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BYRD AMENDMENT VIOLATED NAFTA, CIT JUDGE POGUE RULES

The fuel that has kept the U.S.-Canada dispute over softwood lumber going for five years – nearly $6 billion in collected antidumping and countervailing duty deposits – may no longer be available for distribution to the U.S. lumber industry, under a major ruling (Slip Op. 06-48) that Court of International Trade (CIT) Judge Donald Pogue issued April 7. Pogue ruled that dumping and CVD duties collected on imports from Canada and Mexico cannot be distributed under the Byrd Amendment because Congress failed to include the "magic words" that would have specifically applied the amendment to NAFTA countries.

> The U.S. government is certain to appeal the ruling to the Court of Appeals for the Federal Circuit. But meanwhile, lawyers for Canadian interests say they will seek a permanent injunction from Pogue to block any further Byrd distributions on Canadian imports. The suit was brought by Canadian exporters of lumber, magnesium, and wheat, but could apply to any imports from Canada or Mexico for which Byrd distributions might be made. Congress has repealed Byrd prospectively, but the fight over already collected duties remains unresolved.

"Customs has violated U.S. law, specifically a provision in the NAFTA Implementation Act, in applying the Byrd Amendment to antidumping and countervailing duties on goods from Canada and Mexico," Pogue ruled. The NAFTA statute says any amendment to U.S. trade law will apply to Canada or Mexico "only if the amending statute specifies that it applies to goods" from those countries. "The Byrd Amendment does not specify that it applies to goods from Canada and Mexico, nor did the United States provide advance notice of the Byrd Amendment to Canada or Mexico or engage in consultations with regard thereto," Pogue determined.

Pogue asked the parties to try to agree on a remedy and said he would impose a remedy if they couldn't reach a deal. His ruling does not require the return of the collected duties to Canadian producers, but would prevent further distributions to U.S. petitioners. One issue is whether petitioners who received Byrd funds must return the money to the U.S. Treasury.

SENTENCING COMMISSION DROPS "PRIVILEGE WAIVER" STATEMENT

The U.S. Sentencing Commission agreed April 5 to eliminate from the federal sentencing guidelines language that has stirred a controversy over government requests for corporations to waive their attorney-client privilege in federal investigations, including in export control cases. A Justice lawyer, however, told the commission the change in the guidelines won't affect the department's use of the privilege waiver request (see **WTTL**, Jan. 30, page 1). The statement

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in the guidelines was supposed to explain when a reduction in sentence would be warranted when a corporation cooperates in a criminal investigation. Eliminated from a note to section 8C2.5, which deals with culpability, is this sentence: "Waiver of attorney-client privileges and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."

> Commissioner Beryl Howell said the language was intended to protect the attorney-client privilege but it has been misinterpreted. She said the change "will not have much impact at all on the ongoing debate over the waiver privilege." Another commissioner, U.S. District Court Judge Ruben Castillo, said he reluctantly supported the change although he didn't think the language caused the problem.

Castillo noted that white-collar defense lawyers claim "a culture of waiver" has developed among government lawyers who seek waivers on a recurring basis. He also noted that Justice says such requests are not a uniform policy. "The truth lies somewhere in the middle," Castillo said. "There should not be a waiver to receive a fair and just sentence," he added.

Michael Elston, chief of staff to the deputy Attorney General, told the commission that Justice opposed the language when it was first added to the guidelines. "This change today, however, does not have any impact on the standards by which the department evaluates a company's cooperation in a criminal investigation as set forth in former Deputy Attorney General Larry Thompson's January 2003 memorandum, and I do not understand it to be the commission's intention to advocate or promote changes in the department's policies or practices through this amendment," he declared.

"A company's decision to waive the attorney-client privilege is one manner in which the company can demonstrate its cooperation with government's investigation, but as indicated in the Thompson memorandum, it is not the only factor to be considered," he continued. "The Department of Justice fully respects the values embodied in the attorney-client privilege. The privilege, however, is not absolute, and it may be waived by the client when it is in the client's interest to do so," he stated. "In many circumstances, it is in the best interests of justice – not to mention the best interests of defrauded shareholders and other victims of the corporation's crimes – for a company to decide that full cooperation with the government, including a waiver, when necessary, is in the best interests of the entity," Elston told commission.

