intensified competition from imports as Chinese firms shift their marketing efforts to the

U.S. to make up for their lost sales in Europe. "We believe there needs to be a global solution, consistent with our trade laws, that creates stability and certainty in the various components of the solar sector," USTR Michael Froman said in a statement after the EU announced its deal. "We look forward to working toward that objective," Froman said.

> The EU-China deal, which European Commission, the EU's executive branch, approved Aug. 2, would forestall the imposition of a 47.6% antidumping duty on Chinese panels as of Aug. 6. In addition to putting pressure on Froman to reach a similar agreement, the EU-China deal increases the likelihood that U.S. panel makers will file their own anti-dumping complaint against Chinese imports (see **WTTL**, July 29, page 1).

"We found an amicable solution in the EU-China solar panels case that will lead to a new market equilibrium at sustainable prices," EU Trade Commissioner Karel De Gucht said in a statement announcing the agreement. "We are confident that this price undertaking will stabilize the European solar panel market and will remove the injury that the dumping practices have caused to the European industry," he said.

The EU and China intensified their talks after the EU imposed provisional antidumping duties on Chinese imports on June 6, with an initial duty of 11.8%. The agreement was reached under provisions of EU rules that are similar to suspension agreements permitted under U.S. law to replace an antidumping duty with a minimum price for imports.

"Those exporting Chinese companies participating in the price-undertaking will be subject to its terms. Hence, their exports will be exempted from the anti-dumping duties," an EU release explained. The Chinese exporters were represented by the Chinese Chamber of Commerce in the talks. Full details of the deal won't be released until after the European Commission approves it, the release said.

Froman Says Something about Shoe Tariffs

USTR Michael Froman carefully avoided saying whether or not the U.S. will agree to cut shoe tariffs as part of the Trans-Pacific Partnership (TPP) during a visit to the New Balance shoe factory in Maine July 29. Faced with opposition from New Balance and New England lawmakers to any change in the tariff, Froman tried to keep a shoe on both sides of the sensitive issue by saying he recognizes the importance of protecting U.S. jobs in the shoe industry but also raising the prospects of increased U.S. exports to Asian markets if tariffs are cut in countries such as Japan.

> The gist of his remarks, however, seems to indicate that he is trying to soften the criticism he is likely to get when he reveals an agreement to reduce tariffs on athletic footwear and shoes in a TPP deal. "Maine has a powerful interest in a deal that expands exports to TPP partners including countries where you already know you can do strong business, like Malaysia and Japan, Maine's largest export markets after Canada," Froman said in remarks released by his office.

"Japan's entry into TPP, in particular, gives New Balance a real opportunity to penetrate an attractive market," he said. "At the same time, we know that changes to footwear tariffs will reduce New Balance's expenses as well as affect the price of its goods and

those of its competitors. This visit is helpful to understand how these factors impact New Balance's competitiveness. We will continue to consult with you and with other Maine companies as we work toward a balanced and ambitious outcome for TPP," Froman added.

> A statement from Sen. Angus King (I-Maine), who toured the plant with Froman, stressed the need to protect 1,300 jobs at the New Balance factory. "If the Trans Pacific Partnership does not address the needs of U.S. athletic footwear manufacturers, the ramifications will be significant. It makes no sense whatsoever to support a position that reduces trade protections and takes away American jobs. We cannot undercut our own people," King said.

"We appreciate the delicate nature of international trade negotiations but we hope that Ambassador Froman leaves our factory knowing there are American workers who will be directly impacted by the decisions that he and the President make during the coming days," said New Balance President Rob DeMartini.

FDA Identifies Concerns about Cosmetic Rules in Trade Talks

The Food and Drug Administration (FDA) wants to assure that potential trade agreements, such as the U.S.-EU Transatlantic Trade and Investment Partnership (TTIP), don't result in lowering standards for cosmetics. With its broad oversight of more than a quarter of the U.S. economy, FDA is at the heart of negotiations that are seeking "cooperation" on international regulation, if not harmonization (see **WTTL**, July 22, page 9). FDA's past resistance to mutual recognition agreements and other waivers of its authority has blocked previous transatlantic trade initiatives.

