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Dispute Settlement Body Approves Two New Appellate Members

After months of disagreement, the World Trade Organization (WTO) Dispute Settlement Body (DSB) approved two new Appellate Body (AB) members at a busy meeting Nov. 23. At the same time, Antigua threatened to retaliate against the U.S. for failure to reach a settlement in a 12-year dispute over online gambling.

Members accepted the recommendation of a WTO Selection Committee to appoint Zhao Hong of China and Hyun Ching Kim of Korea as AB members. Their four-year terms will begin Dec. 1. Former AB member Yuejiao Zhang's second term expired in May, and Seung Wha Chang was not reappointed due to U.S. objections.

Antigua won an arbitral award against the U.S. in 2004 when it was found that Antigua online gambling operators were unfairly blocked from the U.S. in violation of GATT. Antigua values the outstanding payment at \$250 million. "If an appropriate and beneficial settlement is not reached with the U.S. by year-end, the government will be compelled to take action to enforce the suspension of copyright on the sale of U.S. intellectual property, consistent with the award of DSB," Antigua's representative said in a statement to the DSB (see **WTTL**, Oct. 31, page 2).

The DSB also established a panel to examine the EU's complaint regarding China's duties on exports of raw materials. China rejected the EU's first request, as they had with the U.S. before a second request for panel was accepted, per WTO rules (see **WTTL**, Nov. 14, page 6). The DSB will have its next regular meeting Dec. 16.

JCCT Participants Hope to Maintain China Relations

At the 27th meeting of the U.S.-China Joint Commission on Commerce and Trade (JCCT) Nov. 23, Obama administration officials expressed hope that any progress made over the last eight years will keep the relationship between the two countries civil during the

“uncharted territory” of the next few months or years. During the meeting, “the two sides focused on ensuring the fulsome implementation of past JCCT commitments and also announced further concrete commitments to promote open trade and investment. The two sides also announced future dialogues and collaborative and capacity building efforts,” a U.S. fact sheet noted. All of the commitments Chinese officials made during the talks remain to be verified by actual practice.

Like in past years, the two sides agreed to address China’s overcapacity in steel and aluminum production. The partners agreed “to jointly promote the expeditious establishment of the Global Forum on Steel Excess Capacity,” the fact sheet noted. The U.S. and China also “commit to actively participate and strengthen information sharing and cooperation,” including holding an informal JCCT Steel Dialogue in 2017, it added. President Obama addressed the issue directly with China’s President Xi Jinping on the sidelines of the APEC meeting in Peru (see story, page 5).

The partners also addressed concerns over China’s investment in its semiconductor industry. “China reaffirms that operation of the integrated circuit investment funds are based on market principles and that the government does not interfere with the normal operation of the funds. China clarifies that the government has never asked the fund to require compulsory technology or IPR transfer as a condition for participation in the Funds’ investment projects,” the fact sheet said.

With several WTO cases pending, the meeting participants could hardly ignore the issue, especially concerns about certain Chinese government subsidy programs. The U.S. “welcomes China’s confirmation that the Ministry of Commerce has coordinated with relevant departments and local governments regarding U.S. concerns relating to International Well-Known Brand subsidies and farm machinery subsidies and that China is prepared to adjust the measures at issue as necessary. The two sides are to continue to consult regarding these two matters in 2017,” the fact sheet noted.

On counterfeit goods, the two sides will “strengthen cooperation with right holders and e-commerce platforms to actively and jointly promote the training of U.S. and Chinese small and medium-sized enterprises by e-commerce platforms on protecting intellectual property rights, to help them to use these platforms to foster international trade,” the fact sheet noted. “China will actively promote e-commerce-related legislation [and] strengthen the supervision over network infringement and counterfeiting,” it added. U.S. industry has called for Chinese e-commerce site Alibaba to be designated a notorious market for selling counterfeit goods (see **WTTL**, Oct. 31, page 6).

U.S. officials also had high hopes for agreement on agriculture issues, including market access for beef. “While the agricultural outcomes of this week’s JCCT did not go as far as the United States had hoped, I remain optimistic that, in the final weeks of this Administration, we can still make additional progress on priority issues including biotechnology approvals and market access for U.S. beef,” Agriculture Secretary Tom Vilsack said in a statement. “I urge both sides to reengage as soon as possible so that we can fulfill this expectation and complete work before the end of the year and the start of the new administration,” he said.

Speaking before the opening plenary in Washington Nov. 23, U.S. Trade Representative (USTR) Michael Froman addressed those hopes as well. “We have made steady progress on a range of economic issues in our bilateral relationship, from intellectual property to indigenous innovation, from cyber theft to beef, although we still have some work to do to have American beef served in Beijing,” he said.