STATE IMPOSES $22 MILLION IN PENALTIES FOR QRS-11 EXPORTS

Three companies, Boeing, Goodrich and L-3 Communications, have reached settlement agreements with State to resolve the long-running drama over Commodity Jurisdiction (CJ) for the QRS-11 sensor, which State claims was covered by the Munitions List (ML) until 2004 (see **WTTL,** Jan. 11, 2005, page 1). After more than a year of negotiations, Boeing agreed to pay a $15 million civil penalty. Goodrich will pay a fine of $1,250,000 and will spend another $1,750,000 over three years to implement remedial compliance measures dictated by State. L-3 will pay a $2 million civil fine and spend another $2 million on remedial measures.

> As part of its agreement, Boeing volunteered to create a new post for a director of export compliance who will report to its vice president for global trade controls. "The person in the new position will focus solely on export compliance and will be responsible for establishing a company-wide program to ensure compliance with all government export regulations," a Boeing spokesman told WTTL.

State charged Boeing with 86 violations of the International Traffic in Arms Regulations (ITAR) stemming from its export of aviation systems known as the CSIS that included the Quartz Rate Sensor (QRS) gyro even after it had been told that State considered the device an ML item. Boeing showed "blatant disregard for State's authority," State charged. "Respondent, after repeatedly being told by the department that the QRS-11 was controlled under ITAR, stated that

the department did not have jurisdiction over the CSIS containing QRS-11s," it said in its charging letter. "Respondent stated that it had re-reviewed the classification of the CSIS and based upon legal analysis by Respondent's in-house and outside expert counsel, it had determined that such CSISs were not under ITAR control, and therefore Respondent would not be disclosing export activity involving these items," the letter added.

> Boeing finally bowed to State's jurisdiction in September 2003 and filed for a waiver of U.S. Tienanmen Square sanctions to export two aircraft to China. A presidential waive was granted. Later, State says it discovered that Boeing had exported the units without licenses and did not disclose these "material facts" when it sought the waiver. When confronted with these charges in March 2004, Boeing submitted new information "to clarify" its previous submissions and "acknowledge and apologize for the confusion and wasted efforts the errors and discrepancies in prior submissions caused," State noted.

The case against Goodrich and L-3 was the result of actions by Goodrich Avionics, which filed a CJ request with State in 2000 for its Electronic Standby Instrument System (ESIS). State claims Goodrich had failed to disclose that the device included the QRS-11 as a component. L-3 got caught in the charges because it acquired Goodrich Avionics from Goodrich in March 2003 and with it, liability for its export violations. Even though L-3 assumed the liability for Goodrich Avionics, State still decided to impose a penalty on the former owner for its role in the 26 violations included in the charging letter.

"Following the acquisition, the business continued to export products based on the CJ until it became aware of a potential compliance issue in August 2003 and immediately stopped all shipments," L-3 explained in a statement. "Since that time, L-3 has fully cooperated with the U.S. Department of State to bring this matter to closure," the statement added. Even though L-3 had conducted a due diligence review of Goodrich Avionics' export compliance before the acquisition, it was "almost impossible to determine that anything was missing" from its CJ request, a company source explained.

CIT ISSUES WRIT OF MANDAMUS TO ITA ON CASH DEPOSITS

Importers may be able to force the International Trade Administration (ITA) to revise cash deposit rates in antidumping and countervailing duty orders even when a court ruling on the rate is being appealed, according to a Court of International Trade (CIT) ruling (Slip Op. 06-43) April 4, imposing a writ of mandamus on ITA to instruct Customs to change the deposit rate for bedroom furniture imported from China by Decca Hospitality Furnishings. Although the government is likely to appeal the decision, the ruling could open ITA to numerous requests for new cash deposit orders, including from importers of softwood lumber from Canada.

> In an earlier CIT ruling, Decca had prevailed in getting ITA to grant it a separate duty rate of 6.65% instead of the "PRC-wide" rate of 198.08%. ITA didn't appeal that ruling, but petitioners in the case, the American Furniture Manufacturers Committee for Fair Trade, did. ITA refused Decca's request to have new cash deposit instructions given to Customs, claiming it didn't have authority to change the rate because there had not been "a final and conclusive court decision."