> "Although 'harmonization' is a term widely used to describe efforts at streamlining international trade, neither the international activities of FDA in general nor of OCAC [the Office of Cosmetics and Colors] in particular are to be understood as 'harmonizing down' the agency's mission to protect public health in the United States," FDA says on its website.

In the area of cosmetics, FDA has identified four areas of interest that have been raised by the cosmetics and consumer product industries and that the agency is examining as it participates in the TTIP and other trade talks. These are:

Harmonization of Ingredient Nomenclature: As the EU works toward an agreement on ingredient labeling to ease the marketing of ingredients among its own members, "the cosmetic industry has requested that FDA allow similar changes in ingredient labeling for cosmetics marketed in the U.S.," FDA notes. "OCAC has considered these requests on a case-by-case basis, in line with its legal responsibilities under the Fair Packaging and Labeling Act (FPLA) to promulgate regulations 'necessary to prevent the deception of consumers or to facilitate value comparisons'," it says.

Color Additives: "This is a complicated issue, due to factors such as the requirements that only colors approved for use in the United States by FDA are allowed to be added to cosmetics and that, for some of these 'approved' colors, only those specifically tested and certified in FDA laboratories may be used," FDA explains. "Although the lists of approved colors in the United States and other countries share some common ingredients,

there are also differences that complicate formulation of products for the different markets. The cosmetic industry in the U.S. and the E.U. has expressed interest in exploring ways in which the different lists are more alike," it notes.

Animal Testing and the Development of Alternatives: "Although U.S. law does not prescribe the methods used by cosmetic firms to test their ingredients or finished products for safety, regulations require a product to bear a warning statement if the safety of the product or its ingredients is not substantiated. That leads to the question of what constitutes 'adequate substantiation of safety,' a question that becomes especially important in light of a pending EU ban on animal testing," FDA states.

Ultraviolet (UV) Filters (Sunscreens): "Sunscreens pose a special challenge in international harmonization because they are considered drugs under U.S. law and cosmetics according to the EU," the agency points out. "However, there has been interest in exploring the approval processes in different countries for sunscreen active ingredients and sharing information about test procedures for measuring Sun Protection Factor (SPF)," it says.

FDA Proposes Changes to Ensure Imported Food Safety

The FDA contends its proposed requirements for imported food are consistent with U.S. WTO obligations because its legislative authority, the Food Safety Modernization Act (FSMA) signed into law in January 2011, requires it to be. "FSMA also states (in section 404) that the provisions of the act and any amendments to the FD&C Act may not be construed in a way that is inconsistent with the agreement establishing the World Trade Organization (WTO) or any other treaty or international agreement to which the United States is a party," FDA says in July 29 Federal Register.

> The FSMA-mandated rules are "aimed at strengthening assurances that imported food meets the same safety standards as food produced domestically," FDA said in announcing the proposals. The agency acknowledges that it doesn't have the resources or staff to inspect all foreign food establishments or to inspect food entering the U.S.

"Because of the different challenges to U.S. government oversight of foreign food establishments exporting to the United States, FSMA includes several provisions that focus on imported food, including the requirement that importers establish FSVPs [foreign supplier verification programs]," FDA notes. "The FSVP provisions in FSMA ensure that U.S. importers, who are domestic entities, share responsibility for food safety with the foreign suppliers of those foods by requiring that importers perform risk-based supplier verification activities," it adds. The FSVP requirements are imposed on U.S. food importers that are domestic entities.

In addition to requiring FSVPs, a second FDA proposal would provide a system for recognizing foreign accreditation bodies, third-party auditors and certification bodies that could conduct food safety audits of foreign food entities, including registered foreign food facilities, and to issue food and facility certifications. An accreditation body can be a foreign government/agency or a private third-party. "It must also meet standards for legal authority, competency and capacity, impartiality/objectivity, quality assurance, and records procedures," FDA says. The agency said it is "proposing a flexible, risk-based

approach to foreign supplier verification." FDA says the proposed rules would require importers to help ensure that food imports are produced in compliance with processes and procedures that provide the same level of public health protection as those required by the Federal Food, Drug, and Cosmetic Act (the FD&C Act), are not adulterated and not misbranded with respect to food allergen labeling.

