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

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CIT PANEL STRIKES DOWN SECTION 129 ORDER IN SOFTWOOD LUMBER

A three-judge panel of the Court of International Trade (CIT) July 21 struck another blow to the effort of the U.S. and Canada to settle the softwood lumber dispute politically (see **WTTL**, July 17, page 4). The panel ruled that the USTR does not have the authority under Section 129 of the Uruguay Round Agreements Act (URAA) to order Commerce to “implement” an International Trade Commission (ITC) determination in a Section 129 review. While the ITC judges withheld issuing an opinion on the remedy from their ruling, their decision would appear to undercut the “threat of injury” ruling the ITC issued in its 129 determination and thus the collection of antidumping and countervailing duties from the outset of the dispute.

In *Tembec v. U.S.* (Slip Op. 06-109), the panel, comprising Chief Judge Jane Restani and Judges Judith Barzilay and Richard Eaton, said, “(1) Section 129 does not grant the USTR authority to order Commerce to implement affirmative section 129(a) determinations; (2) the USTR’s order to Commerce to implement the Section 129(a) determination was ultra vires and void; and (3) the May 22, 2002, Orders are not supported by an affirmative finding of injury.”

The 74-page opinion closely parsed the language of Section 129 and the different authority given the USTR under different subsections. “Conspicuously absent from the text of Section 129(a)(6) is any mention of ‘implementation’ of an affirmative determination that does not withdraw support for an existing order,” the panel stated. “In other words, the text of subsection 129(a)(6) permits the USTR to order revocation only when the ITC’s Section 129 determination withdraws analytical support for some or all of the order in question,” it said.

BIS WILL NEED TO ISSUE GUIDANCE TO EXPLAIN CHINA CATCH-ALL RULE

Many of the exporting community’s concerns about the Bureau of Industry and Security’s (BIS) proposed China licensing regulations have not been fully explored by the agency, which hopes industry will identify these issues in its comments on the proposal. At a July 17 public question-and-answer session on the proposal, BIS Deputy Assistant Secretary for Export Administration Matthew Borman repeatedly responded to questions by urging participants to raise questions he couldn’t answer in their comments. He also said many of the technical questions that industry has may have to be addressed in separate guidance on the final regulation.

Just as pundits say all politics is local, questions at the meeting showed that export control policies also have a specific impact on individual companies and Export Control Classification Numbers (ECCNs). Many questions sought clarification of how the rules would apply to

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specific ECCNs, especially where the 47 ECCNs facing new licensing requirements are closely related to other ECCNs that are not covered. Questions involved areas such as encrypted software, microprocessors, ethernet cards, and composite materials (see **WTTL**, July 17, page 2).

Areas where BIS interpretation of its proposal is still in flux include the application of the regulation to deemed exports and foreign availability. Borman gave two different answers to questions about whether an employee of a Chinese firm that is granted Verified End User (VEU) status would be subject to deemed export licensing requirements. At first he said no and then yes.

“Part of it was that I thought about it some more in between,” Borman told reporters after the meeting to explain the mixed answer. “But it strikes me that if you have somebody at a Chinese entity and that Chinese entity qualifies and then they come to the United States, I don’t know if we’d want to have a separate license for that same technology that they already can go to China [and get] without a license,” he explained. “That’s a piece of it that we’ll just have to think through the factual scenario a little bit more,” he added.

Borman also told reporters he recognizes that foreign availability, including in China, of many of the targeted 47 ECCNs could undermine the controls. So far, he could identify only Sweden as a country that will apply the same catch-all rules to China. Where foreign availability exists outside of China, including among non-Wassenaar countries, the U.S. would try to negotiate with those countries to block exports of the items to Chinese military end uses, he indicated.

Borman stressed that claims of foreign availability will have to be based on more than mere anecdotal stories. “You have to show me something more than that,” he said. The BIS definition of foreign availability will ask, “Is it really something that would essentially defeat the purpose of the control?” Borman said. “If you got a product that can essentially carry out the same function, then that would make a big difference,” he explained.

SCHWAB CAUTIOUS ABOUT PROSPECTS FOR DOHA TALKS

U.S. Trade Representative (USTR) Susan Schwab was heading back to Geneva for another round of talks with trade ministers from the G-6 group of countries July 23-24, but before departing she was uncertain whether the meetings would produce a breakthrough in the Doha Round. Although leaders of the largest industrial nations and the major advanced developing countries made statements at the G-8 summit in St. Petersburg, Russia, July 17 about the need for more “flexibilities” in the round, Schwab took a wait-and-see attitude.

