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PORTMAN PUSHES TO KEEP DOHA ROUND ON NEW SCHEDULE

Prospects for the World Trade Organization's (WTO) Doha Round talks remain as troubled as they were in December at the end of the WTO Hong Kong Ministerial, with concerns now being raised that negotiators won't be able to meet the new deadlines set at the ministerial. Before leaving for a Jan. 26-28 meeting with some 30 to 35 trade ministers in Davos, Switzerland, U.S. Trade Representative (USTR) Rob Portman said he hopes the mini-ministerial will produce a renewed commitment to meeting those new deadlines and some progress toward an agreement on the formulas for cutting farm and industrial tariffs (see **WTTL**, Jan. 9, page 1).

> The Hong Kong Ministerial Declaration called for negotiators to agree on the "modalities" or percentages for cutting farm and industrial tariffs by April 30 and for additional steps by July 31. "The most important thing that could come out of Davos would be to reaffirm those dates and to make incremental progress in core areas," Portman said. He also said he hoped the meeting would "layout a plan for the spring" for moving the talks forward.

Portman's comments followed European Union (EU) Trade Commissioner Peter Mandelson's Jan. 16 warning to the European Parliament that "the road ahead will be tough." He said the EU agreed to end export subsidies by 2013 but "did not cross any red lines" limiting the concessions it could make in agriculture. He repeated his complaint, aimed mostly at G-20 countries such as India and Brazil, that "it was not evident in Hong Kong that other important partners are ready yet to take the hard decisions to make the offers and the contributions that will be needed if this round is to end on a successful note in a year's time or beyond."

But Portman continues to place most of the blame for the deadlock in the round on the EU. He handed out a fact sheet detailing the shortcomings in the EU farm offer and how it would produce little or no new access in many markets. Portman said he disagrees with the concern of some in the trade community who see the 2013 deadline for ending farm export subsidies as an admission that the Doha Round farm deal will track the pace of reforms in the EU's Common Agriculture Policy (CAP). "I don't view it that way," Portman said. "There is a lot of gray area in the CAP," he added, noting that commitments the EU has already offered in agriculture market access and domestic support are likely to require a reopening of the CAP.

SEC GIVES GUIDANCE ON HOW IT WILL IMPOSE PENALTIES

The level of penalty the Securities and Exchange Commission (SEC) will impose on companies that violate securities laws will depend on several factors, including the remedial actions a firm

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takes to prevent future violations of the law, the SEC says in recently issued penalty guidance. Cases in which a company was "unjustly enriched" by a violation are likely to get larger penalties than those where the violations injured shareholders or investors, the advice states. The guidance also will be used to determine penalties for violations of the Sarbanes-Oxley Act.

> The SEC advisory is the latest example of federal agencies trying to explain the factors that might mitigate or aggravate the penalties that could be imposed in an enforcement action (see **WTTL**, Jan. 16, page 4). While the Foreign Corrupt Practices Act (FCPA) isn't specifically cited in the advice, firms that violate the anti-corruption statute are likely to face similar considerations.

"A key question for the commission is whether the issuer's violation has provided an improper benefit to the shareholders, or conversely, whether the violation has resulted in harm to the shareholders," the SEC explained. "We proceed from the fundamental principle that corporate penalties are an essential part of an aggressive and comprehensive program to enforce the federal securities laws, and that the availability of a corporate penalty, as one of a range of remedies, contributes to the Commission's ability to achieve an appropriate level of deterrence through its decision in a particular case," it said. Factors SEC will consider are:

- The presence or absence of a direct benefit to the corporation as a result of the violation.
- The degree to which the penalty will recompense or further harm the injured shareholders.
- The need to deter the particular type of offense.
- The extent of the injury to innocent parties.
- Whether complicity in the violation is widespread throughout the corporation.
- The level of intent on the part of the perpetrators.
- The degree of difficulty in detecting the particular type of offense.
- Presence or lack of remedial steps by the corporation.
- Extent of cooperation with Commission and other law enforcement.

The advice provides a framework for how the SEC will decide when to penalize corporations in addition to individual wrongdoers and the level of the penalty it might impose. The guidance was released in conjunction with the announcement of a $50 million penalty being imposed on McAfee, a software security producer, for allegedly misleading investors by inflating revenues and earnings. The company had reached a consent agreement with the SEC and neither admitted nor denied the charges. The SEC plans to distribute some of the money to shareholders.

