

Washington Tariff & Trade Letter®

A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Export Controls and Trade Laws

Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301-570-4544 Fax 301-570-4545

Vol. 27, No. 47

November 26, 2007

HARBOR MAINTENANCE TAX STILL FUELING LAW SUITS

Legal battles over the now-unconstitutional Harbor Maintenance Tax (HMT) still straggle through the courts, with the most recent case rejecting how Customs has ruled on requests for reliquidation. In granting a summary judgment request Nov. 20 for Esso Standard Oil Co. of Puerto Rico, Court of International Trade Chief Judge Jane Restani chided Customs for failing to update the software in the Automated Broker Interface (ABI) and for letting the ABI continue to collect the HMT even after it was ruled unconstitutional (Slip Op. 07-0171).

Esso claimed Customs illegally collected the HMT on cargo shipped between two U.S. insular possessions and incorrectly rejected its request for reliquidation and a refund of payments. Restani said she would withhold issuing a final order pending resolution of other questions about Esso's eligibility for a refund.

"This is simply a big mistake by both Customs and the importer in failing to note the change in law and act accordingly," Restani wrote. "In this case, however, the onus must fall on Customs. It is simply inexcusable for the master of the Customs laws to fail for almost a decade to amend the applicable regulation that governs the conduct of port officials in collecting HMT and to continue to authorize incorrect software," she declared. "This is exactly the type of non-arguable blunder Section 1520(c) should be allowed to fix," she added.

PRESSURE PUT ON TAIWAN TO UNBLOCK WTO APPOINTMENTS

World Trade Organization (WTO) countries are putting pressure on Taiwan to stop blocking the appointment of a Chinese lawyer to the WTO Appellate Body (AB). An informal "heads of delegation" meeting in Geneva Nov. 23 failed to get Taipei to lift the objections that lead to adjournment of a Nov. 19 meeting of the Dispute-Settlement Body (DSB) where the candidates for the AB vacancies were to be approved (see **WTTL**, Oct. 8, page 3). The DSB agenda called for approval of four candidates for the AB: China's Zhang Yuejiao, Jennifer Hillman of the U.S., Lilia Bautista of the Philippines and Shotaro Oshima of Japan.

Taiwan objects to Zhang's appointment because of concerns about her impartiality. A U.S. statement said Washington was confident that the impartiality of Appellate Body members has been established and will continue. WTO procedures ensure impartiality, the U.S. said. "It's still not solved," said European Union (EU) Ambassador Eckart Guth after the Nov. 23 meeting. Unanimous support was voiced to keep the appointment of the AB panelists on the DSB agenda and to solve the differences as quickly as possible, Guth said. "Everybody urged Chinese Taipei to find a solution," he reported. WTO members see the problem as "posing some very serious,

Copyright © 2007 Gilston-Kalin Communications, LLC. All rights reserved. Reproduction, copying, electronic retransmission or entry to database without written permission of the publisher is prohibited by law.

Published weekly 50 times a year except last week in August and December. Subscription in print or by e-mail is \$647 a year. Combo subscription of print and e-mail is \$747. Additional print copies mailed with full-price subscription are \$100 each. Circulation Manager: Elayne F. Gilston

extremely serious, challenges to a system that is really the cornerstone of this organization,” said Australian Ambassador Bruce Gosper, who chairs the DSB. “I, as chairman, have to say I’m extremely concerned that if this situation persists much longer, then we will have a crisis in this organization,” he added. Gosper said he will continue consultations with Taiwanese officials and other delegations and will provide an update on his consultations by Nov 26 or 27.

More than 30 heads of delegation said Taiwan urgently needed to remove its objection so the DSB could reconvene with a full agenda, another trade official noted. Except for Taiwan, other WTO countries had full confidence in the selection process, the official said. Taiwan told the meeting it has been “trying hard” to find a solution, he said.

“Obviously, something has to give,” said Ujal Singh Bhatia, India's Ambassador. “It's a systemic issue, really,” Bhatia said. “There's a crisis of confidence already,” said another trade official. The first functional crisis may happen after the first two appellate body judges retire on Dec.10. Two more members of the Appellate Body will step down on May 31, 2008.

ITC’s COATED PAPER RULING IS REMINDER OF INJURY CHALLENGE

With its Nov. 20 final negative ruling on coated sheet paper from China, Indonesia and Korea, the International Trade Commission (ITC) sent a reminder that the antidumping and countervailing duty (CVD) law is a two-prong process that requires a finding of injury to U.S. industry as well as dumping and subsidies. The inability of domestic firms to show injury from either dumped or subsidized imports has been one of the main reasons new antidumping and CVD cases fell to historic low levels in 2005 and 2006 (see **WTTL**, April 2, page 1).

