

Vol. 29, No. 35

September 7, 2009

Obama's Export Control Review Set to Begin in October

The comprehensive review President Obama ordered Aug. 13 of U.S. export controls is slated to begin formally in October (see **WTTL**, Aug. 17, page 1). White House and department staffs moved quickly to implement Obama's instructions, meeting the week of Aug. 17 to lay the ground work for the review. Staffers were given marching orders to prepare recommendations for a meeting of "high-level" officials at the end of September, according to one source.

The high-level meeting is supposed to mark the formal commissioning of the review, with work beginning in October. Before then, working-level staff have been instructed to resolve all outstanding export control issues that are on their desks and to bring any unresolved disputes to the meeting for potential escalation to Cabinet-level officials. Unresolved issue also may become part of the review.

Defense Secretary Robert Gates is expected to play a pivotal role in the administration's export control review for several reasons. In addition to being the person who apparently convinced the president to undertake the review, Gates has a personal interest in the subject. "He really knows this stuff," one source said. Along with his long career in Washington at the Central Intelligence Agency and the National Security Council in previous administrations, Gates was president of Texas A&M University where he became knowledgeable about the impact export controls have on academic research. An important task for Gates will be reigning in Pentagon staff who often freelanced on Capitol Hill to block previous efforts at changing export laws.

New Concerns Raised about Foreign Trade Zones

After more than 20 years of being ignored as a trade issue, the status of Foreign Trade Zones (FTZs) is getting renewed attention from U.S. unions and domestic manufacturers. Testimony at two hearings on pending FTZ subzones, one Sept. 1 and one Sept. 10, is renewing questions about how the zones operate and particularly whether imports subject to antidumping (AD) and countervailing duties (CVD) should be allowed to enter the zones duty-free.

Authorized since 1934, FTZs were originally intended to allow U.S. firms to import components and raw materials duty-free into the zones and to manufacture finished products for exports. In the intervening years, exports have become a small share of FTZ output and most goods produced in them now go into the domestic market. While goods subject to AD and CVD duties cannot enter FTZ without paying those tariffs, a question has arisen about whether such goods can enter the zones if the final products will be exported. Commerce's FTZ Board held the



Sept. 1 hearing on applications from Dow Corning and REC Silicon for subzone status for facilities that would import silicon subject to an antidumping order. Testifying on behalf of the Committee to Support U.S. Trade Laws (CSUSTL), David A. Hartquist of Kelley Drye and Warren urged the board to reject the applications.

“Activity of this nature is not in the public interest under the Board’s regulations,” he stated. “In particular, the sheltering of dumped or subsidized goods and the avoidance of antidumping or countervailing duties by means of manufacturing in a zone or subzone and then exporting those goods in downstream products are measures that are inconsistent with U.S. trade laws and that would seriously prejudice U.S. trade negotiations,” he argued.

Hartquist said he recognized that the law is unclear on the issue of exporting finished items from these components. Language in the 1988 Omnibus Trade Act did not directly address the issue, he noted. Nonetheless, the legislative history of that statute “indicates that Congress did not want foreign-trade zones and subzones to facilitate trade of dumped or subsidized merchandise to the detriment of injured U.S. industry,” he testified.. “ This policy is undercut if dumped or subsidized goods take the place of fairly traded U.S. raw materials or components, are processed in a zone or subzone, and then are exported as part of the value-added merchandise,” Hartquist stated. The Sept. 10 hearing will hear a request for zone status for a steelmill Thyssen-Krupp plans to build in Alabama. Testimony in opposition to the FTZ is expected from the United Steel Workers and the Machinists Union.

The number of zones and subzones has ballooned in recent years along with the value of manufacturing in them. In 2006, there were 163 FTZs and 257 subzones. The value of goods entering the zones that year was \$491 billion, of which 61% was domestic. Only \$30.4 billion was exported. There were 350,000 people employed in the zones at 3,500 firms. The largest sectors operating under zone status are autos, electronics, oil, auto parts and apparel.

Ministers Make No Breakthrough in Doha Talks

Trade ministers meeting in New Delhi, India, Sept. 3-4 appeared to make no significant progress in get-ting the stalled Doha Round back on track. Their main achievement was a decision to direct senior trade negotiators to meet again in Geneva the week Sept. 14 to resume negotiations. The goal still is to have some recommendations ready for leaders of the top 20 world economies (G-20) when they meet in Pittsburgh Sept. 23-24 for their next summit.