UNPRECEDENTED CEMENT DEAL COMES WITH SECRET INDUSTRY POT SPLITTING

A tentative agreement announced Jan. 19 between the U.S. and Mexico to cut and then revoke the antidumping duties on gray Portland cement and cement clinker from Mexico apparently has no legal basis and comes with a secret industry-to-industry deal to split over $250 million in collected but unliquidated duties. "This has never been done before," one trade lawyer told WTTL. Another lawyer close to the talks claimed the authority for the deal comes under the government's general powers to settle litigation but didn't cite a specific provision of trade law. While the exact percentage split of the dumping duties is being kept secret, that source said, "It can be assumed that it will be close to 50-50."

> Despite its shaky legal footing, the cement deal could be a model for a U.S.-Canada agreement on softwood lumber. Many of the elements of the two cases are similar with the main the difference being the political will which U.S. and Mexican leaders apparently had to reach a deal, but Washington and Ottawa lack.

Without commenting on the lumber dispute, a senior Commerce official said the cement accord was possible because of "the political will on both sides" and the leadership of top officials. "I would simply say this is an outstanding example of NAFTA partners working very closely on a trade dispute that had gone on too long," he said. The cement deal, which may take until April to complete formally, came the same week the U.S. and Mexico resolved dispute over tequila (see story page 4) The cement and lumber cases share several factors. In both, the

WTO has authorized Canada and Mexico to retaliate against the U.S. for distributing dumping and countervailing duties to domestic industries under the Byrd Amendment. Lumber duties, of course, dwarf those on cement. Nonetheless, Customs distributed $21.3 million in Byrd money to U.S. cement firms in 2004. One U.S. firm, Holcim, received $4.7 million in collected duties from 2001 to 2004, and another, LaFarge North America, received $4.6 million.

> Both cement and lumber are under the cloud of NAFTA panel rulings which could force the U.S. to terminate their dumping orders anyway. A binational panel last June remanded back to the International Trade Commission (ITC) its injury ruling in the 2000 "sunset" review of the cement order (see **WTTL**, June 27, page 4). While the ITC intends to reaffirm its earlier ruling, Mexican exporters would be expected to take the case back to the NAFTA panel, if such a ruling were issued. If the panel were to order the ITC to reverse its opinion, all duties collected since Jan. 1, 2000, would have to be refunded to cement importers.

Another common factor joining the two industries was Hurricane Katrina and the hurricanes that hit Florida. Commerce officials acknowledge that the need for construction materials to rebuild the areas hit by those storms was a factor propelling negotiations.

The U.S. and Mexico have been in talks over the cement case for nearly 10 years with a deal almost reached in 2000. The outline of the current deal had been circulated among key players in the industry as early as last fall. The agreement calls for a reduction of the current antidumping duty to $3 per metric ton with a quota of 3 million metric tons, which will be distribute in the southern tier of U.S. states under an allocation system administered by Mexico.

The U.S. could increase the quota by 200,000 tons to meet disaster reconstruction needs. After three years, the duty and quota will end. The deal also recognizes an industry-to-industry agreement on splitting collected duties. No new antidumping or countervailing duty orders will be imposed on Mexican cement during the three-year period, but the domestic industry could refile cases nine months after the end of the period.

Another provision calls on Mexico to take steps to open its cement market to U.S. imports. "The Mexican government, to their credit, have agreed to work with us to eliminate any obstacles that exist, and there are specific provisions in the agreement to facilitate our ability to that effect," a Commerce official said. Under the agreement, the U.S. and Mexico will establish a North American Cement Committee made up of government and industry representatives to investigate complaints about market access restrictions.

The deal will have a modest impact on the U.S. cement market. The $3 per ton duty compares to the current ad valorem rate which was just recalculated in the last administrative review Jan. 12 at 42.26% or $26.28 per ton. Even with the existing duty, Mexico shipped between 2.1 and 2.2 million tons of cement to the U.S. in 2005, according to the Associated General Contractors of America. Overall, the U.S. consumes about 130 million tons of cement, with domestic firms supplying some 95 million tons and the rest being imported from 30 countries. The Southern Tier Cement Committee, which brought the original case against Mexican imports, said it was pleased with the deal. In a statement, it stressed the promised opening of the Mexican cement market. "Only when the Mexican cement market is opened to imports will there be free and fair trade between Mexico and the United States," it said.

