

Vol. 30, No. 43

November 1, 2010

Court Says Challenge of China Currency Ruling “Not Ripe”

One of the first court suits challenging an International Trade Administration (ITA) decision not to investigate China’s alleged manipulation of its currency as a trade subsidy has been rejected by the Court of International Trade (CIT) because the complaint isn’t ripe for judicial review. In *Nucor Fastener Division v. U.S.* (slip op. 10-121), CIT Judge Evan Wallach said he was dismissing the suit without prejudice and Nucor could refile its complaint later if it prevails in a separate suit against the International Trade Commission (ITC).

Nucor had sued to overturn an ITA notice of investigation in which the agency ruled that it would not examine charges of China’s currency manipulation in a countervailing duty case against steel fasteners from China. Before the ITA could make a preliminary ruling in the case, the ITC determined that the domestic fastener industry was not being harmed by the Chinese imports, thus terminating the case. Nucor separately has sued to have the ITC ruling overturned.

Nucor argued that the ITC’s negative injury determination put an end to ITA’s investigation, making the initiation ruling the agency’s final action and thus eligible for appeal. It also claimed an investigation into the currency issue might have produced a different result at the ITC. In his Oct. 22 ruling, however, Wallach sided with the government’s rebuttal, which said the statutory termination of Commerce’s investigation due to the ITC’s negative preliminary determination does not convert Commerce’s Initiation Notice into a “final determination” that is fit for review. He also agreed that dismissing the case at this stage does not impose a hardship on Nucor since the firm still needs to await a ruling on its complaint against the ITC.

Court Reopens Cases Challenging Byrd Money Distribution

The Court of Appeals for the Federal Circuit (CAFC) lifted a stay Oct. 28 of a suit that could determine the distribution of some \$1 billion in Byrd Amendment money. The court’s two-part ruling in *PS Chez Sidney v. U.S. International Trade Commission* (ITC) confirmed its February 2009 reversal of a CIT decision that the rules for deciding which companies are eligible to receive Byrd funds are unconstitutional because they violate the First Amendment, but it lifted the stay on a separate part of the case in which PS Chez Sidney, a crawfish distributor, claimed it was eligible for payments for other reasons (see **WTTL**, Oct. 5, 2009, page 4).

The CAFC order follows a Supreme Court decision on May 17, 2010, to deny a motion for a writ of certiorari to review the CAFC decision in *SKF USA, Inc. v. U.S. Customs and Border*



Protection, a case consolidated with PS Chez Sidney addressing related issues. In its initial SKF decision, the CAFC overturned the CIT on the constitutional speech question but said a U.S. company could still seek Byrd money if it had “provided assistance” to the ITC investigation that led to an antidumping or countervailing duty determination that ultimately produced duties that could be distributed under Byrd.

At the time of the SKF decision, there reportedly were some 40 pending cases at the CIT awaiting the final outcome at the Supreme Court. The CIT has agreed to lift the stay in one of those cases, *Giorgio Food Inc., v. U.S.* The status of the remaining cases isn’t known yet. PS Chez Sidney is no longer in active operation and reportedly is owned by a group of investors. During the court proceedings, the company claimed it was entitled to about \$1.5 million in Byrd distributions, which may encourage the investors to continue their suit.

With the First Amendment argument dismissed, the CAFC will now judge whether PS Chez Sidney is entitled to Byrd money because it assisted the ITC investigation and whether it supported the petitioners in the case. When the company had received the first questionnaire from the ITC, it checked the box saying it supported the antidumping petition filed by the Crawfish Processors Alliance. On a later questionnaire, however, it failed to check the box. The government claimed the second questionnaire should be considered the basis for determining whether PS Chez Sidney supported the case, a prerequisite for receiving Byrd money. PS Chez Sidney has argued that its first response should determine its standing.

Attorneys close to the pending cases say the outstanding suits could fall into one of three baskets: those like PS Chez Sidney that claimed they did indicate support for the petitions in their questionnaires; those like Giorgio that may have publicly opposed the petitions but nonetheless “provide assistance” through their participation in the case; and those like SKF that opposed the petitions and provided no assistance. All these cases may come down to a question of facts and what the firms can show to demonstrate that they meet the CAFC standard set in SKF for proving they provided assistance in the trade case.