The need to wait for a final court decision only applies to final liquidation, CIT Judge Donald Pogue ruled. "Liquidationis not the same thing as the collection of cash deposits," he wrote. The CIT's earlier decision was a final court decision, he argued. "The issue has been decided," he declared. "As established by *Timken*, Commerce has a clear duty to implement the cash deposit rate required by the court's grant of judgment affirming Commerce's remand determination, and Decca has a clear right to the requested writ," Pogue stated. Changing the cash deposit rate will have an "immediate and ongoing consequences" to Decca. On the other hand, if the federal circuit overturns the CIT decision on Decca's duty rate, the government will still be able to collect those duties at the time of final liquidation, he asserted.

WTO MAY MISS END OF APRIL DEADLINES IN DOHA ROUND

There are growing doubts in Geneva that Doha Round negotiators will meet the April 30 deadline for agreeing on key modalities or formulas in talks on agriculture and non-agriculture market access (NAMA). World Trade Organization (WTO) Director General Pascal Lamy reportedly plans to let a meeting of ministers at the end of the month extend into the first week of May, but there is also speculation that deadlines adopted at the Hong Kong Ministerial in December might not be achieved until July. "I don't think Lamy will give up that easily to a three-month extension," one source in Geneva told WTTL. If they say the deadline is July 31 "everyone will cool off for one and a half months," he added. "I don't think anybody will agree openly to this position. They'll probably just keep mashing on," the source said.

> Sources say Lamy has admitted that discussions have moved away from achieving full modalities by April 30 to achieving part of the modalities. U.S. Trade Representative (USTR) Rob Portman has made similar statements (see **WTTL**, March 20, page 2). "It will be very difficult to meet the [April 30] deadline, but we'll do our best," said Ambassador Chitsaka Chipaziwa of Zimbabwe.

Senate Finance Committee Chairman Charles Grassley (R-Iowa) April 6 told the Senate that Doha Round talks "are in a very determinative state." He said, "Success will be made, I believe, during the month of April or the Doha Round, for all practical purposes, would end." Meeting the April 30 deadline "appears to be elusive," he said. "I comment in these few minutes on where we are on the Doha Round and what I expect to happen and leave the message, if it does not happen very soon, this round could be dead," he said.

Lamy is pushing for improved offers on three fronts: on domestic support for agriculture from the U.S.; on both domestic support and market access from the European Union (EU); and on industrial goods from Brazil and India. Progress in these areas would then feed into a larger group of 25-30 countries that would meet in the "green room" and from there to the entire membership. While there has been some closing of gaps, "We don't see any offer or even some tentative numbers," one diplomat in Geneva said. "We have not reached that stage," he said.

Philippine Ambassador to the WTO Manuel A.J. Teehankee said is important for the WTO as an institution to keep faith with the Hong Kong mandate to deliver major decisions by the end of April or early May. "In the event that full modalities were not achievable, the Philippines and G-33 would look to prioritizing agreement on the elements to assure effective operation and availability of Special Products and the Special Safeguard Mechanism" [in agriculture], he said. "Similarly in NAMA, an affirmation by the end of April of the stand-alone nature of paragraph 8 flexibilities and removal of the brackets with moderate enhancements of the numbers in those brackets would be viewed by the Philippines as a major step," he asserted.

* * * BRIEFS * * *

SOFTWOOD LUMBER: WTO Article 21.5 panel April 3 said changes Commerce made in its "zeroing" methodology in antidumping case against softwood lumber from Canada as part of Section 129 remand brought U.S. into compliance with earlier panel ruling that methodology was inconsistent with WTO rules.

SAUDI ARABIA: House by voice vote April 5 adopted non-binding resolution (H.Res. 370) sponsored by Rep. Clay Shaw (R-Fla.), calling on President Bush and USTR Rob Portman to press Saudi Arabia to abide by its WTO accession agreement to end its boycott of Israel (see **WTTL**, March 13, page 2).

STEEL PIPE: ITC April 6 issued divided decisions in "sunset review" cases on seamless steel standard line and pressure pipe. It agreed unanimously that lifting antidumping orders on imports from Japan would cause renewed injury to U.S. industry, and by 3-3 vote that injury would recur if duties ended on pipe from Romania. By 4-2 vote, it found injury not likely recur if duties were lifted on imports from Czech Republic, South Africa and Mexico.

BIS: Fiscal 2005 annual report has been posted on agency website.

TELECOMMUNICATIONS: USTR April 6 released annual Section 1377 review of foreign trade barriers.