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AUSTRALIA REQUIRES THIRD-COUNTRY APPROVALS FOR RE-EXPORTS

U.S. exporters may need to help their Australian customers obtain re-export licenses from the Bureau of Industry and Security (BIS) or State for re-exports from Australia. Australia's Defense Trade Control and Compliance (DTCC) Section issued new rules Aug. 19 requiring proof of re-export licenses from government agencies in the country of origin of the goods.

> "All export applications for re-exports and/or re-transfers [of] goods and technology sourced from a third country will be assessed to determine the need for any country of origin (third country) approvals," DTCC said. A question on the Australian export license application asks whether a proposed export involves release of goods or technology from a third country. If the answer is yes, then "evidence must be provided showing country of origin approval," DTCC said.

"Australian exporters are required to make themselves aware of any limitations or constraints or re-export or re-transfer imposed on goods and technology sourced from another (i.e., third) country," DTCC announced. "It is the exporter's responsibility to obtain country of origin government approval for the re-export or re-transfer of the goods or technology proposed for export before submitting an export application to DTCC," it added. Applications will not be processed until that evidence is provided, it said.

CHALLENGE OF SOFTWOOD LUMBER RULING COULD BE LONG SHOT

The U.S. is expected to ask for a rare Extraordinary Challenge Committee (ECC) under NAFTA rules to review an Aug. 31 binational panel ruling which ordered the International Trade Commission (ITC) to reverse its threat of-injury decision in the antidumping and countervailing duty (CVD) cases against softwood lumber from Canada. But the U.S. could face a hard time winning an appeal to an ECC under Annex 1904.13 of NAFTA given the past history of ECCs.

> In its order, the panel directed ITC to reverse its injury determination within 10 days. After the ITC made two attempts to rewrite its original ruling to meet the panel's earlier objections, the panel concluded the commission still did not have substantial evidence in the record to support its threat-of-injury determination.

The panel ruling sets in motion a scenario that will unfold over the next six months. By Sept. 10, the ITC is expected to issue a new order reversing its injury finding. If it doesn't, trade lawyers say it could be in contempt of the panel ruling, which would trigger a legal battle at the Court of International Trade (CIT) to get the panel order enforced. If it does reverse its

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determination, there would be a 40 day comment period back to the panel and a final ruling by the panel. After that final disposition, the U.S. has 30 days to ask for the ECC; the committee would be formed in 15 days; and the ECC would have 90 days to complete its review.

> The U.S. has already issued an opinion claiming panelist Louis Mastriani created an "appearance of impropriety or an apprehension of bias," because his law firm was involved in a case with legal issues similar to the softwood lumber case. Such a charge is one criterion for appeal under Annex 1904.13. The U.S. also is likely to claim the panel exceeded its authority by not following a standard of review that gives deference to the ITC's expertise.

Although the U.S. has concerns about the panel's decision, "we haven't decided what to do yet," said Assistant U.S. Trade Representative Chris Padilla. Washington still wants to negotiate a settlement of the lumber dispute with Canada. "We've told the Canadian government that it makes sense to resolve the softwood lumber dispute bilaterally," Padilla told WTTL.

There has been only one ECC convened under NAFTA. In that case the ECC issued an opinion in October 2003 upholding a NAFTA panel's ruling against parts of the International Trade Administration's (ITA) findings in an administrative review of the antidumping order on gray Portland cement and cement clinker from Mexico. That ECC took over three years to reach a decision. Sources say the U.S. and Canada have already discussed the possibility of an ECC on lumber and have agreed not to use the delaying tactics that slowed the cement review. It is possible the two sides will agree to appoint the same judges who are currently serving on an ECC on magnesium from Canada to review the lumber case. The same legal questions on standard of review are central to both cases, one lawyer said.

Under almost identical ECC provisions in the U.S.-Canada Free Trade Agreement, a committee in 1994 split along national lines and voted 2 to 1 to reject a U.S. challenge of a binational panel's ruling against the ITA subsidy finding in the last softwood lumber case. Interestingly, among the lawyers representing British Colombia in that case was Grant Aldonas, the current Commerce under secretary for international trade, who was with the law firm of Miller & Chevalier at the time. Also representing Canadian industry was Peter Lichtenbaum, the current Commerce assistant secretary for export administration, who was with Steptoe and Johnson.