Group Says FCPA Making U.S. Industry Less Competitive

U.S. Chamber Institute for Legal Reform (ILR) wants Congress to amend the Foreign Corrupt Practices Act (FCPA), citing changes in other international bribery laws and increased U.S. enforcement penalties that make U.S. businesses less competitive in the world market. “Legal reforms in other countries, such as the new limitation on corporate liability for bribery in Britain and new corporate statutes in Italy, may help remove obstacles that currently hamper the competitiveness of American businesses and make Congress realize that such reforms are neither unprecedented nor pro business,” the ILR said in a paper released Oct. 27. Its recommended reforms include:

- Adding the compliance defense recognized by the United Kingdom;
- Limiting a company’s successor liability for prior FCPA criminal acts of a company it has acquired;
- Adding a “willfulness” requirement for corporate criminal liability;
- Limiting a parent company’s liability for acts of a subsidiary; and
- Defining a “foreign official” under the statute.

“The last decade has seen a marked increase in FCPA enforcement by both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC),” noted the ILR, an affiliate of the U.S. Chamber of Commerce. “Indeed, the last five years has seen nothing short of a boom in FCPA enforcement. More enforcement actions are being brought than ever before, fines and penalties have risen dramatically, and the government has shown an increased willingness to seek jail terms for individual defendants,” it said. The proposed amendments “are aimed at providing more certainty to the business community when trying to comply with the FCPA, while promoting efficiency and enhancing public confidence in the integrity of the

free market system as well as the underlying principles of our criminal justice system,” the paper stated. “The time is ripe to amend the FCPA so as to make the statute more equitable, its criminal strictures clearer, and its effect on American business no more onerous than warranted,” it declared.

Industry Gives Congress “Incomplete” Grade on Trade Legislation

It’s hard to give a grade when there are very few questions on a test. That’s the problem an industry group faced trying to grade the 111th Congress on its pro or anti-trade votes over the last two years. The National Foreign Trade Council’s (NFTC) 111th Congressional Report Card gives lawmakers an “incomplete” because so little trade legislation was voted on during the past congressional term. “In college, an ‘incomplete’ is typically given to students who have failed to complete required course work but show promise of being able to complete it within a designated time frame,” said NFTC President Bill Reinsch in a statement.

“That is how we view this Congress, as we are deeply disappointed but hopeful that when Congress returns to Washington after the election, it will take meaningful action on the U.S. trade agenda and avoid further growth-damaging tax legislation,” he said. Most disappointing was the lack of action on free trade agreements with South Korea, Panama and Colombia.

The NFTC’s scoring system gave lawmakers a plus if they voted in a way the association considered pro-business or pro-trade and a minus if they voted against such measures. It graded senators on only two votes – an amendment to cut off government procurement from firms that have a presence in Iran’s energy sector and a bill to cut tax benefits for firms that offshore jobs. House members were graded on five measures, including the Miscellaneous Tariff Bill (H.R. 4380), the Iran Sanctions Act (H.R. 2194) and the China currency bill (H.R. 2378).

With so few votes to score, the differences among lawmakers was very narrow for the most part. In the Senate, Max Baucus (D-Mont.) and Scott Brown (R-Mass.) were among those who scored a high grade of 2. Sens. Evan Bayh (D-Ind.), Sherrod Brown (D-Ohio) and Mary Landrieu (D-La.) were in the group getting zero. In the House, Reps. Ronald Paul (R-Texas), Ted Poe (R-Texas) and Thomas Price (R-Ga.) were among high scorers with four votes that the NFTC liked, while Reps. David Price (D-N.C.) and Peter Roskam (R-Ill.) scored zero.

Korean FTA Talks Will Go Down to Wire

Any agreement between the U.S. and Korea to resolve the remaining concerns about the U.S.-Korea Free Trade Agreement (FTA) isn’t likely to emerge until hours before President Obama attends the next meeting of the G-20 in Seoul on Nov. 11. Whatever progress, if any, the two countries are making in negotiating their differences is being kept close to the vest to avoid quick rejection by opponents of the deal in the U.S. and Korea and to prevent a new agreement from angering the Democratic Party’s union base, whose “get-out-the-vote” effort will be crucial to Democratic hopes for the Nov. 2 midterm elections.

U.S. officials are being extremely taciturn about intense talks between U.S. Trade Representative (USTR) Ron Kirk and Korean Trade Minister Kim Jong-hoon in San Francisco Oct. 26-27. “United States Trade Representative Ron Kirk and Korean Trade Minister Kim Jong-hoon have concluded their meeting to discuss the U.S.-Korea trade agreement in San Francisco. They have agreed to meet again in the lead up to the G-20 Leaders’ Meeting at a time and venue to be determined,” was all the USTR’s press office would say about the meeting.

