Washington Tariff & Trade Letter®

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

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Vol. 25, No. 33 August 15, 2005

INDUSTRY GEARS UP FOR FIGHT OVER CHINA CATCH-ALL RULE

U.S. exporting community representatives gathered in Washington Aug. 8 to begin mapping a strategy to deal with an expected Bureau of Industry and Security (BIS) proposal to establish "catch-all" controls on exports to China. While the details of what might be in the BIS proposal are still being debated within the interagency process, exporters are concerned the rules could capture almost anything going to a Chinese customer affiliated with the Chinese military regardless of current export licensing policies (see **WTTL**, Aug. 1, page 3).

> Industry fears the coming rules will be dictated by hardliners at Defense and State rather than officials at BIS. In addition, executives say the policy will be driven by the staffs of the House International Relations (HIRC) and the House Armed Services Committees, who are advocating stronger export controls on China.

BIS officials so far have been taciturn on what will be in the proposal or its scope. In public statements, acting BIS Under Secretary Peter Lichtenbaum has said the regulation would require an export license for any good or technology that would make a material contribution to Chinese military capabilities even if the item were not subject to licensing controls now.

Because those terms haven't been defined, industry sources say they are worried the rules could catch almost anything used by the military. As an example, one industry consultant pointed to the production in China of tennis rackets made with advance composite materials. Since the Chinese military is involved in many commercial businesses, companies may not know their exports are going to a firm controlled by the Chinese army, industry and legal sources say.

Regardless of the scope written into the rule, industry is concerned that State and Defense will use the licensing process to delay or reject licenses for items that previously went license-free to China. At the industry meeting, participants said a stricter licensing policy for China would accelerate the offshore movement of U.S. companies and hurt the U.S. trade balance.

CUSTOMS SAY "BAH HUMBUG" TO CHRISTMAS IMPORTS

Importers of "festive articles," primarily Christmas giftware and linens, are protesting a Customs proposal that would narrow the scope of two court rulings that had granted duty-free treatment to these products. In comments filed with Customs, importers, retailers and foreign gift manufacturers objected to a proposal published in the Customs Bulletin June 29 to restrict the application of rulings the Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (CAFC) issued in *Park B. Smith v. U.S.* Customs said it wants to limit

Published weekly 50 times a year except last week in August and December. Subscription in printed or electronic form is $597 a year in U.S., Canada & Mexico; $627 Overseas. Additional copies with full price subscription are $75 each.
Circulation Manager: Elayne F. Gilston

those rulings to the specific products that were the subject of litigation in that case. At issue is whether "festive articles," which also include items with Easter, Halloween or other holiday motifs, can only qualify for duty-free status under Harmonized Tariff Schedule 9505 when they have no utilitarian function. Customs pointed to an Explanatory Note adopted in 2003 by the World Customs Organization (WCO), which excludes utilitarian goods from the heading.

> In *Park B. Smith* and in related rulings, the courts set a two-fold standard for items falling under 9505 as festive articles. These articles must be closely associated with the festive occasion and used or displayed principally during that festive occasion. The rulings thus covered a wide array of products with images of Christmas trees, Santa Claus, bunnies, jack-o-lanterns, and ghosts. Customs wants to exclude from the category linens, tableware, apparel and kitchenware, which could be subject to higher duties or quotas.

Customs "has battled the courts' interpretation of festive articles provisions for a decade," wrote Brenda Jacobs of Sidley Austin in comment on behalf of J.C. Penney. Having lost at the CIT and CAFC, Customs "now seeks to evade the judiciary altogether, to the considerable economic harm of U.S. importers, who have justifiably and in good faith implemented business plans in reliance upon established judicial precedents," she stated. Jacobs claimed Customs pushed for the change in the WCO Explanatory Note while the Smith case was in litigation and is now seeking congressional adoption of the change in legislation to modify the HTS in 2007.

"If Customs has its way, the 2007 statutory changes would in effect be made retroactive, thereby making a mockery of the CIT and CAFC decisions relating to this issue, as well as Customs' own procedures governing changes to the statue," wrote attorneys Robert Eisen and Michael Cole at Coudert Brothers, which represented Park B. Smith. "The attempt to characterize a 'change' as a 'clarification' is a thinly disguised strategy that demeans the notion of fair play and due process that importers have a right to expect from their government," they charged.