Froman also acknowledged the incoming administration without naming the president-elect. “Because this is my last JCCT meeting, I want to emphasize the need to keep the U.S.-China relationship on an even keel, even as we sail into the strong headwinds of populism and protectionism that are blowing all around the world. Our two governments have less than two months to reinforce and fortify this relationship, so that it can endure through the uncharted waters that lay ahead,” he said.

Despite Froman’s high hopes, the fact sheet made no mention of progress toward a Bilateral Investment Treaty (BIT). Over the past eight years, the countries “have had an opportunity to advance discussions towards a high standard Bilateral Investment Treaty that locks in important disciplines and opens China’s markets, and promotes market reforms,” Froman said at the opening plenary.

CAFC Clarifies Meaning of ‘High Proportion’ in Duty Rate

Classification under the tariff schedule referencing a “high proportion” of one component means there is a “high ratio of that component compared to the other components,” not necessarily that the one component accounts for more than 50% of the end product, the Court of Appeals for the Federal Circuit (CAFC) ruled Nov. 18. With this clarity, the court upheld a Court of International Trade (CIT) decision that held that imported liquid-filled glass bulbs were properly classified under as “other articles of glass” on the Harmonized Tariff Schedule of the U.S. (HTSUS) and have a 5% duty rate, rather than “Other” “Parts” of goods, which are duty-free.

“The court determined that the bulbs do not contain a ‘high proportion’ of non-glass material and that the bulbs do not comprise both a static and a mechanical component,” wrote CAFC Judge Timothy Dyk for the three-judge panel in *Tyco Fire Products v. U.S.* The court also held that “Tyco’s bulbs, which consist of up to 31% of liquid by weight, did not consist ‘mainly of liquid rather than of glass,’ and therefore, they did not have a high proportion of liquid,” Dyk wrote.

“Turning to other factors for determining essential character, the evidence shows that for each bulb model the glass weighs more than the liquid. Tyco concedes that the relative weight factor favors the government. The glass is also the more expensive component in all of the imported bulbs except the smallest models and the water heater models,” Dyk added. “Furthermore, as Tyco admits, the bulbs are sometimes referred to as ‘glass bulbs,’ and much of the packaging and marketing materials in the record use similar terminology. In light of this evidence, we see no error in the CIT’s conclusion that the bulbs have the essential character of glass and are properly classified under Heading 7020,” he wrote.

President-Elect Names Economic Landing Teams

President-elect Donald Trump's trade and economic advisors are coming into focus as he floated nominees for major Cabinet secretaries and he named members to "landing teams" Nov. 21 and 22 for Commerce, Treasury and the USTR's office. These teams are meeting with current officials to ease the transition from the current administration to the next.

At press time, industrial investor Wilbur Ross, who is known for restructuring failed companies in the steel, coal and other industries, was expected to be nominated as Commerce secretary. "Ross, who is already reassuring investors that Trump won't do anything rash on trade, invests in 'distressed assets.' What the aliens in 'Independence Day' do to planets like Earth, Ross does to troubled companies. He plunders them for anything of value and then leaves them in ruins," wrote Richard Eskow, senior fellow at Campaign for America's Future, in a blog post.

When it comes to trade policy, Ross has a mixed corporate history, veering from steel protectionism to international textile manufacturing. In 2004, Ross had a change of heart on the U.S.-Central American Free Trade Agreement (CAFTA), since his newly created textile manufacturing conglomerate, which bought the bankrupt operations of Burlington Mills and Cone Mills, had production facilities in Mexico (see **WTTL**, Nov. 22, 2004, page 3). A year prior, the then-head of International Steel Group told **WTTL** that he wanted the current Section 201 import tariffs imposed on foreign steel to stay "pretty much the way they are."

Trump's Commerce landing team includes: Dallas investor Ray Washburne; David Bohigian, venture capitalist with Pluribus Ventures; Joan Maginnis, who with Bohigian served as Commerce attorneys during the George W. Bush administration; William Gaynor, president and CEO of Rock Creek Advisors LLC, who also served at Commerce during the George W. Bush administration; and former Dallas mayor Tom Leppert.

Dan DiMicco, former Nucor Steel CEO, and Robert Lighthizer, deputy USTR during the Reagan administration, are part of the USTR transition team. As a private attorney, Lighthizer represented firms in hundreds of antidumping and countervailing duty cases on behalf of the steel industry. Observers were quick to highlight the overrepresentation of the steel industry in the incoming administration. "The direction of the administration's trade policy is being shaped by two men who speak on behalf of interests that account for less than 0.3% of the U.S. economy?" Cato Institute's Dan Ikenson wrote in a blog post. "Will the interests of the other 99.7% of the U.S. economy have a voice in the formulation of trade policy?" he wrote.