GSP Renewal May Have to Await Bigger Trade Bill to Ride

The Generalized System of Preferences (GSP) can't seem to get any respect. Just as it has on several past occasions, its authorizing legislation expired July 31 and its renewal will likely depend on it getting attached to a larger trade bill later in the year. When GSP last expired in December 2010, it took nine months for it to be renewed along with a provision applying its tariff cuts retroactively to its expiration date. The September 2011 renewal was tied to extension of the Trade Adjustment Assistance (TAA) program.

> Maneuvering to get a Senate vote on GSP before Congress recessed for its August vacation failed because of continuing opposition from Sen. Tom Coburn (R-Okla.). Coburn reportedly objected to the budget gimmicks that have funded GSP in the past through Customs user fees and corporate tax changes that really didn't offset the program.

If the Senate had agreed to a so-called "deemed-and-passed" vote that would have approved GSP renewal but awaited House action on a companion bill, the House reportedly would have taken up its own GSP measure and passed it. Now GSP may have to wait again for another vehicle to ride on, which might be another TAA bill, Trade Promotion Authority, Customs reauthorization or the Miscellaneous Tariff Bill. "The Obama administration urges Congress to extend this important trade program, which increases U.S. competitiveness, keeps costs low for U.S. consumers, and benefits some of the world's poorest countries," USTR Michael Froman said in a statement after GSP expired.

White House, GOP Stake Claims on Fast-Track Renewal

One week after House Democrats set the bar on Japan's entry into TPP trade talks, Sen. Orrin Hatch (R-Utah) put down his own marker on the Obama administration's trade agenda July 30 in a speech in Washington. Hatch questioned the White House's commitment to Trade Promotion Authority (TPA) or fast-track negotiating authority for ongoing trade talks. "No economically significant trade agreement has ever been negotiated by any administration and approved by Congress without Trade Promotion Authority. Yet this Administration's enthusiasm for TPA seems tepid at best," Hatch said.

> "Our trading partners will not put their best deal on the table unless they know the United States can deliver on what we promise," he added. In the dance known as politics, Hatch, ranking member on the Senate Finance Committee, objected to the inclusion of TAA, which Democrats and their constituents have long sought (see **WTTL**, July 29, page 3).

"TPA renewal should limit the addition of social issues, such as labor and the environment, to our trade agenda. These issues dilute the economic focus of our trade policy and, more often than not, detract from our ability to reach strong trade agreements at the

negotiating table," the Utah Republican noted. He also argued for "long-term renewal" of TPA and said he hopes it "will reflect the priorities of today's economy, including strong intellectual property rights protections, provisions to address state-owned enterprises, and provisions on digital trade." Although President Obama hasn't formally asked Congress to enact a fast-track bill, USTR Michael Froman and the White House press office continue to say the president wants it. In a speech July 30 at Amazon's distribution center in Chattanooga, Obama came close to requesting it.

> "I'm asking Congress for the authority to negotiate the best trade deals possible for our workers, and combine it with robust training and assistance measures to make sure our workers have the support and the skills they need for this new global competition. And we're going to have to sharpen our competitive edge in the global job marketplace," the president said.

At his confirmation hearing, Froman said Obama was "requesting" TPA. That didn't mean the White House intends to send Congress a bill, which would likely face immediate objections from Republicans, if it included TAA and strong labor and environment provisions. Instead, administration sources say they want to work with lawmakers to draft a bill the president can support. Hatch's complaint appears to be based on the lack of any meaningful work on a bill from the administration since Froman's statement.

Corporate Shield Protects Negligent Import Filing, Court Rules

An individual employee cannot be held liable for an importer's gross negligence in the filing of import data if the "importer of record" was a corporation, a divided Court of Appeals for the Federal Circuit (CAFC) ruled July 30. Two of the members of the three-judge panel decided to reverse a ruling of the Court of International Trade (CIT), which agreed with Customs that an officer of the company should be held liable for payment of duties and fines for a corporation's filing of false information on an import entry.