“I came to New Delhi with the message that the United States is ready to do the real work it will take to move the Doha Round toward a balanced and ambitious conclusion,” U.S. Trade Representative (USTR) Ron Kirk said in a statement at the close of the ministerial. “We came here in the hopes that our trading partners are ready to do the same,” he added. “In two short days, we have seen various nations’ readiness, and in some cases reluctance, with regard to the sustained bilateral talks that are necessary along with our multilateral work to move the Doha talks into an end-game,” Kirk said.

Before leaving for India, Kirk had told reporters he hoped the talks would be more successful than past ministerial meetings because of changes in leadership in several countries. “With the changes in administrations in the United States, in India certainly and South Africa and other countries, you have new leadership” that has expressed support for a successful round, he said.

Kirk also defended Obama’s trade policies from criticism in the trade community about the president’s failure to articulate his trade policy. “I can tell you I take very seriously my president’s directions to be engaged at a very high level, direct level, and to do so with the expressed goal of moving us toward a successful conclusion,” Kirk said. He also said he expects the president to make some statement on trade before the G-20 meeting in Pittsburgh. At the opening of the meeting, Indian Commerce Minister Anand Sharma explained why he

thought this ministerial would be more successful than previous ones. "A question has been asked by some that why India took the initiative to host this meeting when heads of state and governments have already, in no uncertain terms, signaled what needs to be done," he said. "But let's be frank in acknowledging that even the unequivocal expression of political resolve has not yet been translated into action," he said.

Meanwhile, it is becoming clear that the full ministerial of WTO members scheduled to start Nov. 30 won't become a major negotiating session. The WTO secretariat is not planning to organize small negotiations or so-called "green room" talks or to have facilitators chosen to try and hammer out agreement in the various sectors being negotiated in the round.

C-4, Brazil Ponder Negotiating Options after Cotton Ruling

The Aug. 31 ruling by a World Trade Organization (WTO) arbitration panel on U.S. cotton subsidies may have dashed hopes Brazil and four African cotton countries (C-4) had to use the case to squeeze concessions from the U.S. in the Doha Round (see story below). If the panel had accepted Brazil's request to calculate illegal U.S. subsidies at \$2.7 billion and allow it to retaliate across sectors against U.S. intellectual property rights and services, the Brazilians could have held the sanctions over the head of the U.S. like a sword in the negotiations.

The WTO arbitration panel ruling isn't strong enough to pressure the U.S. to change its cotton policies or provide much leverage in the Doha round negotiations, sources in Geneva said. However, a source familiar with the positions of the C-4 said they should reconsider bringing their own case.

The best way for Brazil to put pressure on the U.S. to change its cotton regime is to take the most "targeted measures that really hurt the [Obama] administration" on the most politically economically sensitive measures, said an executive following the case. That would stir complaints from other U.S. industries against the cotton program. "I don't think Brazil is going to do that," the executive said. Brazil still will try to use the ruling in the talks, he said.

"I don't know how this is going to interplay with the negotiations, if at all," said Roberto Azevedo, Brazil's permanent representative to the WTO. "Of course what we would like is to have that outcome in the negotiations. Whether that's possible or not, I don't know; we'll try," Azevedo said at an Aug. 31 press conference. If a U.S. cotton subsidy cut "is enough to avoid price suppression or price depression in the world markets, of course, that would be something that would, in fact, be the implementation of the decisions of the United States," Azevedo said. "If, however, the cuts are not enough, and the amount of subsidization ... still lead [sic] to a price suppression and price depression, then we still have grounds for continuing the retaliation," Azevedo said.

The C-4 countries "are just screwed" as a result of the circumstances of the case, said Dan Sumner, Brazil's economist on the case since 2003. "I'm still hopeful the U.S. at some stage – hopefully sometime fairly soon with a new administration and all – would say now let's do the right thing on these policies," Sumner said. "Even if the rest of agriculture is harmed by these cotton rulings and the fact that the U.S. won't comply, I don't see the politics lining up to make it happen; it's hard to picture in the current political environment," Sumner said.