"To those who have been holding out hope that Trump's anti-trade campaign bluster would moderate before it could be converted to policy, the selection of DiMicco and Lighthizer is pretty devastating news. Neither has met a tariff he didn't like or a trade agreement he did. To the non-political staff at USTR, the DiMicco/Lighthizer duo must feel like a real poke in the eye," he noted. "DiMicco and Lighthizer bring an enforcement and prosecution ethos to the USTR, which will send a lot of the existing staff to the exits,

while ensuring that the agency's budget is devoted primarily to bringing complaints against our trade partners, rather than negotiating new and better deals," Ikenson wrote.

At Treasury, William Walton, chairman of Rappahannock Ventures LLC and Rush River Entertainment, has been tapped as part of the landing team, as have Curtis Dubay, tax expert at the Heritage Foundation; Judy Shelton, senior fellow at Atlas Network; and Mauricio Claver-Carone, executive director of the U.S.-Cuba Democracy Political Action Committee and Cuba Democracy Advocates, which are pro-embargo advocacy groups. Claver-Carone was an attorney-adviser at Treasury until November 2003 and has testified before Congress against lifting the Cuba embargo (see **WTTL**, Sept. 19, page 7).

APEC Meetings Address Trade Secrets, TPP, Steel

At the 24th annual Asia-Pacific Economic Cooperation (APEC) Economic Leaders' Meeting in Peru Nov. 19-20, leaders endorsed best practices in trade secret protection and enforcement against misappropriation, a move heralded by the USTR's office. At the same time, President Obama met with specific trading partners, including China, in side meetings to push for continued reforms.

Among the best practices are: broad standing to claims for trade secrets protection and enforcement against trade secret theft; civil and criminal liability, as well as remedies and penalties; robust procedural measures in enforcement proceedings; and adoption of written measures that enhance protection against further disclosure when governments require the submission of trade secrets.

"The United States' innovation economy requires strong, enforceable trade secret protections. The theft of trade secrets, including through cybertheft, is a real and serious concern for many American companies," USTR Michael Froman said in a statement.

On the sidelines of the meeting, Obama met with leaders from the other 11 Trans-Pacific Partnership (TPP) countries Nov. 19. He reiterated his support of trade agreements like TPP. Though the trade deal is unlikely to advance at this point, with the U.S. president-elect vowing to scrap the deal, Obama still urged his fellow leaders to advance TPP and similar policies. "The President commended those TPP leaders who have already successfully worked with their legislatures to move forward with TPP approval," according to a White House readout (see **WTTL**, Nov. 21, page 5).

Obama also met on the sidelines with China's President Xi Jinping. According to the White House, Obama "encouraged China to advance reforms that will help it to shift to a sustainable, domestic consumption-driven economic model." He also told Jinping that China should address overcapacity in its industrial sectors, particularly launching a Global Forum to address steel excess capacity. G20 leaders discussed overcapacities at their meeting in Hangzhou in September.

Officials Seek to Stem Uncertainty, Power of WTO Appellate Body

Tools that could avoid a significant expected backlog for processing World Trade Organization (WTO) appeals in the coming years, and which could shore up confidence in adjudication, have so far not been brought to bear despite rising concerns over politicization of the WTO Appellate Body (AB) and its unexpectedly central role and powerful place in the legal process of resolving disputes.

AB Chair Thomas Graham addressed the “difficult” and “challenging” 2016 and the future of the body at an event in Geneva Nov. 22. Work in the AB will not get easier, he said. “Many things are unforeseeable” even if the long-predicted “tsunami” of cases has appeared, he said. The independence of the WTO adjudicative system and the impartiality of adjudicators could be “challenged” using tools such as pressure during reappointments and by limiting resources and staffing, Graham said.

Graham also addressed in the expected increase in cases. WTO division directors expect 26 panel reports in 2017, including another “enormous” appeal, the Boeing compliance case, and an appeal of the “large and complex” Australian “plain packaging panel decision,” Graham said. Four dispute-settlement cases are associated with Australian plain packaging requirements for tobacco and certain other products.

An already busy workload in 2016 is expected to nearly triple next year, he said. Seventeen or 18 new appeals are expected, along with three pending appeals, namely Airbus, methodologies and Russian pigs. Some appeals will very likely be for “unusually large and complex” cases, he said. This number compares to the 24 appeals that have been made during the past three years. The length and complexity of appealed panel reports have more than doubled, he said.