CONSTITUTIONAL CHALLENGE OF NAFTA QUESTIONS PANEL PROCESS

Whether or not the Coalition for Fair Lumber Imports succeeds in getting the dispute-settlement process in NAFTA Chapter 19 declared unconstitutional, its suit raises questions that might need to be addressed in the future about the selection of binational panelists and their oversight. In a brief filed Jan. 17 in the U.S. Court of Appeals for the District of Colombia, supporting its September 2005 petition seeking to have Chapter 19 declared unconstitutional, the Coalition challenges the selection of practicing trade lawyers as panelists (see **WTTL**,

Sept. 19, page 3). The Coalition's main argument is that its rights have been violated because it has been denied the ability to appeal binational panel rulings to a U.S. court established under Article III of the Constitution. The procedures in NAFTA Chapter 19 for selecting panel members and reviewing their judgments fail to remedy that shortcoming, it claims. In particular, it contends that Canadian panelists aren't familiar with U.S. law and legal precedents which must be applied to panel reviews.

> Members of Binational Panels (BNP) "are selected from a pool of trade lawyers and consultants who may well be advocating a position before the ITC or Commerce Department on behalf of their own clients, while simultaneously facing the very same issues as panelists on BNPs," declares the Coalition's brief. "Compounding this flaw, if a party has evidence that a binational panelist has a conflict or bias, that panelist cannot be removed without the consent of the party's adversary, i.e., the one benefiting from the conflict or bias," it adds.

The brief also claims Chapter 19 violates the constitutional principle of a "unitary executive," an arcane constitutional issue that became a front page topic of discussion during the confirmation hearings of Judge Samuel Alito for a seat on the Supreme Court. "To the extent that BNPs are not deemed to be exercising judicial power in violation of Article III, BNPs are exercising executive power in reviewing determinations made by the U.S. agencies," the brief argues. "The responsibility of the Executive Branch has thus been impermissibly transferred to BNPs, which are wholly outside of the U.S. government," it contends.

The Coalition draws a parallel between the adjudication of antidumping and countervailing duty cases and a 1987 Supreme Court ruling in *Commodity Futures Trading Commission v. Schor*. In *Schor* the Court established a balancing test to determine when a non-Article III administrative body may decided a case versus an Article III court. There was no need for such a transfer because antidumping and countervailing duty cases were already being reviewed by a competent court, the Court of International Trade, the Coalition notes. When Congress has created non-Article III bodies, it has done so either to reduce a backlog in the court or where highly specialized expertise is needed. "Neither justification applies here," the Coalition argues.

* * * BRIEFS * * *

FTAs: USTR Rob Portman Jan. 20 said U.S. was still not ready to announce launching of FTA talks with Egypt and Korea, saying of both, "We are not quite there yet." He said he was not as optimistic about prospect of FTA with Switzerland because "I am not sure the agriculture issues can be resolved." Separately, Portman Jan. 13 asked ITC to conduct study on economic impact of FTA with Peru.

EAA: Legislation (H.R. 4572) introduced by Rep. Henry Hyde (R-Ill.) to renew and amend EAA may have more legs than some thought (see **WTTL**, Jan. 16, page 1). Senate sources say Senate Banking Committee Chairman Richard Shelby (R-Ala.) "would be very likely to support the Hyde bill."

TEQUILA: U.S. bottlers will be able to continuing bottling Mexican tequila in the U.S. under U.S.-Mexico agreement announced Jan. 17. Mexico agreed not to apply restrictive bottling and labeling standard on U.S.-bottled tequila, but U.S. also agreed to establish "tequila bottlers registry" of approved bottlers.

OMAN: USTR Rob Portman signed FTA with Oman Jan. 19 and said he hopes to get congressional approval for deal early this year (see **WTTL,** Oct. 10, page 2).

VIETNAM: Latest round of talks on Vietnam's accession to WTO, which ended Jan. 18, "made progress across all areas," said Assistant USTR Dorothy Dwoskin. Vietnam's National Assembly has already enacted some reforms needed for WTO membership, she noted. USTR Rob Portman said he hopes Vietnam can complete its accession this year along with Russia, Ukraine and Kazakhstan and get Jackson-Vanik Amendment waivers from Congress.

UKRAINE: ITA issued notice in Jan. 18 Federal Register reopening comment period on "changed circumstances" review of Ukraine's NME status to weigh impact of reforms instituted following "Orange Revolution" (see **WTTL**, July 18, page 3). New deadline for comments is Feb. 16. Separately, EU Dec. 21granted Ukraine market economy status.