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COURT UPHOLDS ITA'S "ZEROING" METHODOLOGY IN DUMPING CASES

The U.S. faces a legal dilemma. It has won U.S. court support for its practice of "zeroing" when calculating margins in antidumping cases, but has lost World Trade Organization (WTO) rulings on the issue. While WTO decisions so far have been limited to case-by-case reviews of specific trade actions, a broader ruling could come from a panel hearing a European Union (EU) complaint against the methodology, which tends to result in higher dumping margins.

> The latest and most important victory for the U.S. came Jan. 21 when the Court of Appeals for the Federal Circuit (CAFC) upheld a Court of International Trade (CIT) decision that sustained the International Trade Administration's (ITA) use of zeroing in a case against hot-rolled steel from the Netherlands. The CAFC decision in *Corus Staal v.Commerce* (Case 04-1107) rejected arguments that the U.S. must change its policy to comply with previous WTO ruling on the issue.

Because U.S. trade law doesn't directly require zeroing, the court gives deference to the ITA under the *Chevron* doctrine to use its expertise to interpret the statute, wrote Judge Haldane Robert Mayer. It rejected Corus' argument that, under the Supreme Court doctrine in *Charming Betsy*, Commerce had to end zeroing because of WTO panel rulings against the practice.

The WTO argument is "no more persuasive here than it was for the appellant in *Timkin*," Haldane said, citing an earlier CAFC ruling. "We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specific statutory scheme."

U.S. WILL KEEP UNILATERAL CONTROLS ON NIGHT VISION PRODUCTS

The U.S. intends to maintain controls that the Wasssenaar Arrangement adopted on a temporary basis in December on focal plane arrays made with amorphous silicon even if the regime decides not to extend the restrictions. At its plenary meeting in December, Wassenaar adopted a package of changes to controls on thermal imaging devices and night vision products, but because it could not agree on the parameters for these controls, it also adopted a Validity Note that keeps the new controls in place for only six months unless the regime agrees on new controls or extends the temporary ones (see **WTTL**, Jan. 10, page 1).

"We will probably implement a unilateral control, if we don't get an agreement by June," Bureau of Industry and Security (BIS) licensing officer Jim Johnson told the agency's Sensors and

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Instrumentation Technical Advisory Committee (SITAC) Jan. 25. "I don't think we will let this lapse," he added. BIS on Jan. 24 sent out for interagency review a draft regulation to implement all the changes Wassenaar adopt in December. Although the U.S. intends to move quickly to implement the new rules, particularly new controls on amorphous silicon, the European Union (EU) is expect to delay adoption of the thermal imaging control changes until after June when the regime decides whether to revise the controls or make them permanent

> While adding controls on amorphous silicon, Wassenaar liberalized controls on other thermal imaging devices. The changes might help slow the growth of export license applications filed with BIS. In the fiscal year that ended Sept. 30, 2004, the agency handles over 3,000 applications for items in this category compared to around 1,400 the year before, Deputy Assistant Secretary Matthew Borman told SITAC. Despite the heavier load, review times have dropped to an average of 29 days in the first quarter of fiscal 2005 compared to 53 days the year before.

Another way to slow the growth in applications is to cover more exports under one license, Borman suggested. "Folks should not feel constrained to give us very small license applications in terms of scope or volume," he said. "If you think you have larger projects that can be credibly set out in an application, that is another way to get at this so rather than a 100 applications a year it can be cut to 75 or 50," said Borman. "We have had in the interagency process some success now getting larger volume applications approved," he reported.

U.S. ASKS JUDGE TO STAY INJUNCTION AGAINST CHINA SAFEGUARDS

The Justice Department Jan. 27 asked Court of International Trade (CIT) Judge Richard Goldberg to stay the injunction he issued in December blocking Commerce from moving forward with any special safeguard action against Chinese textiles and apparel based on the threat of market disruption. On Jan. 25, it filed a separate notice with him of its intent to appeal the injunction to the Court of Appeals for the Federal Circuit (see **WTTL**, Jan. 10, page 4).

> In its submission, Justice asked Goldberg to stay his injunction because the safeguard action is needed to "prevent domestic textile producers from irreparable harm." If he won't grant a complete stay, the government asked him to modify the injunction to allow it to continue to review comments filed on pending cases, collect and analyze data, and initiate consultations with China on the petitions. It also requested expedited review of its motion.