Schwab noted that the leaders had expressed a willingness to show more flexibility in the talks and a commitment to an ambitious but balanced outcome in the round. “Ask me next week how that translates into new flexibilities,” she told reporters when asked how the G-8 statements would affect the talks.

“President Bush made it clear that the United States is prepared to be more flexible,” Schwab stated. “We are, however, looking forward to seeing what flexibilities on market access are there,” she added. Schwab declined to say whether the U.S. flexibility included offering to cut domestic support further while accepting less on market access. Schwab spent July 18-19 briefing key House and Senate committees on the outcome of the G-8 summit as well as plans for talks over the weekend and for a second weekend of G-6 talks in Geneva July 28-29.

The formal G-8 statement on the Doha Round essentially repeated previous formulaic declarations in support of a “high level of ambition in all areas” of the talks, but it didn’t specifically promise new flexibilities. Statements on flexibilities only came during press conferences and photo opportunities featuring the leaders in attendance. So the leaders didn’t formally agree to step forward together with new offers. During a photo session with President Bush, Brazilian President Lula da Silva praised negotiators but admitted “now it seems to me that they don’t have any hidden cards in their pockets anymore.” He said it’s the leaders who “have to

take our cards from the pockets.” World Trade Organization (WTO) Director General Pascal Lamy July 17 briefed the G-8 and invited leaders and warned them that the current “deadlock in which we are caught will lead us to failure very soon if you do not give your ministers further room for negotiations.” Having conducted “confessionals” over the past few weeks, Lamy declared, “The problem is not technical, but political” (see **WTTL**, July 10, page 1).

The differences are not insurmountable but will require countries to offer “a few billion trade-distorting agriculture subsidies”...“a few billion in supplemental agriculture exports for some”...“and a similar order of magnitude for industrial products,” he said. “Quite frankly, the price you have set for these concessions is too high,” Lamy told the leaders. “We all know how politically difficult it is to change that price. We know that an added effort has a cost for you. But I am convinced that if we are to reach a compromise, that cost will have to be accepted,” he asserted.

RUSSIA’S DRIVE FOR WTO MEMBERSHIP FACES FURTHER DELAYS

It may take another year before Russia can become a member of the WTO following the failure of U.S. and Russian negotiators July 15 to reach a bilateral agreement on issues that concern Washington (see **WTTL**, July 17, page 4). The next deadline for reaching a bilateral accord will be before President Bush and President Putin meet at the Asia-Pacific Economic Cooperation Forum (APEC) annual summit in Hanoi in November, USTR Susan Schwab indicated after the latest round of talks. Even after the bilateral deal is done, a multilateral WTO accession agreement and protocol have to be completed, and Moscow will have to enact all required implementing legislation. That whole process could take a year, industry sources estimate.

Schwab said progress was made in several key areas with some 90% of the issues resolved. “We’ve made significant progress and, in fact, have virtually closed the industrial tariff side; virtually closed the services side; excellent progress on intellectual property rights; and very close on agricultural issues, with the exception of some agricultural market access issues, including what is known as sanitary and phytosanitary -- SPS -- issues, just having to do with regulatory processes,” Schwab reported.

“In terms of the outstanding agricultural issues, there’s some outstanding agricultural market access issues including the two SPS issues I raised, involving primarily beef and pork,” she noted. “The other market access issues, though, are broader and involve poultry and a couple of other products,” she stated. Schwab said the U.S. and Russia reached an agreement on industrial tariffs, including airplane tariffs. “We made incredible progress on intellectual property rights,” she declared. An agreement on services is almost complete.

DEMOCRATS RAISE NATIONAL SECURITY CONCERNS ABOUT FTAs

Having lost traction trying to build opposition to free trade agreements on labor issues, House Democrats have turned to national security as the justification for their opposition to new trade pacts. Democrats initially raised their national security concerns in the discussion of the Oman FTA and then raised it again when the House Ways and Means Committee undertook its “mock” markup of the draft Peru FTA July 20. Despite these objections, the committee approved the draft Peru implementing legislation by a 23-13 vote, and the House passed the Oman accord (H.R. 5684) the same day by a narrow 221-205 vote. On Oman, 22 Democrats broke with their party to support the accord, while 28 Republicans went the other way in opposition to the deal.