The CVD case against coated paper from China was supposed to be a landmark in the Commerce Department’s application of the countervailing duty law. The department’s decision to change 23 years of trade policy and apply the CVD law to China awakened dreams among some trade lawyers of a return to the golden days of trade litigation after a long drought. Seven new CVD cases against imports from China have been filed in 2007.

The ITC’s 5-1 vote that the U.S. paper industry has not been hurt by imports from the three countries isn’t likely to chill those dreams, contends Donald Cameron of Troutman Sanders, which represented Korean exporters in the paper case. But it isn’t enough just to blame Chinese imports for an industry’s problems, there is still a need to have compelling data, he says. “You really do have to prove your case that there is injury to the U.S. industry,” Cameron argues.

Although the CVD case against Chinese imports drew the most publicity, Korea was the larger supplier of the paper covered in the cases. The respondents apparently succeeded in proving to the ITC that there is attenuated competition in the paper supply industry. They had argued that the U.S. paper industry mainly produces paper in large rolls used on Web presses and that rolled paper doesn’t compete directly with sheet paper which is used on different types of printing equipment. Lawyers for Chinese, Korean and Indonesian producers also claimed the U.S. paper industry’s key economic indicators are improving, including prices, sales and profits.

COURT CLARIFIES MEANING OF “AFFILIATE” IN TRADE CASES

The term “affiliate” under trade law cannot be applied to a foreign company that acts as its own importer of record in the U.S., the Court of Appeals for the Federal Circuit (CAFC) ruled Nov. 20 (case no. 2007-1011). It reversed and remanded a Court of International Trade (CIT) ruling that said Commerce was authorized to consider the U.S. operations of Agro Dutch Industries to be an affiliate of the parent company in a duty-absorption inquiry as part of the fourth administrative review of a dumping order on mushrooms. The CAFC said the definition of “affiliate” in 19 U.S.C. Section 1675(a)(4) is not ambiguous and subject to interpretation as Commerce

claims. "If a foreign exporter or producer can be 'affiliated' with itself, however, the statute's distinction between the two categories of sales would be eliminated," the CAFC ruled. "Agro's interpretation of 'affiliated' in Section 1675(a)(4) is consistent with the definition of 'affiliated' given in Section 1677(33), as well as with the use of that term in both common parlance and elsewhere in the antidumping statute, whereas Commerce's proposed reading is in conflict with each of these guideposts to statutory interpretation," the court declared.

The court, however, cautioned that its ruling doesn't bar Commerce from examining each case individually in duty-absorption reviews. "In sum, then, our holding today that Commerce was not authorized to conduct an absorption inquiry as part of the fourth annual review of the Antidumping Order at issue here cannot be read to permit Agro, or other foreign producers or exporters who act as their own importers of record, to obtain an unjustified benefit or to undermine the enforcement mechanisms of the antidumping laws," the ruling stated.

WORLD BANK TRIES TO HELP DOHA WITH AID-FOR-TRADE

World Bank President Robert Zoellick, who helped launch the Doha Round when he was U.S. trade representative in 2001, is using his new role at the Bank to give the multilateral trade talks a boost. In Geneva Nov. 19-20, Zoellick announced new World Bank Aid-for-Trade commitments as well as expansion of the International Finance Corporation's Global Trade Finance Program (GTFP). He told a press conference his goal was to "try to lend my further support to move the Doha agenda forward."

Any suggestion that the Aid-for-Trade program is being used to buy the support of less developed countries for a Doha deal hits a raw nerve among WTO officials. "There is a strong and clear firewall between the trade negotiations and the Aid-for-Trade initiative," said WTO Director General Pascal Lamy in a November 16 online chat. "There really couldn't be a trade off in practice between the two, since the WTO is not a financing agency," he said. The World Bank, however, wants the WTO to monitor the use of Aid-for-Trade monies.

Integrating trade is the key to Aid-for-Trade, Zoellick said. But "countries have to decide to integrate it [trade] into their program," he cautioned. Aid-for-Trade assists developing countries to improve their trade facilitation, including logistics, transport and supply chains. The World Bank has also provided training for trade and customs officials in these countries and helped capacity building, particularly in low-income countries. The Bank provided an estimated \$3.1 billion a year to low income countries for trade programs from 2002 to 2005.

The World Bank's International Finance Corporation (IFC) is expanding trade finance programs for developing countries through the GTFP. It will increase financing for export and import credits in these countries and help them connect with larger international banks. About \$1.33 billion in credits have been supported in the two years since inception of the GTFP, Zoellick said. Another \$2 billion in trade finance will be provided through the program during the next four years, he announced. "We're going to try to have the number of banks covered to 260 and increase the number of transactions five-fold to 4,000," Zoellick said.