As the government fights to maintain its ability to judge safeguard cases based on threat, the textile industry is looking ahead to filing new safeguard petitions based on the real trade data that will be coming in over the next few months. By the time the court dispute is resolved, industry representatives say they will have actual data and won't rely on threat anymore.

Representatives from several foreign textile associations, which have banded together as members of the Global Alliance for Fair Textile Trade (GAFTT), and governments were in Washington Jan. 26 to lobby U.S. officials to take action against China's looming dominance of the global textile and apparel market. One of GAFTT's goals is to get the WTO to make the temporary China special safeguard mechanism, which expires at the end of 2008, permanent. That is something China is certain to oppose. The group also supports a proposal from Turkey for the WTO to establish a system for monitoring textile and clothing trade, to address the economic impact of the phase-out of quotas and to create a global safeguard mechanism.

But a potential split in GAFTT may arise in the Doha Round where least developing countries (LDCs) are expected to ask for total duty free treatment of all their exports to developed countries. China safeguard measures "are not going to be a total solution" for LDCs, said Kiran Prakash Saakh, a representative of the Nepal Garment Association. "Duty free access for LDC goods to developed countries under the Doha declaration" is also needed, he told a press conference Jan. 25. Cass Johnson, head of the National Council of Textile Organizations, said

GAFTT has not discussed that issue and for now China is the common agenda item for its members. "I don't think there is any disagreement that duty-free status for any country is enough of a remedy to prevent that market from being swamped by Chinese imports," he said.

ADMINISTRATION, BUSINESS LAUNCH CAMPAIGN FOR CAFTA-DR

Although the International Trade Commission (ITC) says the proposed U.S.-Central America-Dominican Republic Free Trade Agreement (CAFTA-DR) will have "minimal" impact on the U.S. economy, one of the toughest congressional fights in years is looming over legislation to implement the accord. The Bush administration is expected to submit the implementing measure for fast-track treatment even before it is assured of having the votes to pass it.

> Ahead of introduction of the bill, the administration and the business community have launched a coordinated effort to sway lawmakers. Industry executives, working through a group called the Business Coalition for U.S.-Central America Trade, Jan. 24-26 attempted to visited nearly two dozen House members who could be swing votes on the measure. The coalition also sent a letter signed by 151 firms and associations to House and Senate leaders supporting the accord.

The letter acknowledged a new road bump that could slow submission of the legislation: Guatemala's enactment in late December of legislation which provides protection for data from clinical drug studies only for new products that have never been registers in Guatemala or elsewhere in the world. The law may violate the terms of CAFTA. "We strongly support current administration efforts to ensure that Guatemala comes back into compliance with the obligations under CAFTA-DR as quickly as possible so that congressional consideration of the agreement is not delayed," the group wrote.

Meanwhile, administration officials are reportedly negotiating with Sen. Max Baucus (D-Mont.) and some other Democrats on ways to amend the implementing legislation to address Democratic concerns about the labor and environment provisions of the accord. While the White House doesn't intend to re-open the deal, efforts may be made to increase aid to the region to improve capacity building to address labor and environmental issues. "I'm sure we will be able to reach an agreement, but we are not there yet," one congressional source said.

Opposing business and the administration on the legislation is organized labor, which has made defeat of CAFTA-DR one of its top priorities for 2005. The defeat or retirement of several moderate Democrats in the House will make it tougher for CAFTA-DR supporters to round up the thin margin of votes they will need to approve the deal. Given the accord's small impact, some Democrats may consider a vote against the deal a free vote, a congressional aide said. The remaining free-trade Democrats in the House might ask themselves "what will I get out of bucking my party and one of its major constituents," he said.

IMPORTERS MIGHT BE FORCED TO SUE CUSTOMS TO GET LUMBER REFUNDS

The U.S. continues to take a hardline against Canada in the bilateral dispute over softwood lumber, threatening to withhold the refund of antidumping and countervailing duty deposits regardless of the final outcome of NAFTA and World Trade Organization (WTO) dispute-settlement proceedings. If the U.S. loses all these challenges at the end of the day – which American officials don't concede is likely – importers will have to sue Customs in the Court of International Trade (CIT) through the normal protest-of-liquidation process to get their deposits back, suggested Commerce Under Secretary Grant Aldonas Jan. 24.