Also objecting was the British Ceramic Gift & Tableware Manufacturers Association, which also sent comments to the International Trade Commission (ITC), which is reviewing the HTS ahead of expected legislation. The group's lawyers at Barnes Richardson claim the Explanatory Note, if adopted by the U.S., "would not be rate-neutral as mandated by U.S. law."

SINGAPORE TAKE FIRST ACTION AGAINST ILLEGAL EXPORTS

Singapore has imposed the first fine on a company for violating its Strategic Goods Control Act, according to the law firm of Baker & McKenzie. Far Eastron Co. pled guilty to exporting S$36,830 or approximately U.S.$22,000 in integrated circuits to customers in Germany, China, and Taiwan without export permits. It was fined S$20,000, which is almost U.S.$12,000.

> "Key points to note in this case are the relatively high level of the fine compared to the value of the products shipped...and the fact that the violation was not voluntarily disclosed to Customs, but detected by Customs during routine checks," the firm pointed out. The maximum fine under the Singapore law is S$100,000 or four times the value of the goods plus up to three years in prison.

U.S. TRADE DEFICIT IS UNSUSTAINABLE – AND UNCORRECTABLE

At every congressional hearing on trade or floor debates on trade legislation, some member of Congress shows up with a chart showing the growth of the U.S. trade deficit over that last 20 years. The chart is always in red, and the argument is made that the ballooning trade deficit is unsustainable. Trade figures released Aug. 12 show the U.S. trade deficit in manufactured goods at $373 billion for the first half of 2005 and on its way to $750 billion for the full year. The data show the trend to be not only unsustainable but uncorrectable. Critics of U.S. trade policy offer no explanation of how the U.S. in the near term could raise exports by $750 billion

while keeping imports flat or decrease imports by a similar margin. According to estimates, each $1 billion in exports creates some 19,000 jobs. Thus, to lift exports by $750 billion would take about 14.3 million additional workers, which isn't doable in less than a decade.

> Right now, according to Bureau of Labor Statistics numbers released Aug. 5, there are only 14.3 million U.S. workers in manufacturing out of a total civilian workforce of 149.5 million. It estimates that there are 7.5 million unemployed, most of whom would not qualify for a manufacturing job. Moreover, 85% of the deficit in the first six months of 2005 was created by seven product categories where U.S. production isn't likely to replace imports: energy, clothing, shoes, primary metals, computers and electronics, electrical equipment, and motor vehicles.

OH, HUM, U.S. LOSES ANOTHER SOFTWOOD LUMBER RULING

Having sought and lost a NAFTA Extraordinary Challenge Committee (ECC) ruling Aug. 10 on the dispute over softwood lumber from Canada, the U.S. now says the ECC ruling doesn't mean anything. The ECC ruling "will have no impact on the antidumping and countervailing duty orders, given the ITC's November 2004 injury determination," said Neena Moorjani, a spokeswoman for the U.S. Trade Representative's (USTR) office (see related story below).

> In November, the International Trade Commission (ITC) issued a revised threat-of-injury ruling in the cases in an attempt to comply with a World Trade Organization (WTO) ruling which found its initial decision inconsistent with WTO rules. Canada has challenged the ITC remand determination back at the WTO.

Washington's attitude toward the ECC decision appears to give weight to the three-member committee's opinion that the NAFTA panel reviewing the ITC's original threat-of-injury determination did not exceeded its legal authority when it ordered the commission to issue a no-injury determination based on a lack of supporting evidence. An order to dismiss a case "in rare circumstances" is the same standard permitted in U.S. federal courts when repeated remands are futile, the ECC said. The U.S. had argued the case should have been remanded back to the ITC for a new ruling. "An obvious difficulty with this argument is that it allows for the possibility of never-ending remands for reconsideration," the ECC said.

It noted ITC statements that indicated that it would not accept the panel's authority. "It is also clear that a court need not remand when to do so 'would be an idle and useless formality' and that *'Chenery* does not require that we convert judicial review of agency action into a ping-pong game," the ECC wrote, quoting the Supreme Court in *NLRB v. Wyman-Gordon Co.*

The ECC also rejected allegations that NAFTA panelist Louis Mastriani violated the NAFTA Code of Conduct by participating in the lumber case while also arguing a related trade law issue before the ITC in a case involving hand trucks from Japan. "Having regard to the circumstances here, the concern expressed by the United States Parties is unfounded," the ECC ruled.