Both U.S. and Brazil Claim Victory in WTO Cotton Ruling

A WTO arbitration panel ruling Aug. 31 gave Brazil authority to impose up to \$294.8 million in retaliation against U.S. goods for illegal U.S. cotton subsidies but rejected the Brazilian request to be allowed to cross-retaliate against American intellectual property and services. While Brazil claimed a victory in the decision, the amount of permitted sanctions is far below the \$2.7 billion it was seeking. The panel also disagreed with Brazil's contention that there

was not enough trade in U.S. goods to retaliate against without hurting Brazilian industry and consumers. Even as the decision was being announced, U.S. farm groups were urging USTR Ron Kirk to ask the WTO to convene a new panel to look at more up-to-date figures on the amount of subsidies going to American cottons growers. The U.S. cotton industry also argues that subsidies have declined drastically since the 2008 Farm Bill.

Brazil won on all the substantive economics of the case, the assessment and how to calculate the damages, argued Dan Sumner, Brazil's economist on the case since 2003. "The panel adopted the methodology of Brazil both for" the serious prejudice under the cotton General Sales Manager (GSM) program and counter-cyclical payments, said Sumner, a former USDA assistant secretary for economics. "Brazil won on all of that...whether or not they had the right to cross retaliate," said Sumner, who is now a professor at the University of California.

"We are pleased that the arbitration award is far less than requested by Brazil, that the panel provided no award with respect to the Step 2 cotton program, and that Brazil is not authorized to cross retaliate at this time," said Jon Hardwick, chairman of the National Cotton Council (NCC). Council President Mark Lange told reporters in a conference call that his group will work with the USTR. to determine whether the U.S. should ask for another panel to adjust the sanctions downward. He also said the NCC would look at the possibility of seeking a WTO case against India and China for new subsidies they are giving their cotton growers.

The panel "failed to recognize the significant changes that have been made to the GSM-102 program since 2005," said a statement from the North American Grain Export Association, National Cotton Council, CoBank, Farm Credit Council, U.S. Rice Producers Association, and National Council of Farmer Cooperatives. They claimed the GSM-102 program will generate a positive return to the government of \$54 million in 2010.

* * * Briefs * * *

EXPORT ENFORCEMENT: Federal agents arrested Jacques Monsieur, a Belgian national, Aug. 28 as he arrived on plane in New York on indictment charging him with attempting to export F-5 jet engine parts to Iran. His co-defendant, Dara Fotouhi, an Iranian national currently living in France, remains at large.

USTR: President Obama Sept. 3 said he intends to nominate Michael Punke to be deputy USTR in Geneva, filling post left vacant by retirement in August of veteran trade negotiator Peter Allgeier. During past six years Punke has served as trade consultant in Montana but mostly spent his time writing novels. Previously, he served as advisor in USTR's office in Clinton administration, at the White House as director of international economic affairs and as trade aide to Sen. Max Baucus (D-Mont.).

SHRIMP: CIT Judge Timothy Stanceu Aug. 25 threw out Customs' rule imposing enhanced bonding requirements on shrimp imports and remanded bonding issue for recalculation (slip op. 09-89). "The court holds that the enhanced bonding requirement is arbitrary and capricious in imposing greatly increased bond requirements only on importers of shrimp products subject to antidumping duty orders," he ruled.

FCPA: Leo Winston Smith of Chula Vista, Calif., former sales and marketing director for Pacific Consolidated Industries (PCI), pleaded guilty Sept. 3 in Santa Ana, Calif., U.S. District Court to two-count information charging him with conspiracy to violate FCPA with illegal bribes of United Kingdom Ministry of Defense official to obtain and retain lucrative contracts for PCI and with obstructing administration of the internal revenue laws. UK official pleaded guilty in UK and was sentenced to two years in prison.

PULUNGAN: Seventh Circuit Court of Appeals Aug. 10 denied without comment Justice request for rehearing of *U.S. v. Doli Syarief Pulungan*, in which appellate court had overturned conviction of man charged with violating Arms Export Control Act (see **WTTL**, June 29, page 1). Justice motion for rehearing argued that court had mistakenly relied on its belief that government had conceded that word "willfully" required the government to prove that Pulungan knew that it was illegal to export riflescopes and that they were designated as defense articles. "It is simply unfair to reverse the conviction based on an isolated statement made in the government's appeal brief not meant to be a concession," Justice said. [Editor's Note: **WTTL** is sponsoring audio-conference briefing on impact of Pulungan case on export prosecutions on Sept. 15. Contact Tami at 202-463-1250, Ext. 193, for details.]