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Court Reopens Legal Challenge to Softwood Lumber Deal

The Court of Appeals for the Federal Circuit (CAFC) has reopened a challenge to the 2006 U.S.-Canada Softwood Lumber Agreement (SLA) just as the two countries reportedly are close to agreement on extending the accord. In *Almond Bros. Lumber Co. v. U.S.*, the appellate court June 28 reversed and remanded a decision of the Court of International Trade (CIT), which said the CIT did not have jurisdiction to review the agreement because it was not negotiated under the authority of a trade law (see **WTTL**, May 25, 2009, page 4).

> The SLA isn't set to expire until Oct. 12, 2013, but U.S. and Canadian officials are talking about agreeing early to extending it for two more years to 2015. An agreement might be announced as soon as Aug. 9, sources speculate. Despite disputes under the deal that have led to the initiation of arbitration dispute-settlement, the accord has provided a degree of certainty, and due to the crash of the U.S. housing market, Canadian exporters aren't using their available quotas.

Almond was part of a group of some three dozen U.S. lumber companies that were not members of the Coalition for Fair Lumber Imports. The group sued the U.S. and U.S. Trade Representative (USTR) Ron Kirk, claiming the SLA was illegal because only members of the Coalition got a share of the $500 million Canada paid as part of the deal. CIT Judge Richard Eaton rejected the suit for lack of subject matter jurisdiction. The CAFC disagreed. It sided with Almond's argument that the 2006 SLA was negotiated under the same Section 301 (section 2411 of the 1974 Trade Act) authority as the 1996 SLA and was subject to CIT review.

"This court is persuaded that the lengthy history of the Canadian softwood lumber dispute, much of which indisputably involved action under the authority of section 2411, provides ample basis on which to conclude that the 2006 SLA, like the similar agreements before it, was entered into under the authority of section 2411," wrote Appellate Court Judge Richard Linn for the court. "There is no explicit indication in the record that the USTR used any different authority to enter into the 2006 SLA than it used to enter into the 1996 SLA," Linn added.

Search Begins for Deal to Move TAA and FTAs

With both the House Ways and Means Committee and Senate Finance Committee having approved draft implementing legislation for free trade agreements (FTAs) with Colombia, Panama and Korea during "mock" markups July 7 – but only Finance attaching renewal of the Trade Adjustment Assistance (TAA) program to the Korean pact – lawmakers and the White

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House will now have to figure out a way to get TAA passed through both the House and Senate. Congressional sources say they recognize that it will be tough to do, but they are also optimistic that a deal can be found (see **WTTL,** July 4, page 2). With mixed messages coming from the two committees, it will be up to President Obama to decide whether to attach TAA to the Korean bill he sends Congress or to accept a separate deal to move the measure on its own. "We are getting guidance from the committee [Finance] that we got today. We got guidance from Ways and Means, and we'll determine what to send up," Deputy USTR Demetrios Marantis told WTTL. He declined to say when Obama would send up the measures. "We'll see. I'm not going to speculate on timing," he said.

> Finance rejected all Republican and Democrat attempts to amend the draft implementing legislation for the three pacts. It left intact Chairman Max Baucus' (D-Mont.) version of the U.S.-Korea FTA bill, which included a title he had negotiated with House Ways and Means Chairman Dave Camp (R-Mich.) and the White House to renew a slimmed-down TAA. During the markup, Baucus steadfastly opposed proposed amendments from both sides of the aisle in an effort to keep the implementing bills clean, save for TAA.

Ranking Member Orrin Hatch (R-Utah) tried to strip TAA from the Korean bill, but his motion was defeated on a party-line vote of 11 to 13. Hatch argued that TAA doesn't meet the criterion for inclusion in a trade agreement subject to "fast-track" process because it isn't "necessary and appropriate' to implement the accord. He rejected claims the attachment of TAA to the North American Free Trade Agreement (NAFTA) set a precedent for adding it to other trade pacts. He called the addition of TAA to the FTA a "fundamental abuse of the process."

The committee also rejected an amendment sponsored by Sen. Benjamin Cardin (D-Md.), which would have added to the Colombia FTA bill the labor action plan that Bogota has undertaken. Baucus strongly opposed the amendment, citing statements President Obama has made, promising that he would not allow the Colombia deal to go into effect until he was satisfied that the terms of the action plan were met. Cardin accepted a voice vote defeating his amendment; not wanting to have some Democrats on the committee voting against the proposal on the record, which would weaken the effort of Democrats supporting the amendment to make their case to the White House to include it in the bill the president will send to Congress.

