

Vol. 31, No. 14

April 4, 2011

Ex-Im Bank Chairman Takes Wait-and-See on Reorganization

Export-Import Bank Chairman Fred Hochberg is willing to let the White House Office of Management and Budget (OMB) complete its review of U.S. trade agencies before taking a stand on where the bank should end up in any potential reorganization of trade agencies. In an exclusive interview with WTTL, Hochberg said he doesn't have an opinion on whether Ex-Im should remain independent or be merged into a larger, consolidated trade department (see **WTTL**, March 14, page 4). "We haven't looked at this in a serious way for a long time," Hochberg said.

"Coming from the business sector, you look at yourself, and your customers force you to do it, every two, three, four, five years. We have to look at it," he said. "I can see a number of ways, some closer coordination, we can do to be a more effective tool," Hochberg told WTTL. "The key thing is that we should be effective, and sometimes being efficient is not the Holy Grail," he said.

Ex-Im's charter is up for reauthorization this year, but the Obama administration is still debating internally what amendments to propose to Congress for a new charter. Bank officials want to increase Ex-Im's exposure limits, renew the charter for four years and clean up out-of-date references and provisions. "We have a challenge no doubt in our reauthorization," Scott Schloegel, Ex-Im senior vice president for congressional affairs, told Ex-Im's Advisory Committee March 30. One contentious issue that arose during a House hearing on reauthorization is bank requirements for U.S. content in bank-financed exports. Business groups want Ex-Im to allow more foreign content and include indirect costs in the content calculation. Unions oppose any change in the policy.

CAFC: ITA Must Defend "Zeroing" in Administrative Reviews

The International Trade Administration (ITA) must justify continuing to use "zeroing" in administrative reviews of antidumping orders while abandoning its use in original investigations, the Court of Appeals for the Federal Circuit (CAFC) ruled March 31. Although the court has upheld ITA's use of zeroing in the past as a permissible interpretation of the statute, it said the agency "has failed to adequately explain why it has interpreted this statutory provision inconsistently." The ruling in *Dongbu Steel Co. v. U.S.* comes as ITA has already bowed to World Trade Organization (WTO) rulings against its use of zeroing in original investigations and has proposed ending the practice in administrative reviews prospectively (see **WTTL**, March 21, page 1). Unless ITA can come up with a justification for the inconsistency that the courts will approve, scores of pending and past administrative reviews could see dumping



margins significantly cut or eliminated, if other respondents file suits citing *Dongbu*. “The upshot of this decision is that Commerce has very few options,” says Julie Mendoza of Troutman Sanders, which represented the plaintiff-appellant in the case, Union Steel Manufacturing Co. Ltd. “Commerce needs to eliminate zeroing in reviews just like it has eliminated zeroing in investigations,” she said.

“We have upheld Commerce’s use of zeroing as reasonable no fewer than seven times over the past decade,” noted Judge Sharon Probst, who wrote the CAFC opinion, citing previous precedents in *Timken* and *Corus Staal*. “While we have repeatedly upheld Commerce’s use of zeroing in administrative reviews, we have never considered the reasonableness of interpreting 19 U.S.C. Section 1677(35) in different ways depending on whether the proceeding is an investigation or an administrative review,” she wrote. “Accordingly, we are not bound by the prior cases and apply the *Chevron* step two analysis anew,” Probst declared.

“Commerce must provide an explanation for why the statutory language supports its inconsistent interpretation,” she wrote. “In the absence of sufficient reasons for interpreting the same statutory provision inconsistently, Commerce’s action is arbitrary,” Probst wrote for the court.

Summer Action on FTAs Looks Increasing Likely

Despite partisan bickering over when President Obama will send the Panama and Colombia free trade agreements (FTAs) to Congress and when lawmakers should vote on the Korea FTA, action on all three trade pacts looks increasingly likely to come this summer. Panama’s National Assembly is moving “very quickly” to enact labor rights and tax transparency legislation that has delayed submission of the Panama accord, Deputy U.S. Trade Representative (USTR) Miriam Sapiro told the House Ways and Means Committee's Trade Subcommittee March 30. “Last evening, both pieces of [labor] legislation passed their second reading,” Sapiro said.

Sapiro also said intensified talks with Colombian officials are continuing. “I am pleased to say that this afternoon I will resume high-level discussions with President Santos’ senior advisers on how best to advance these goals,” she said.