U.S. LUMBER INDUSTRY PLANS CONSTITUTIONAL CHALLENGE OF NAFTA

The Coalition for Fair Lumber Imports, which represents U.S. petitioners in the countervailing duty and antidumping cases against imports of softwood lumber from Canada, intends to file suit challenging the constitutionality of Chapter 19 of the North American Free Trade Agreement (NAFTA). Under NAFTA implementing legislation provisions that were adopted from the U.S.-Canada Free Trade Agreements (CFTA), private parties can challenge the constitutionality of the dispute-settlement provisions of the accord in a fast-track process through the D.C. U.S. Court of Appeals and then the Supreme Court.

Any suit must be filed within 30 days after Commerce publishes the final results of the Extraordinary Challenge Committee's latest ruling in the lumber dispute in the Federal Register (see

story above). That notice should be published in the next few weeks and the suit is likely sometime in September. The constitutionality of CFTA and NAFTA procedures, under which binational panels replace Article III federal courts in reviewing dumping and CVD rulings, has been a legal question ever since the Canadian pact was enacted in 1988. Both agreements provide for a legal challenge to resolve the issue.

> The Coalition "believes the Chapter 19 dispute-settlement system is constitutionally defective, and the Coalition has directed its attorneys to prepare a case to challenge its constitutionality," said its chairman, Steve Swanson. Attorneys at Dewey Ballantine have started work on the suit.

The Coalition filed a similar suit in 1994 when it had lost a previous case against lumber imports. It withdrew that suit when the U.S. and Canada reached a bilateral deal that established the 1996 Softwood Lumber Agreement (SLA), which imposed an export tax on Canadian lumber. There is a strong probability that this new suit might also be withdrawn if the U.S. and Canada reach a negotiated settlement of the dispute. Both sides continue to say they want to negotiate a deal notwithstanding the repeated NAFTA and WTO rulings against the U.S.

Canadian officials say they expect the U.S. government to side with Canada and defend the constitutionality of Chapter 19. In the Statement of Administrative Action (SAA) that accompanied the CFTA implementing legislation, the Reagan administration argued that the procedures were constitutional. "In the view of the administration, Article III of the U.S. Constitution does not require judicial review of AD/CVD determinations," it stated in the SAA.

"The courts have not, however, squarely addressed the separate issue of whether, in the case of challenges to AD/CVD determinations raising constitutional issues, review by an Article III court may be constitutionally required," it continued. The implementing legislation contained provisions to ensure "judicial review not only of the constitutionality of the legislation implementing Chapter Nineteen of the Agreement, but also of constitutional issues arising out of an AD/CVD determination," the SAA stated.

* * * BRIEFS * * *

TEXTILES: U.S. and China set to begin talks on comprehensive textile and apparel restraint agreement in San Francisco Aug. 16-17 (see **WTTL**, Aug. 8, page 2

ANTIBOYCOTT: BIS has reached settlements with two firms for alleged violations of antiboycott regulations. National-Oilwell, L.P. of Houston, Texas, which voluntarily disclosed violation, agreed to pay $3,000 fine. H.D. Sheldon & Company of New York, settled with $13,500 civil fine.

INDIA: United Kingdom's Trade and Industry Department has revised export licensing policy for certain Nuclear Supplier's Group exports to India, replacing policy of denial with case-by-case review.

NIGHT VISION EXPORTS: Naji Antoine Abi Khalil, dual-citizen of Lebanon and Canada and general manager of New Line Services in Montreal, pled guilty Aug. 9 in Little Rock, Ark., U.S. District Court to attempting to export night vision goggles and military equipment to Hizballah. He was caught in government-staged sting operation and has been in jail since his arrest on money-laundering charges.

CALENDAR SLIDES: By split 3-2 vote, ITC made preliminary determination Aug. 11 that alledgedly dumped imports of metal calendar slides from Japan may be injuring U.S. industry.

SUGAR: In five-year "sunset" ruling Aug. 11, ITC, by 5-1 vote, found that lifting CVD order on sugar from European Union and antidumping orders on sugar from Belgium, France and Germany would not lead to recurrence of injury to U.S. industry.

BRITISH EXPORT ENFORCEMENT: Saroosh Homayouni pled guilty in British court in June and agreed to pay £70,000 fine and receive 18 months' suspended jail sentence for attempted exports of military components to Iran. Homayouni was fugitive from December 2000 criminal indictment in U.S. which charged him; his company, Multicore, Ltd.; and Saeed Homayouni with illegal exports to Iran. Saeed Homayouni in 2001 was sentenced to 24 months in jail and three years of supervised release.