Ways and Means Chairman Dave Camp (R-Mich.) acknowledged the confusion surrounding TAA and the FTAs. While TAA wasn't included in the bills the committee considered, Camp said he was committed to fulfilling his part of the agreement with Baucus and the White House. "If the Administration formally sends up the agreements to Congress without TAA, I intend to formally mark up those agreements and TAA on the same day," he stated. "The agreement reached on TAA was limited to the substance of the package and did not include a consensus on the process for moving it forward, whether on its own or as part of one of the FTAs. I have made clear many times that a decision about the process for voting on these items is something for the Speaker, House and Senate leadership and the White House to make," Camp said.

In the committee markup, roll call votes went strictly along party lines, with members passing the implementing legislation of all three trade agreements. Two amendments that Ranking Member Sander Levin (D-Mich.) and Rep. Jim McDermott (D-Wash.) proposed, one to add the labor action plan to the Colombia deal and one to attach TAA renewal to the Panama bill, failed by party-line votes of 22-15.

WTO Panel Finds China Violating Rules on Raw Material Exports

Export restraints China has imposed on nine raw materials violate numerous international trade rules as well as promises Beijing made as part of its accession agreement to the World Trade Organization (WTO), a WTO dispute-settlement panel ruled July 5. The irony of the U.S. victory against China and its claim that the restrictions are hurting U.S. industry is Washington's imposition of antidumping duties on imports of four of the materials in the dispute: silicon

metal, manganese, magnesium and coke (see **WTTL**, June 29, 2009, page 2). The WTO panel said China acted inconsistently with trade rules with its restrictions on bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc. In its Protocol of Accession, China had committed to ending export quotas on these materials, the panel also found. China had argued that its export restrictions were part of an effort to conserve exhaustible natural resources. The panel said Beijing had not demonstrated that it imposed the restrictions in conjunction with other domestic conservation measures.

> "The Panel acknowledged, however, that China appears to be heading in the right direction in adopting a framework to justify its quotas under WTO rules, but that the framework is not yet WTO-consistent as it still has to be put into effect for domestic producers," a WTO release noted. China has the right to appeal the panel ruling to the WTO Appellate Body.

"China's policies provide substantial competitive advantages for downstream Chinese industries at the expense of non-Chinese users of these materials," USTR Ron Kirk said in a statement. "They have also caused massive distortions and harmful disruptions in supply chains throughout the global marketplace," he added.

Among the WTO-inconsistent measures cited by the panel were China's export quotas and bans, export licensing and export performance requirements and the requirement to have previous export experiences. The panel noted that under Article 3.8 of the Dispute-Settlement Understanding where there is infringement of obligations under a covered agreement, "the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement." It concluded that "China has acted inconsistently with Articles X:1, X:3(a), XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83 and 84 of China's Working Party Report, it has nullified or impaired benefits accruing to the United States under the WTO Agreement."

Mexico Cuts Retaliatory Tariffs in Response to Trucking Deal

Mexico cut its retaliatory tariffs on U.S. goods by 50% July 7, keeping its side of a deal signed July 6 by Transportation Secretary Ray LaHood and Mexican Secretary of Communication and Transportation Dionisio Arturo Pérez-Jácome Friscione to launch a three-year pilot program to allow Mexican trucks into U.S. Among the 89 products affected by the reduction are ham, cheese, grapefruit, apples and pears, as well as chewing gum, fruit juice, wine, toilet paper, sunglasses, shampoo and pencils (see **WTTL**, July 4, page 1). Even as the agreement was going into place, opponents were continuing to mount legal and legislative efforts to block it.

> The Owner-Operator Independent Drivers Association (OOIDA), which has long opposed the program, filed suit in the D.C. U.S. Court of Appeals July 6, asking the court to "enjoin, set-aside, suspend (in whole or in part) or determine the validity of the implementation of this pilot program." It said "implementation of the pilot program is arbitrary, capricious, and abuse of discretion, and otherwise not in accordance with law." OOIDA filed a similar petition in the Ninth Circuit Court, which dismissed the complaint in April 2009.

Reps. Peter DeFazio (D-Ore.) and Duncan Hunter (R-Calif.) July 6 introduced a bill (H.R. 2407) to limit the use of Highway Trust Fund dollars to pay for Electronic On-Board Recorders that Mexican trucks must use as part of the pilot program. "My legislation puts the brakes on a bad deal for American truck drivers and the traveling public," DeFazio said.

"With Mexico's announcement that it has cut tariffs on products exported from the U.S. by half, American manufacturers, farmers, ranchers, and companies will be able to better compete for customers in Mexico," USTR Ron Kirk said in a statement. Praise for the deal also came from the U.S. Chamber of Commerce, the American Trucking Association, and the National Pork Producers Council, but opposition continued from unions such as the Teamsters.