The focus of Democratic attention was a provision in the services portions of both the Oman and Peru agreements, which give Omani and Peruvian firms the right to undertake landside cargo operations at U.S. ports. Democrats raised the specter of foreign firms, such as Dubai Ports World, setting up subsidiaries in Oman and Peru to gain access to this service and having

the right to challenge any attempt by the U.S. to block them. Administration trade officials argued that provisions in the Peru deal give the U.S. unilateral power to take actions to protect U.S. "essential security," including the review and blocking mechanism of the Committee on Foreign Investment in the U.S. (CFIUS). Ways and Means Chairman Bill Thomas (R-Calif.) called this right "a trump card" to prevent such challenges. A proposed Democratic amendment sponsored by Rep. Ben Cardin (D-Md.), which would have blocked the Peru deal unless the port services provision was dropped from the FTA, failed in the Ways and Means Committee by a 22-14 vote along party lines.

An amendment sponsored by Rep. Charlie Rangel (D-N.Y.) to the informal Peruvian bill would have blocked the deal from going into effect until both the U.S. and Peru comply with the standards of the International Labor Organization (ILO). Rep. Nancy Johnson (R-Conn.) called Rangel's proposal a "sweeping, dramatic, unprecedented amendment that would require a complete change in American labor laws." Rep. Phil English (R-Pa.) called it "radical." Johnson noted that some state laws don't comply with those ILO standards. Rangel replied, saying "sweeping it may be but not radical." The amendment was defeated by a 23-14 vote along party lines. Senate Finance Committee action on the Peru FTA could come before the Senate leaves Aug. 3 for its August recess.

EBAY BECOMING MAJOR VEHICLE FOR SMALL BUSINESS EXPORTS

Ebay, the online shopping and electronic swap meet, is becoming a major avenue for U.S. exports, according to International Trade Administration (ITA) Under Secretary Frank Lavin. About 15% or \$5 billion in transactions handled through Ebay are exports, Lavin told the President's Export Council (PEC) July 19. Offering a preview of the soon-to-be-issued annual National Export Strategy, Lavin said ITA is working with Ebay to develop programs to help small and medium size enterprises (SMEs) to increase their exports. As part of the NES plan, ITA also will work with service providers, such as banks and express delivery services that already have relations with these companies, to help introduce them to exporting.

* * * BRIEFS * * *

KOREA: President's Export Council July 19 approved letter to President Bush voicing strong support for U.S.-Korea FTA, but also emphasizing that any deal must address Seoul's "arbitrary price cuts" on drugs made by research-based pharmaceutical industry, ban on imports of U.S. beef, and its automobile sector which is "the most closed auto market in the world."

VIETNAM: Working party on Vietnam's WTO accession is aiming to circulate draft accession agreement in September and have final accord ready for WTO General Council consideration in October, group's chairman, Ambassador Eirik Glenne of Norway, said July 19. Meanwhile, Senate Finance Committee hopes for vote on Vietnam PNTR before Aug. 3 recess may face delay because of increased complaints about Vietnam's lack of religious rights, Finance Chairman Grassley said July 19 (see **WTTL**, July 17, page 3).

METAL CALENDAR SLIDES: For second time in six weeks, ITC has made negative determination in antidumping case (see **WTTL**, June 26, page 4). On July 20, in final determination, it voted 6-0 that dumped imports of metal calendar slides from Japan are not injuring U.S. industry.

ITA: New DAS for Services is Ana Guevara. She comes from UPS where she was VP for public affairs for Latin America. She served at Transportation Department in administration of George H.W. Bush.

SECTION 301: USTR Susan Schwab July 21 rejected AFL-CIO Section 301 petition seeking investigation of violations of Chinese workers' rights (see **WTTL**, June 12, page 4). "We do not need to conduct a year-long investigation to know that there are serious concerns with labor rights and working conditions in China," said USTR spokesman Sean Spicer.

MALAYSIA: U.S. and Malaysian officials made "solid progress" during FTA talks in Washington that ended July 21, USTR's office reported. Negotiators are still discussing texts and approaches to FTA, it said.

IRAN: OFAC July 20 posted new guidance on favorable licensing policy for cultural exchanges with Iran.