Rep. Sander Levin (D-Mich.) reiterated his stand March 29 that Colombia must adopt legislation to meet international labor standards, reduce violence against workers and strengthen the administration of justice to bring more of those guilty of violence to justice and end their impunity from punishment. Separately, Rep. Jim McDermott (D-Wash.) said movement by Colombia toward these goals may be sufficient to win Democratic support for the FTA.

“Colombia is moving,” he told WTTL in an exclusive interview. “They will be able to lay down the groundwork to have it done,” he added. “They have to show some interest in prosecutions; they have to show some investigations, some things that have gone on for a long time; there are labor things that have to be done,” McDermott told WTTL. “What we’re looking for is real movement...There are things happening that indicate they are actually moving. I think some movement like that will be enough ultimately,” he said. “It’s a question of balance,” he added. “You’re going to have to make compromises,” McDermott stated.

WTO Panel Finds Boeing Received Illegal Subsidies

A WTO dispute-settlement panel ruling March 31, which found that Boeing has received federal and state subsidies that were inconsistent with international trade rules, was probably exactly right, because both the U.S. and European Union (EU) claimed victory with the decision. Although the panel rejected most of the EU claims about aid given to Boeing, it still found some \$5.3 billion in subsidies from the Defense Department, NASA and Washington state. For the U.S., this was a victory, because a different WTO panel has ruled that European countries have given Airbus some \$20 billion in illegal subsidies (see **WTTL**, Feb. 7, page 3). The U.S.

claim of victory appears to be based on the premise that it is the less sinful of two sinners. “The WTO has vindicated the view the United States has taken for the last 20 years – that the subsidies the Europeans give to Airbus dwarf anything that the U.S. government does for Boeing,” U.S. Trade Representative (USTR) Ron Kirk told reporters.

While EU officials tried to put the best face on the partial victory it won, the EU Commission notified the WTO on April 1 that it will appeal the panel’s ruling. U.S. officials said they are still weighing whether to appeal. “The EU has chosen to quickly appeal technical elements of the ruling for legal strategic reasons - including to reduce what has been a growing time gap between the two parallel aircraft disputes,” said EU spokesman John Clancy.

Boeing President and CEO James McNerney Jr. said the WTO ruling sends an important message to emerging countries that plan to help the development of airplane industries in their countries. “We know China is coming,” he told the Export-Import Bank’s annual meeting March 31. The WTO ruling “was a dramatic victory for clarifying the rules of engagement for developing countries as they develop products like airplanes. We’re very hopeful that that will help us as we start dealing with China as they start supporting their efforts,” he said.

McNerney also noted the sharply different amount of subsidies found for Airbus and Boeing. He noted the one panel ruling that found some \$20 billion in subsidies for Airbus and the new panel ruling that found \$3.7 billion for Boeing, which was “stuff that happened 20 years ago and we’ve all stopped doing it,” he said. “Of the 20 Europe was found to have violated, four has to be paid back immediately and 15 will dramatically change their business model, because the business model is around direct subsidy of airframe development,” he added.

Lamy to Hold Private Talks to Save Doha Round

WTO Director-General Pascal Lamy will step into the faltering Doha Round talks with one-on-one meetings with each of the key countries in the negotiations. Lamy’s increased effort to save the round comes as early optimism for concluding talks this year drained completely during the week of March 28 (see **WTTL**, March 28, page 3). Gaps between major players in agriculture, manufacturing and services are wide or getting wider, Deputy USTR Michael Punke told officials during a March 29 meeting of the Trade Negotiations Committee (TNC).

Lamy told the TNC that “now is the time for all of you, and in particular those among you who bear the largest responsibility in the system, to reflect on the consequences of failure.” Lamy plans to start the private consultations April 4 and spend two weeks meeting with key countries. At the end of the process, he will report back to WTO members on the next steps for the round.

“At this point, there’s quite a bit of pessimism,” ex-Deputy USTR Peter Allgeier told **WTTL**. In most areas, talks seem to be focused on restating old positions rather than reaching a compromise, Allgeier said. There is “a serious question” about what can be salvaged from the completed work to close the round with less ambition than many had hoped, he said. People are reluctant to discuss that option, because they don’t want to give up on the round, he said.