* * * Briefs * * *

FCPA: In June 30 FCPA advisory opinion to unnamed company, Justice said it would not take enforcement action against firm for proposed payment of certain expenses for trip to U.S. by one official from each of two foreign government agencies to learn more about services provided by the requestor. Department cited two previous opinions in which it foreswore enforcement for payment directly related to promotion.

EXPORT JOBS: Commerce says exporting supported 9.2 million jobs in 2010, up 8.7% from 2009. It estimates that for every billion dollars of exports, over 5,000 jobs are supported. This is far below 20,000 jobs per billion in exports that used to be claimed in 1980s.

FORMER YUGOSLAVIA: OFAC in June 29 Federal Register terminated Federal Republic of Yugoslavia (Serbia and Montenegro) and Bosnian Serb-Controlled Areas of Republic of Bosnia and Herzegovina Sanctions Regulations, Federal Republic of Yugoslavia (Serbia and Montenegro) Kosovo Sanctions Regulations, and Federal Republic of Yugoslavia (Serbia and Montenegro) Milosevic Sanctions Regulations.

BALKANS: OFAC June 29 amended the Western Balkans Stabilization Regulations in Federal Register to add new section defining "financial, material, or technological support," to mean any property, tangible or intangible, and to include specific examples. It also added new definition for "technologies."

LIBYA: OFAC issued new Libyan Sanctions Regulations in the Federal Register July 1 to authorize provision of certain legal services to Libyan government officials and Libyan diplomatic missions in the U.S. New rules replace two general licenses issued in March 2011.

EXPORT ENFORCEMENT: Eric Cohen of Brooklyn, N.Y. agreed to $15,000 civil penalty and five-year denial order to settle charges of evading EAR and causing, aiding or abetting violation with export of thermal imaging cameras classified under ECCN 6A003, and controlled for regional stability from the U.S. to Komeco Co., Ltd., in South Korea, without required license, BIS announced in Federal Register July 7. Cohen's employer, SZY Holdings LLC, also in Brooklyn and known as Ever Dixie, June 30 settled three BIS charges of evasion, unlicensed export of thermal imaging cameras, and failure to file shipper's export declaration in AES. It will pay $75,000 civil penalty and complete external export compliance audit. BIS will suspend and then waive five-year denial order against Ever Dixie, if it pays fine, completes audit and commits no further violations. Cohen and SZY neither admitted nor denied BIS charges.

MORE EXPORT ENFORCEMENT: Conax AS of Oslo, Norway, will pay $50,000 civil penalty to settle one charge of unlicensed reexport of computer servers and software to Sudan, BIS announced July 1. On Nov. 26, 2006, Conax reexported items, including six Sun servers under ECCN 5A002; Oracle software under ECCN 5D002; and one Sun Solaris operating system and update package under ECCN 5D992, from Norway to Sudan through UAE without required license. Conax neither admitted nor denied BIS charge.

AND MORE EXPORT ENFORCEMENT: Mohammed El-Gamal, president and CEO of Applied Technology Inc. (ATI) in Kenansville, N.C., agreed to pay $340,000 civil fine to settle four charges of violating EAR with export of controlled networking equipment to Libya without required licenses, BIS announced July 1. El-Gamal also agreed to conduct compliance audit, put in place compliance program, attend BIS export compliance training, and complete audit for past exports. Separately, El-Gamal was sentenced May 16 in D.C. District Court to $5,000 fine, 100 hours of community service, and two years supervised probation, after pleading guilty to making material false statements to BIS agents (see **WTTL**, June 7, 2010, page 4).

ANTIBOYCOTT: BIS issued warning letter June 30 to Barthco International Inc. of Philadelphia, Pa., for failing to report receipt of "request to engage in a restrictive trade practice or boycott." Letter of credit from Gulf Bank KSC (Kuwait) on March 26, 2006, included boycott language, BIS claimed.

AD/CVD: After conducting pilot test of new IA ACCESS system in 2010, ITA in July 6 Federal Register amended its rules to mandate electronic filing of all documentation in antidumping and countervailing duty cases (see **WTTL**, June 21, 2010, page 4).

COMMERCE: GAO report (GAO-11-583) released July 7 says department's office of manufacturing and services (MAS) does not systematically obtain feedback on its performance from agencies to which it provides analysis, nor does it track its contributions to major policy decisions. "This makes it difficult to assess the extent to which MAS's work adds value to the trade policy process," GAO said.

STEEL: ITC made "sunset" ruling July 8 that revocation of CVD order on stainless steel sheet and strip from Korea and AD orders on products from Japan, Korea and Taiwan would likely lead to renewed injury to U.S. industry. It found injury unlikely to recur from imports from Germany, Italy and Mexico.