WTO MEMBERS QUESTION U.S. ALLOCATION OF FARM SUBSIDIES

Several WTO members don't think Washington has put its farm subsidies in the correct boxes, raising the specter of more dispute-settlement cases being filed against the U.S. for violating its permitted limits for agriculture aid. At the Nov. 21 meeting of the regular WTO Agriculture Committee, members questioned the notification the U.S. filed at the WTO Oct. 4 on farm subsidies it paid from 2002 to 2005 and the allocation of those payments into Amber and Green Boxes (see **WTTL**, Oct. 8, page 4). U.S. representatives at the meeting spent an hour responding to 50 written questions that had been submitted by Australia, Canada, the EU, Japan and

New Zealand on the U.S. farm aid. The questions asked how the U.S. could justify putting “decoupled income supports” into the Green Box as a non-trade distorting subsidy. They also challenged Washington’s description of counter-cyclical payments as “non-product specific,” particularly in light of a WTO ruling against the U.S. on upland cotton.

The U.S. officials defended the allocation of direct payments into the Green Box, claiming they are based on production and yield levels that are fixed and unchanging for the life of the programs. They also argued that counter-cyclical payments are not specific to products because they don’t require specific crops to be grown.

ITA MUST DEFEND CHANGE FROM PAST PRACTICE, COURT RULES

Even though the International Trade Administration (ITA) has the discretion to interpret U.S. antidumping and countervailing duty laws, it can’t change its practices without justifying the change, Court of International Trade Judge Gregory Carmen ruled Nov. 20 (Slip Op. 07-0170). Huvis Corporation had challenged the ITA’s decision to use facts available in the fifth administrative review of the antidumping order on polyester staple fiber from Korea even though the agency had not done so in previous reviews.

“While Commerce may have the *statutory* discretion to apply facts available to a respondent like Huvis, that discretion can be curbed in the face of a consistent contrary agency *practice*,” Carmen declared (his emphasis). “While Commerce has not *exclusively* accepted cost of production data alone to test transfer price, the history of the prior administrative reviews here establishes that Commerce has repeatedly and regularly done so, and Huvis could ‘reasonably . . . expect adherence to the’ particular agency action,” he added, quoting previous case law.

* * * BRIEFS * * *

IRAN: OFAC Nov. 20 issued advice on application of recent bans on trade and banking with three Iranian banks, Bank Mellat, Bank Melli and Bank Saderat. It warned exporters: “Even if you are holding a valid OFAC license authorizing the exportation or reexportation of agricultural commodities, medicine or medical devices to Iran or Sudan, as of October 25, 2007, you are no longer permitted to engage in any transactions, directly or indirectly, with any of the above-listed banks (see **WTTL**, Oct. 29, page 3).

EXPORT ENFORCEMENT: Canberra Albuquerque of Albuquerque, N.M., has agreed to pay \$33,000 civil fine to settle two BIS charges of exporting thermal imaging cameras to Germany without approved license. Firm neither admitted nor denied agency charges.

MORE EXPORT ENFORCEMENT: BIS imposed \$110,000 civil fine on Hamburger Woolen Company of New Hyde Park, N.Y., for 20 alleged violations tied to export of restraint devices to England and Germany without licenses. Agency cited 10 exports and 10 false SED statements. BIS suspended \$80,000 of fine for year and will waive balance if firm stays in compliance. In addition, Hamburger is being allowed to pay fine in 24 equal monthly payments of \$1,250 each. Firm neither admitted nor denied BIS charges.

MORE EXPORT ENFORCEMENT: Alleged failure to maintain export control documents, including notes, correspondence and financial records, for export of machine tools to Israel cost Hardinge, Inc., of Elmira, N.Y., \$3,000 civil fine in settlement with BIS. Firm neither admitted nor denied agency’s single charge.

COMMERCE: President Bush has nominated ITA Deputy Assistant Secretary for Services Ana Guevara to be U.S. alternative executive director to World Bank.

CHEMICAL CONVENTION: BIS in Nov. 15 Federal Register asked for public comment on whether U.S. chemical, biotechnology, and pharmaceutical firms are significantly harmed by limitations of Chemical Weapons Convention on access to and production of Schedule 1 chemicals.

JAPAN: U.S. and Japan Nov. 21 said they have completed final steps to implement agreement reached in February 2007 to facilitate trade in telecommunications equipment and provide mutual recognition of each other’s certification bodies. U.S.-Japan Agreement on Mutual Recognition of the Results of Conformity Assessment Procedures for telecommunications equipment will go into effect on Jan. 1, 2008.