Debate over Fisheries Subsidies Foreshadows Environment Talks

Backers of efforts to include restrictions on fisheries subsidies in the WTO Doha Round and Trans-Pacific Partnership (TPP) talks see their work as a prelude to broader negotiations on trade and the environment. So far, however, countries such as Japan, China, Brazil, Korea and several developing countries have blocked progress in the round on these subsidies and tried to water down proposed restrictions. Negotiations on fisheries subsidies are “perhaps the first trade and environment example,” because of the link between subsidy reform and resource conservation, says Courtney Sakai, senior campaign director at Oceana. Support for restrictions

on fisheries subsidies came April 1 in a statement from a group of countries, including Argentina, Australia, Chile, Iceland, New Zealand, Norway and the U.S. “The WTO’s credibility on trade and environment issues is at stake here,” their statement said. “An outcome that appeared to discipline some subsidies, only to provide such extensive flexibilities that the status quo remains unchanged, would not be credible,” they argued.

Former Deputy USTR Peter Allgeier, who is now president of C&M International, a trade consulting firm, says a deadlock in the Doha talks could lead to issues such as fisheries subsidies being moved to plurilateral or multilateral agreements such as the TPP. What the U.S. has done in bilaterals with some TPP members, such as Australia, Singapore, Chile and Peru, could be adopted by the nine countries participating in the TPP, suggests Allgeier.

Cloudburst of AD/CVD Cases May Be Limited

It was raining antidumping (AD) and countervailing duty (CVD) petitions at ITA and International Trade Commission (ITC) March 30-31, but members of the trade bar cautioned against expecting the new cases to foreshadow a steady stream of additional complaints. In two days, petitioners filed complaints against imports of four products, launching 11 separate investigations. According to trade lawyers, the cases were filed before April 1 so the period of investigation for all the cases will include all four quarters of 2010. The inclusion of 2010 also will help them win injury determinations from the ITC, because the ITC’s three-year period of investigation will now include a year that saw sharp import growth after two years of flat or declining imports during the recession (see WTTL, Jan. 10, page 1).

Despite the recent filings, fewer new petitions are likely because of structural changes in U.S. industry, one trade lawyer said. Many industries, such as steel, chemicals and manufacturing, that used to be big users of trade remedy laws are now owned by multinational companies that are importers themselves, he noted. In addition, many foreign firms closely monitor and audit their own export prices to the U.S. to avoid potential dumping charges.

Financially, the largest filing came March 30, with Whirlpool’s AD and CVD complaints against imports of bottom-mount combination refrigerator-freezers from Korea and Mexico. Whirlpool is represented by the law firm of Cassidy Levy Kent in the cases, which are expected to hit imports made by LG and Samsung. Also on March 30, Accuride Corporation and Hayes Lemmerz International, Inc., filed both AD and CVD petitions against steel wheels from China. Schagrin Associates filed the cases for the companies.

On March 31, Sidley Austin helped Clariant Corporation file an AD case against imports from China and Taiwan of stilbenic optical brightening agents. Also on March 31, Mid Continental Nail Corporation, represented by Wiley Rein, filed an AD case against imports of steel nails from the United Arab Emirates. Davis Wire Corporation, Johnstown Wire Technologies, Inc., Mid-South Wire Company, Inc., National Standard LLC and Oklahoma Steel & Wire Company Inc. filed AD and CVD cases March 31 against galvanized steel wire from Mexico and China. Their attorneys are Vorys Sater Seymour and Pease.

* * * Briefs * * *

EXPORT ENFORCEMENT: Polar Star International Co Ltd. of Hong Kong, will pay \$50,000 civil fine to settle BIS charge of unlicensed reexport to entity that was part of sanctions on Mayrow Trading Co. BIS claimed Polar Star in 2007 reexported electronic components valued at \$6,600 and classified under ECCN 3A991 to entity in UAE without export license. Polar Star neither admitted nor denied allegations.

MORE EXPORT ENFORCEMENT: Aviation Trading & Leasing Inc. of New York will pay \$20,000 civil penalty to settle BIS charge of exporting an aircraft component to Syria without required license. In 2004, AT&L exported mode select panel classified under ECCN 7A994 and valued at \$11,000, BIS claimed. AT&L neither admitted nor denied allegations.