Also under the Canada FTA, an ECC in 1991 rejected a U.S. appeal of a panel ruling against the ITC's injury ruling on fresh, chilled and frozen pork from Canada. In that case, the ITC bowed to the ECC decision and reversed its injury determination.

U.S. LIKELY TO ACCEPT SANCTIONS RATHER THAN CHANGE BYRD AMENDMENT

With strong bipartisan congressional opposition to any change in the Byrd Amendment, the U.S. is likely to accept retaliation rather than repeal the law to avoid the sanctions a WTO arbitration panel approved Aug. 31. Washington can ignore the sanctions for now because the overall level of retaliation approved by the panel is relatively small and will be spread out among eight U.S. trading partners, including the European Union (EU) and Japan.

> The Bush administration has made no serious effort to seek repeal of the amendment, formally known as the Continued Dumping and Subsidy Offset Act. "The U.S. will comply with its WTO obligations and the administration will work closely with Congress to do so in a way that supports American jobs and American workers," said Assistant USTR Chris Padilla after the ruling was announced.

Administration sources say repeal of Byrd would require a creative alternative that would shift the payment of funds from individual companies to broader programs that would help U.S. industry and workers without running afoul of WTO rules. This might include increases in worker training or community development. Officials admit such an approach may face opposition from within the administration from the Office of Management and Budget, which

wants import duties go to the Treasury without earmarks. Ending the disbursements also would garner strong opposition from companies that have reaped windfall distributions from Customs in the last three years under Byrd (see **WTTL**, March 22, page 4). Among the industries benefitting the most are steel, bearings, pasta and candles. The U.S. lumber industry is hoping someday to get hundreds of millions of dollars in Byrd payments, if it ever wins its AD and CVD cases against softwood lumber from Canada.

> For fiscal 2003, Customs disbursed $190 million to U.S. firms under Byrd and is about to pay out another $50 million that was tied up in litigation. The WTO arbitrators ruled that complaining countries can impose retaliation equal to 72% of the funds Customs disburses each year to companies that supported the antidumping or countervailing duties impose on the products from each of those countries. That could produce more than $170 million in retaliation from those countries. In fiscal 2002, Customs disbursed almost $330 million.

In its report, the arbitration panel raised a broader question about the purpose WTO Dispute Settlement Understanding (DSU) rules, which allow members to seek permission to retaliate against countries that fail to comply with a WTO ruling. Is the goal of retaliation to induce compliance with WTO rulings or to seek temporary compensation for lost concessions or trade? it asked. “It is not completely clear what role is to be played by the suspension of obligations in the DSU, and a large part of the conceptual debate that took place in these proceedings could have been avoided if a clear ‘object and purpose’ were identified,” it declared.

TEXTILE INDUSTRY SEEKS STOPGAP MEASURES AGAINST CHINESE IMPORTS

The U.S. textile industry, which says it is poised to file dozens of safeguard cases against Chinese imports in the next month or so, hopes it can delay Chinese hegemony in the textile and apparel world long enough to see China’s pricing advantage tempered by the appreciation of the Chinese currency, higher wages and costs in China and an end to Beijing’s de facto export subsidies and government intervention. At best, the industry expects to win three years of extra import relief for goods that will come off quota on Jan. 1, 2005, when the global Multifiber Arrangement (MFA) is terminated.

> With U.S. elections just eight weeks away, there is no doubt the Bush administration will accept the petitions and provide much, if not all, of the relief sought. The petitions are certain to be election issues in such states as North Carolina, South Carolina and Georgia. They could also play a role in getting trade pacts, such as the U.S.-Central American Free Trade Agreement, through Congress.

The industry Sept. 1 said it intends to use a “threat of injury” argument to get safeguard relief before the quotas come off. Although that announcement produced some initial legal debate over whether threat can be a basis for a case, Commerce Under Secretary Grant Aldonas Sept. 3 made it clear that the department interprets the safeguard rules to permit such petitions. “The bilateral agreement gives the industry the right to file threat cases,” he told reporters. The rules also allow the filings to come before the quotas end, he added.

While current China safeguard procedural rules can be used for such petitions, Aldonas said Commerce is drafting guidance that will clarify what petitioners need to show in their complaints. The guidance will be based on a combination of the factors that define “threat” under U.S. trade law as well as WTO rulings on this issue, he explained. Aldonas stressed, however, that the China safeguard procedures are not bound by the antidumping, countervailing duty or Section 201 rules. Nonetheless, “there may be a fair bit of overlap,” he said.