> Judges S. Jay Plager and Kathleen O'Malley, who wrote the majority opinion, drew a distinction between fraudulent and grossly negligent entries. Because Customs and Border Protection (CBP) chose not to charge the company and its president with fraud, under which it could have pierced the corporate veil, the agency could not hold the president liable for the firm's negligent behavior, the majority ruled.

In its appeal from the CIT in *U.S. v. Trek Leather, Inc.*, the government sought to impose penalties on the company's president and sole stockholder, Harish Shadadpuri, for filing false data for the import of men's suits. Shadadpuri argued that, because Trek, a corporation, was the importer of record, he could only be personally liable if the government either pierced Trek's corporate veil or established that he either had committed fraud or aided and abetted fraud by Trek, making him liable under Section 1592(a)(1)(B) of the Trade Act. To support his argument, he cited the CAFC's 1999 ruling in *Hitachi,*which rejected a broad reading of the word "person" under the act.

The government had abandoned its fraud claim against Trek and asked for judgment for gross negligence and a penalty under Section 1592(c)(2). "As for Shadadpuri, the government declined his invitation to either pierce Trek's corporate veil or to prove that Shadadpuri had aided or abetted a fraud by Trek. Instead, the government claimed it

could prevail on its negligence claims against Shadadpuri in the absence of such proofs solely because Shadadpuri is a 'person' within the meaning of Section 1592(a) generally," O'Malley wrote. "The question posed is whether Shadadpuri, under the circumstances here, can be personally chargeable with negligence for the actions he took in his capacity as a corporate officer and on behalf of the corporation. Under basic principles of corporate law, he cannot," O'Malley wrote.

"The government has asked us to adopt a broad legal principle that would expose all corporate officers and shareholders to *personal* liability for *negligent* acts they undertake *on behalf of their corporation*," she explained (her emphasis). "Absent an explicit statutory basis for doing so, we decline to believe Congress intended to supplant the common law so completely. And, we decline to reverse or dilute our holding in *Hitachi,*" she wrote.

In his dissent, Judge Timothy Dyk said the interpretation "person" should continue to cover same individuals who were specifically identified in the Trade Act before it was amended in 1978. "There is nothing in the statutory text that would distinguish between an agent's direct liability for fraudulent entries and negligent ones. The majority's effort to suggest that the statutory text might cover fraud and not negligence is misguided," Dyk wrote.

* * * Briefs * * *

CUSTOMS: President Obama nominated R. Gil Kerlikowske, 63, to be Customs commissioner Aug. 1, replacing Alan D. Bersin, whose recess appointment expired in December 2011. Post has been filled on acting basis since then. Kerlikowske has been White House director of national drug control policy, also known as "Drug Czar" since 2009. Prior to that, he was chief of Seattle police department for nine years and at Justice from 1998 to 2000.

ITC: Senate voted unanimously Aug. 1 to confirm F. Scott Kieff to be ITC commissioner for term expiring June 16, 2020 (see **WTTL**, July 29, page 10).

USTR: Under budget squeeze, USTR will send staff to only one country for follow-up out of 41 listed in annual Special 301 report on IPR enforcement, USTR Michael Froman said July 30 at U.S. Chamber of Commerce event. "Due to the sequester and some decisions, we're in a situation where we're having to choose where can we send people to a negotiation, can we bring this enforcement case or another?" he added.

INDIA: Senate Finance Committee and House Ways and Means Committee leaders asked ITC Aug. 2 to conduct investigation into "Indian industrial policies that discriminate against U.S. imports and investment for the sake of supporting Indian domestic industries, and the effect that those barriers have on the U.S. economy and U.S. jobs."

WOOD FLOORING: CIT Chief Judge Donald Pogue agreed July 31 to Commerce request for voluntary remand to reconsider its method for analyzing targeted dumping and surrogate values in final antidumping order on multilayered wood flooring from China (slip op. 13-96). "Government presented a persuasive argument explaining why the targeted dumping issues may become moot on remand," he wrote. "Commerce has altered its practice since publication of the Final Determination and now examines a respondent's targeted dumping by volume as a component of the pattern requirement," Pogue noted.