Aldonas met the week before with Canadian officials in Canada and reportedly told them the only way to get deposits refunded is through a negotiated settlement. The U.S. has already collected more than $3.7 billion in deposits and is collecting about $10 million more each day. Sources say Aldonas told the Canadians he was leaving office at the end of February but was

prepared to spend the coming month negotiating a deal. Those sources say Aldonas' visit and statements just hardened Canadian industry opposition to any deal that would let U.S. industry get any of the deposit funds (see **WTTL**, Jan. 17, page 4). Speaking to reporters after the submission of the third remand determination in the countervailing duty (CVD) case, Aldonas claimed Commerce doesn't have the authority to order Customs to refund the deposits. He also said any final NAFTA panel determination would only apply prospectively to deposits paid after the ruling and not retrospectively to the start of the case.

> "We have to depend on the CIT giving us, in effect, an injunction, directing us when they make their finding, to take those steps necessary to implement the decision, including the return of deposits," Aldonas said. "That power is lacking in these [NAFTA] panels, and there's no separate authority under the statute for us to do that," he argued.

Canadian Trade Minister Jim Peterson reacted quickly. "Recent statements made in the United States are not only wrong and invalid, but they are also extremely unhelpful in resolving the softwood lumber issue over the long term. Duties extracted contrary to law must be returned."

Although the U.S. has refunded deposits at the end of other NAFTA panel rulings, Aldonas distanced himself from those actions. "It certainly wasn't me who did that," he said. Commerce regularly orders Customs to revise duties and deposits, and it's not clear why a revised dumping or CVD order in response to a NAFTA panel ruling would be different. Moreover, Paragraph 15 of Article 1904 of the NAFTA requires each party "to amend its statutes" to assure refunds with interest "to give effect to a final panel decision."

Some Canadian lumber producers are pressing Ottawa to seek a NAFTA Chapter 20 review of the lumber issue, claiming Washington has failed to live up to the treaty. If Canada prevailed in the Chapter 20 process and no satisfactory resolution is reached, it could seek compensation or retaliate against U.S. exports. "That would blow up NAFTA," one trade lawyer told WTTL.

Commerce's third remand determination reduced the CVD rate in the initial investigation to 1.88%. Aldonas said the department was "acquiescing in the decision" of the NAFTA panel but still didn't agree with it. In a normal CIT case, it would have appealed such a ruling to the federal circuit court, he said. "But more to the point as a practical matter, the litigation is moot," he argued, claiming the final administrative review issued in December with a 17.18% CVD rate is the true margin and basis on which deposits will be collected. Canadian exporters intend to challenge the new remand, claiming it still fails to meet the panel's order. If Commerce had fully complied, the margin rate would be below 1% and would have been considered de minimis, thus terminating the case, one trade lawyer said . Canada has already challenged the department's administrative review determination.

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CHINA: IBM said it is fully cooperating with Treasury's Committee on Foreign Investment in the U.S. (CFIUS) review of company's planned sale of its personal computer business to China's Levono Group. "IBM believes the CFIUS process is an appropriate and effective way to address the national security interests of the United States," a company spokesman said. "We are confident in the process and its outcome," he added. Review was given extra attention after three House committee chairs wrote to Treasury Secretary Snow to raise their concerns about deal. Industry sources expect CFIUS to approve deal but impose conditions that would make sure sensitive technology is not transferred to Chinese army.

> EXPORT ENFORCEMENT: Nozzle Manufacturing of Wildwood Crest, N.J., has agreed to pay $10,000 civil fine to settle BIS charge that it export oil burner nozzles that were classified as EAR99 to Iran without OFAC approval. U.S. Attorney in Philadelphia filed separate criminal information against firm in October (see **WTTL**, Nov.15, page 4).

ITC: Senate Democrats urge President Bush to name Finance Committee aide Shara Aranoff to ITC.

RICE: U.S. Jan. 28 said it has notified WTO of intent to retaliate against EU for increased tariffs on American rice. Proposed targets of retaliation include: yogurt, paprika, olives, sauerkraut, and peaches.