The petitions could give the U.S. more leverage to get China to negotiate a comprehensive agreement to restrain textile and apparel exports to the U.S. after the MFA ends. The Chinese, so far, have rejected U.S. proposals to discuss such a deal, but Aldonas will raise the topic again during a Sept. 7-18 trip to China. Although WTO rules bar members from entering

Voluntary Restraint Agreements (VRAs) to restrict trade, Aldonas said the safeguard provisions of China's WTO accession agreement "provide the legal hook to avoid violating WTO rules."

The industry's plea for relief may be more complicated than a normal safeguard case because its complaints are not based on a surge of overall imports but rather on a surge in China's share of U.S. imports. The industry points to a June ITC study and a July WTO report which projected sharp growth in China's share of the global textile and apparel markets after the MFA is terminated. It estimates that China's share of imports for goods coming off quota could rise to 72%.

Industry representatives had little data to show that imports overall would surge. They admit imports already have about 90% of the U.S. apparel market, a share that has been growing steadily for 40 years. Thus, their new argument for relief will be based in part on their loss of export markets abroad in countries that will lose market share to Chinese goods. In particular, countries such as Mexico and those in the Caribbean and Africa, which import U.S. fabric and components to meet rules of origin under preference programs or NAFTA, will lose market share in the U.S. and therefore buy less U.S. inputs, they argue. Restrictions on China may only shift sourcing to other low cost suppliers, they concede. Prices for goods from those other sources, however, won't be as low as they are for Chinese products, they contend.

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EXPORT ENFORCEMENT: New Brunswick Scientific of Edison, N.J., agreed to pay $51,000 civil fine to settle BIS charges that on seven occasions from 1999 to 2001 it exported laboratory equipment to India, Israel and Taiwan without approved export licenses. Exports to India went to customers on Entity List.

MORE EXPORT ENFORCEMENT: Chyron of Melville, N.Y., paid $15,300 civil penalty as part of settlement agreement with BIS to resolve charges that it exported animation system to Indian Space Research Organization, which was on Entity List at time of export.

EAR ON VEHICLES: BIS in Aug. 31 Federal Register revised EAR to clarify that export controls on certain off-road vehicles under ECCN 9A018 also apply to parts and components.

OFAC: Monthly list of settlements released Sept. 3 includes $33,000 in fines imposed on ConocoPhillips for facilitation of trade with Iran: $27,800 in fines on JP Morgan for transferring funds to Cuba, Iran and Sudan; $33,214 fine on Ryan International Airlines for payments to designated Cuban national.

EU EXPORT CONTROLS: EU in Aug. 31, 2004, issue of Official Journal of European Union amended export control regulations to implement change in rules of multilateral export control regimes, including Wassenaar Arrangement, NSG, Australia Group, MTCR and CWC. New rules also recognize accession of Czech Republic, Hungary and Poland into EU. Rules become effective Sept. 30.

CANADA WHEAT BOARD: U.S. intends to shift its fight against Canadian Wheat Board to Doha Round negotiations, where talks will aim at imposing discipline on state-trading enterprises. Focus on Doha talks became necessary Aug. 30 when WTO Appellate Body rejected Washington's appeal of April dispute-settlement panel ruling which found CWB export regime for wheat doesn't violate WTO rules. Ruling could make it more difficult for U.S. to get Canada to accept restraints on CWB. "Today's report by the Appellate Body notes the existing WTO agreement itself recognizes the need for more negotiations," said Assistant USTR Chris Padilla. "The United States will continue to press in the coming Doha negotiations for meaningful disciplines on agriculture state trading enterprises," he added.

CHINA: Chinese officials Aug. 26 gave Chief Agriculture Negotiator Allen Johnson and USDA Under Secretary J.B. Penn assurances that new import quarantine decree imposed in June won't interfere with imports of U.S. soybeans. Even before new rules, during first half of 2004, U.S. soybean exports to China dropped to $732 million from $1.135 billion in same period in 2003.

DR-CAFTA: ITC report (ITC Publication No. 3717) Aug. 26 on economic impact of U.S. free trade agreements with Central America and Dominican Republic found some increase is likely in import competition for textiles, apparel, leather and sugar and some new export opportunities textiles and fuels. "However, given the small economy and market size of the CA/DR region relative to the United States, any such increases would be from a small initial level and, thus, are likely to have minimal impact on production, employment, or prices in corresponding U.S. sectors," it found.