The number of attorneys supporting the AB, now at 16, is “flatly inadequate” for the expected case load, Graham said. Nearly four dozen attorneys are working at the panel stage. The 90-day deadline “simply is not realistic” for the AB to complete consideration of an appeal and release a final report considering the size and complexity, Graham said. Forty-two days are devoted to filing of submissions and translation, he said.

The AB was an “afterthought” at the end of the Uruguay Round, “designed to review a few cases [each] year,” Graham said. The AB has “succeeded despite” an organizational structure that was “obsolete” nearly from the start and hasn’t changed in the intervening two decades, he said. The AB was created as “sort of a court, but not exactly,” and few expected the AB to be “very busy” or central in WTO dispute settlement, he said. AB members were not envisaged to be like other judges, Graham said. They were expected to be part-time, not live in Geneva, and were not prohibited from other employment, he said.

Trade executives and officials echoed those concerns. Neither the WTO director-general nor individual members have reacted to AB calls for a boost in staff and resources commensurate with the increased workload, one trade executive told WTTL. In addition, the political theater surrounding Trump’s election has increased uncertainty about the

possible effect of declarations on disputes, one trade executive suggested. A “near paralysis in negotiations” and greater developing country confidence in bringing cases likely means a further rise in the AB’s workload and backlog, a knowledgeable trade chief said. U.S. opposition to reappointment of AB member Seung Wha Chang left a lingering whiff of intimidation in the minds of some trade officials, which has increased the perceived instability, the trade chief told WTTL (see **WTTL**, Oct. 31, page 2). Resistance to increasing AB resources to match the expected case load comes from philosophical opposition to spending increases, and in part from U.S. and other leaders and executives who aren’t fond of WTO dispute settlement, the trade chief said.

*** * * Briefs * * ***

AIRBUS: OFAC issued second license to Airbus Nov. 21 for sale of 106 planes to Iran Air. OFAC issued previous license to Airbus in September (see **WTTL**, Nov. 21, page 4). House Speaker Paul Ryan (R-Wisc.), along with California Republican Reps. Kevin McCarthy and Ed Royce, sent letter to White House Nov. 22 requesting that administration “take no further actions designed to bolster international investment in Iran.” State spokesperson John Kirby at daily press briefing Nov. 22 confirmed he’d seen Ryan’s letter. License “has been in train for quite some time, as other licenses have as well. ... there’s no Machiavellian intent here, to push any way outside the bounds of our normal commitments and obligations here in the final months of the Administration,” Kirby said.

SANCTIONS: Ahmad Sheikhzadeh, U.S. citizen and N.Y. resident, pleaded guilty Nov. 21 in Brooklyn U.S. District Court to conspiring to facilitate funds transfer to Iran without required OFAC license. Sheikhzadeh, former consultant to Iran’s Permanent Mission to UN, admitted to remitting services to U.S. co-conspirators to facilitate investments in Iran and to direct disbursements from Iranian bank accounts. Sentencing is set for March 30, 2017.

NUCLEAR CONTROLS: In Federal Register Nov. 25 BIS removed unilateral nuclear nonproliferation (NP) Column 2 license requirements from certain pressure tubes, pipes, fittings, pipe valves, pumps, numerically controlled machine tools, oscilloscopes and transient recorders on Commerce Control List (CCL). Final rule removes ECCNs 2A292, 2A293, 2B290 and 3A292 and adds four new ECCNs: 2A992, 2A993, 2D993 and 2E993. Rule “is expected to have the most significant impact with respect to exports, reexports, or transfers (in-country) of certain digital oscilloscopes to Israel,” BIS noted. Effect on exports, reexports or transfers (in-country) to other destinations “is expected to be insignificant,” it said.

LUMBER: Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (COALITION) filed antidumping and countervailing duty petitions Nov. 25 at ITA and ITC against certain softwood lumber products from Canada. Petition alleges that “Canadian provincial governments, which own the vast bulk of Canada’s timberlands, provide standing trees to Canadian producers for an administered fee that is far below the market value of the timber, as well as a number of other subsidies,” group said in press release. Lumber standstill agreement expired in October (see **WTTL**, Oct. 31, page 4).

FCPA: Ng Lap Seng, owner of Macau Real Estate Development Company, and Jeff Yin, Ng’s principal assistant, were charged in superseding indictment in Manhattan U.S. District Court Nov. 22 with violating Foreign Corrupt Practices Act (FCPA) by bribing Antiguan and Dominican ambassadors to UN. Ng and Yin allegedly paid hundreds of thousands of dollars to ambassadors in exchange for official action to benefit Ng and his company. Specifically, Ng sought formal UN support for Macau Conference Center that he hoped to build.