The Export Practitioner and Washington Tariff & Trade Letter Present

A Live Webinar

**Common Ground:
Leveraging FCPA Compliance From
Your Company's Export Control Program**

For international business, compliance with U.S. export controls now goes hand-in-hand with compliance with the Foreign Corrupt Practices Act (FCPA). Countries targeted for U.S. trade restrictions often are "hot spots" for corruption and bribery. If you do business in these markets, your trade compliance program needs to address both of these twin regulatory concerns. This timely webinar will provide you with insights and advice on how to take a comprehensive approach to trade compliance; the latest trends in FCPA enforcement; and where the government is focusing export controls and FCPA prosecutions. You will hear from a panel of experts on both FCPA and U.S. international trade laws and enforcement, and learn how to get your trade compliance programs ready for this important challenge.

Speakers

Saul M. Pilchen

Partner, Skadden, Arps, Slate, Meagher & Flom LLP

Gary DiBianco

Partner, Skadden, Arps, Slate, Meagher & Flom LLP

Neil Lombardo

Senior Associate, Skadden, Arps, Slate, Meagher & Flom LLP

Stephanie Fleischman Cherny

Associate, Skadden, Arps, Slate, Meagher & Flom LLP

Elizabeth C. Billhimer

Associate, Skadden, Arps, Slate, Meagher & Flom LLP

Tuesday, December 11, 2007

2:00 to 3:30 P.M. (Eastern)

1:00 to 2:30 P.M. (Central)

12:00 Noon to 1:30 P.M. (Mountain)

11:00 A.M. to 12:30 P.M. (Pacific)

REGISTER NOW:

CALL: 202-463-1250, Ext. 2 or FAX: 301-570-4545

Convenience of Webinar: Attend From Your Own Office

About Our Speakers

Saul M. Pilchen

Saul Pilchen is a partner in the Skadden, Arps, Slate, Meagher & Flom LLP Litigation and Government Enforcement Group in Washington, D.C. A former federal prosecutor, he defends corporations, officers, directors and employees in a wide variety of administrative enforcement and criminal matters, including cases related to export control and the FCPA, as well as in civil and class action litigation. Mr. Pilchen also advises clients on the design and implementation of legal compliance programs and assists them in conducting sensitive internal investigations. He has been named one of Washington, D.C.'s "go-to" white collar criminal defense counsel in *Best Lawyers in America*, a peer-review compilation. Mr. Pilchen has been published widely in journals such as *The Export Practitioner* and *American Criminal Law Review*.

Gary DiBianco

Gary DiBianco is a partner in Skadden's Washington, D.C. Litigation and Government Enforcement Group where he specializes in white collar criminal defense, securities and consumer fraud class action cases. He represents U.S. and foreign companies, financial institutions, accounting firms and individuals in civil and criminal government investigations and complex civil litigation in matters involving federal and state securities laws and the FCPA. He has advised and represented audit committees, boards and special litigation committees in connection with government investigations and shareholder litigation. Mr. DiBianco has published numerous articles and lectures frequently on the FCPA. Prior to joining Skadden, Mr. DiBianco was a trial attorney in the Justice Department's Criminal Division and was detailed as a special assistant U.S. attorney to the U.S. Attorney's Office for the Eastern District of Virginia.

Neil Lombardo

Neil Lombardo is a senior associate in the Litigation and Government Enforcement Group of Skadden's Washington, D.C. office. His practice focuses primarily on conducting internal corporate investigations and representing clients in complex securities and accounting fraud cases. Mr. Lombardo also defends clients in FCPA cases investigated by the SEC and the Justice Department. He has significant experience conducting global FCPA investigations in countries such as Egypt, Morocco, India, Vietnam, Thailand, Indonesia, Brazil, Argentina, Singapore and Mexico. Mr. Lombardo has performed internal FCPA investigations, due diligence, and training for clients in the oil and gas, beverage and automotive industries.

Stephanie Fleischman Cherny

Stephanie Fleischman Cherny is an associate in Skadden's Washington, D.C. Litigation and Government Enforcement Group. She represents companies and individuals in a broad range of federal investigations conducted by the Justice Department, SEC, OFAC and the Commerce Department, including those involving export control and FCPA issues. She has assisted companies in conducting international internal investigations and in drafting compliance programs. In the August 2007 issue of *The Export Practitioner*, she co-authored with Mr. Pilchen an article entitled "Adding FCPA Compliance to Your Business Arsenal." Ms. Cherny also has extensive civil litigation experience in federal and state courts.