The two officials reportedly spent their time reviewing a paper prepared by their staffs on the key issues that have to be resolved to allow Obama to send the trade pact to Congress for approval early in 2011. The key issue remains auto trade and the two sides are trying to

develop a formula that would allow more American cars to be sold in Korea and to reduce the taxes imposed on larger U.S. cars. Another topic is cheese and complaints that the 15-year phase out of the Korea Tariff-Rate Quota (TRQ) on U.S. cheese, which will grow only 3% a year, is too slow. Although Korean restrictions on imports of U.S. beef remain a political issue in Congress, the industry apparently is satisfied with a separate agreement it already has reached with Korea to allow increased imports of U.S. beef. The U.S. textile industry continues to complain about the opening of the U.S. market to more Korean products, especially polyester staple fiber that is the subject of an antidumping order against Korean imports.

Any final deal is likely to find strong critics in both the U.S. and Korea. Lawmakers opposed to the FTA in both countries are finding common cause to fight its approval. That unified opposition was seen in a joint letter sent Oct. 18 to Obama and South Korean President Lee and signed by 20 members of the U.S. House and 35 members of South Korea's National Assembly. "An FTA between our two countries should not jeopardize our governments' policies to protect public health, the environment, and public services," they wrote.

"We ask that the language in this agreement state more explicitly our countries' intention to maintain our high health, labor and environmental standards," they said. "In this regard, two particularly troubling provisions are the investor-state dispute settlement mechanism and the negative list system of services," they wrote.

* * * Briefs * * *

CORRECTION: "There has not been any interagency 'squabbling' over the revisions to Category VII," BIS Assistant Secretary for Export Administration Kevin Wolf e-mailed WTTL in reaction to article on DTAG effort to revise USML (see **WTTL**, Oct. 25, page 2). "The process has gone very smoothly and the interagency team has worked quite well in improving the drafts. Seriously," he wrote.

SUBSIDIES: WTO Committee on Subsidies and Countervailing Measures Oct. 28 gave 19 less developed countries an extra year – until end of 2011 – to eliminate certain export-subsidy programs permitted under Uruguay Round Agreement transition provisions. Getting more time are Antigua and Barbuda, Barbados, Belize, Costa Rica, Dominica, Dominican Republic, El Salvador, Fiji, Grenada, Guatemala, Jamaica, Jordan, Mauritius, Panama, Papua New Guinea, St. Kitts and Nevis, St. Lucia, Saint Vincent and the Grenadines, and Uruguay. Programs in Belize, Fiji and Mauritius have already been phased out.

ITAR: Three proposals to amend ITAR "see-through" rule, definition of "defense services," and rules for licensing replacement parts and components will be published in Federal Register as proposals by end of 2010, Assistant Secretary of State Andrew Shapiro promised DTAG Oct. 20 (see **WTTL**, July 12, page 3).

EXPORT ENFORCEMENT: York Yuan Chang, 53, also known as David Zhang, and his wife, Leping Huang, 49, both of Diamond Bar, Calif., were arrested Oct. 9 on criminal complaint accusing them of violating IEEPA and EAR by conspiring to export restricted items to China without license. They also were charged with making false statements to federal agents. Owners of General Technology Systems Integration, Inc., in Ontario, Calif., pair were charged with contracting with Sichuan Institute of Solid-State Circuits, which is also known as the 24th Research Institute of the China Electronics Technology Corporation Group, in Chongqing, China, to design and transfer to PRC technology for development and production of two types of high-performance analog-to-digital converters.

MORE EXPORT ENFORCEMENT: Juwhan Yun, also known as Jw Yun, was sentenced in Miami U.S. District Court Oct. 20 to 57 months in prison, to be followed by 3 years of supervised release, for violating Arms Export Control Act by attempting to broker export of rocket technology to South Korea. He had pleaded guilty in May (see **WTTL**, June 7, page 4).

ANTIBOYCOTT: BIS sent Thermon Manufacturing Company of San Marcos, Texas, Warning Letter July 23 for alleged violation of antiboycott regulations, agency recently revealed. Three Thermon overseas subsidiaries reached separate settlements with BIS on antiboycott charges and together paid \$32,500 in civil fines, while neither admitting nor denying agency allegations (see **WTTL**, Sept. 27, page 3).

COPPER PIPE: ITC made final determination Oct. 26 that imports of dumped seamless refined copper pipe and tube from China and Mexico threaten to injure U.S. industry.