WASSENAAR ARRANGEMENT: Regime is expected to adopt U.S. proposal at its December plenary to add new controls for products known as accelerometer-based hydro-acoustics sensors used on passive marine acoustic system operating with three distinct axes. U.S. used "truncated" 0A521 process for regulating emerging technologies that are not already regulated, BIS staff told agency's Sensors and Instrumentation Technical Advisory Committee (SITAC) July 30. "These

were reviewed and determined to be new relevant technologies in terms of military sensing for inclusion on the dual-use list," BIS licensing officer John Varesi told SITAC.

FCPA: Another former executive of France's Alstom Power was indicted July 30 in New Haven, Conn. U.S. District Court for his role in scheme to bribe Indonesian officials in exchange for assistance in securing contracts. Lawrence Hoskins, former senior VP for Asia, was charged with conspiracy to violate FCPA and money laundering (see **WTTL**, May 6, page 8).

EXPORT ENFORCEMENT: Chih-Kwang Hwa of Woodinville, Wash. and his company, Precision Image Corporation, pleaded guilty July 30 in Seattle U.S. District Court to violating Arms Export Control Act (AECA) and wire fraud. Hwa allegedly obtained Navy contracts to supply circuit boards, by falsely claiming the boards would be manufactured in U.S. Instead, Hwa illegally sent restricted information to company in Taiwan to manufacture boards there.

EX-IM BANK: Oswaldo Kuchle-Lopez, Mexican ranch owner, was sentenced July 29 in El Paso U.S. District Court to time served and 24 months' supervised release for his role in scheme to defraud Ex-Im Bank of approximately $3.21 million. Kuchle pleaded guilty in October 2010 to one count of conspiracy in connection with scheme after being arrested in February 2010 as he crossed the U.S. border (see **WTTL**, March 1, 2010, page 4).

BEEF: U.S. and EU have agreed to two-year extension of agreement to provides duty-free access to EU market for U.S. non-hormone treated cattle as part of 2009 settlement of U.S. complaint against EU restrictions on imports of hormone-treated beef. "In the year since Phase 2 began, U.S. beef shipments under the quota were an estimated $200 million, up 300 percent from the value of exports in the year before the MOU entered into force," USTR's office said Aug. 1

IRAN: House passed Nuclear Iran Prevention Act (H.R. 850) by 400-20 vote July 31. Bill broadens economic sanctions to cover automotive and mining sectors and bars entry to U.S. of vessels registered in countries that also register Iranian vessels (see **WTTL**, May 27, page 2).

AFGHANISTAN: Country could conclude WTO accession process in December at Bali ministerial. At working party meeting on its membership July 25, members said they "welcomed progress on its draft Working Party Report and on its bilateral market access negotiations." Kabul "was urged to resolve outstanding technical issues, enact the few outstanding draft laws and conclude remaining bilateral negotiations to ensure that it remains on track to complete its accession process at the Ninth Ministerial Conference (MC9) in Bali," WTO said.

KAZAKHSTAN: Kazakhstan's WTO accession is less certain than previously forecast, as "serious systemic concerns remain on a range of questions regarding the country's foreign trade regime and market access. At the current rate of progress, it is unlikely that the accession will be on the agenda" in Bali in December 2013, WTO members said July 23 (see **WTTL**, June 10, page 11).

LIBYA: State in Federal Register Aug. 5 amended ITAR Section 126.1 to reflect UN Security Council Resolution 2095, which removed requirement to notify Committee of the Security Council of exports to Libya of non-lethal military equipment and technical assistance for security or disarmament and dropped need for committee's approval for exports of non-lethal military equipment and technical aid for humanitarian and protective use (see **WTTL**, March 25, page 9).

JAPAN: Acting Deputy USTR Wendy Cutler heading to Tokyo August 7-9 for promised parallel talks on autos, insurance and non-tariff measures (see **WTTL**, July 29, page 4). Japan's agreement to hold talks "was a critical factor in the decision of the United States to support Japan's entry into the Trans-Pacific Partnership," she said in statement before leaving.

TEXTILES: Four years running, Earned Import Allowance Program (EIAP) "has not provided incentives sufficient to curtail the continued decline in production of woven cotton bottoms in the Dominican Republic," ITC noted in report released July 26 (Pub. 4417).