Elizabeth C. Billhimer

Elizabeth Billhimer is an associate in Skadden's Washington, D.C. Litigation and Government Enforcement Group, where she has assisted in conducting internal investigations and in defending companies in government enforcement actions. Ms. Billhimer has significant experience assisting in the management of FCPA investigations for large corporate clients with worldwide operations, involving countries such as China, Iraq, Brazil, Indonesia, Mexico, Kazakhstan, and Nigeria. She also has assisted companies in enhancing their compliance programs to address FCPA requirements.

Today's Headlines Tell the Story:

Cost of FCPA Violations Is Going Up. Need for Comprehensive Compliance Plan Greater than Ever.

**Companies Pay Over \$130 Million in Penalties
for FCPA Violations in 2007**

This Timely Webinar Will Help Keep You Out of Tomorrow's Headlines

What You'll Learn from this Webinar:

- ✓ Latest Changes in Key Laws and Regulations
- ✓ Overview of Law on Bribery and Books and Records Requirements
- ✓ Potential Criminal and Civil Penalties for FCPA Violations
- ✓ Lessons Learned from Recent Settlements and Disclosures
- ✓ Enforcement Trends against Companies and Individuals
- ✓ How Justice Department Uses Sentencing Guidelines to Set Fines
- ✓ FCPA Hot Spots for Bribery and Corruption
- ✓ Which Industries Are Most Vulnerable to FCPA Enforcement Actions
- ✓ Role of Risk Assessment in FCPA Compliance
- ✓ How to Set Up Effective and Comprehensive Trade Compliance Program

WHO SHOULD SIGN UP?

- Corporate Legal Counsel
- Trade Compliance Managers
- Senior Management
- VPs International
- International Trade Lawyers
- Foreign Investment Specialists
- International Sales Staff
- Agents and Distributors
- Export Compliance Consultants

CONVENIENCE OF WEBINAR

- Participate from Your Own Office
- Let Staff Join on Speaker Phone
- No Limit on Number of Listeners
- Add to Your Training Program
- Live Program Permits Questions
- Hear From Compliance Experts
- Avoid Costly Travel to Conference
- No Time Lost out of Your Office

A Live Webinar Briefing:

Common Ground: Leveraging FCPA Compliance From Your Company's Export Control Program.

Tuesday, December 11, 2007 ♦ 2:00-3:30 P.M. (Eastern)

SUBSCRIBERS SAVE 15% ON PRICE OF AUDIO-CONFERENCE

(Non-Subscribers, call today to subscribe at special discount rate.)

3 EASY WAYS TO SIGN UP

- ① **FAX: 301-570-4545**
- ② **CALL: 202-463-1250 Extension 2**
- ③ **MAIL: Gilston-Kalin Communications, P.O. Box 5325, Rockville MD 20848-5325**

☛ Please Complete and Return this Information to Register:

Yes, Please register me for the December 11, 2007, 90-Minute Webinar Briefing on "Common Ground: Leveraging FCPA Compliance From Your Company's Export Control Program" for \$197.

I'm a subscriber to *The Export Practitioner* or *Washington Tariff & Trade Letter*, please sign me up at 15% discount price of \$167.

Check Enclosed (Payable to Gilston-Kalin Communications, LLC)

Charge My Credit Card: VISA MasterCard American Express

Card No. _____ Exp. _____ / _____

Signature _____ E-Mail _____

Name _____ Title _____

Company _____

Address _____ City/State _____ Zip _____

Phone Number _____ Fax Number _____

WT-2

Please send me information about future audio-conferences, webinars and compliance materials on U.S. export controls.

About the Sponsors:

The Export Practitioner

This monthly magazine is the only publication devoted exclusively to the export licensing requirements and law enforcement policies of Commerce, State and Treasury. It provides exclusive in-depth news and analysis aimed at helping exporters speed their products to customers abroad while avoiding costly legal troubles. With special guest features and columns written by experts in the field, *The Export Practitioner* gives export managers, international trade lawyers, and trade consultants information they can apply directly to coping with U.S. export controls and trade sanctions. For more information, visit www.exportprac.com.

Washington Tariff & Trade Letter

Since 1981, this award-winning weekly newsletter has helped business executives, legal experts and consultants stay ahead of U.S. trade policies, export and import regulations, trade negotiations, and enforcement of antidumping and countervailing duty laws. In four, concise pages, it provides exclusive advance reports on U.S. export controls, trade legislation, international trade disputes, as well as efforts to open foreign markets for American exports and investment. For more information, visit www.WTTLOnline.com.