

# Washington Tariff & Trade Letter®

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

Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301-570-4544 Fax 301-570-4545

Vol. 28, No. 3

January 21, 2008

## CANADIAN COMMISSION OPPOSES ITAR DUAL-NATIONAL RULES

The International Traffic in Arms Regulations (ITAR) “are inconsistent with the Québec Charter of Human Rights and Freedoms,” Quebec’s Human Rights Commission declared Jan. 17 in a statement announcing the settlement of a complaint by a Haitian-born Canadian citizen who claimed he was discharged by Bell Helicopter because of the U.S. export rules. “More specifically, they infringe the right to equality without discrimination based on ethnic or national origin,” said the Commission Des Droits De La Personne et Des Droits De La Jeunesse.

The commission said the Haitian-born individual and Bell reached a private settlement after the commission made a finding supporting the complaint. Details of the settlement weren’t released. Other complaints against Bell are pending at the commission (see **WTTL**, Feb. 12, 2007, page 2).

The commission said the Haitian-born citizen applied for an internship with Bell as part of a training program. His application was accepted, along with that of 14 other students, but when he began his internship he was notified that his place of birth, Haiti, disqualified him from continuing under the ITAR rules. The commission is aware of recent agreements between State and the Canadian government on the application of ITAR to Canadian dual nationals and other recent changes in the regulations dealing with dual-nationals of close U.S. allies, but those changes would not have caused it to revise its ruling, a commission spokesman told WTTL.

“The Commission reiterates its opposition to the application of the ITAR rules in Québec because of their discriminatory impact,” its statement said. “It has conducted a legal analysis of the rules and concluded that they include requirements that are inconsistent with the Québec Charter of Human Rights and Freedoms,” it added. The commission said it filed its findings in the case in letters to Canadian federal and provincial governments in July 2007 and urged the governments “to take action to prevent American rules from causing discrimination in Québec.”

## ANTIDUMPING FISH STORY LEADS TO GUILTY PLEA AGREEMENT

The 2003 antidumping order on catfish filets from Vietnam has spawned a black market that has been importing catfish, known as basa and tra, from Vietnam and illegally labeling it as other types of fish, including sole and grouper. The government’s crackdown on these imports led to a plea agreement Jan. 14 between Justice and David S. Wong, of Elk Grove Village, Ill., who pleaded guilty in Los Angeles U.S. District Court to two counts of a 27-count indictment, including violating the Lacey Act, for importing the fish and not paying the required antidumping duty of 63.88% and for misbranding the fish. The value of the two shipments he imported

Copyright © 2008 Gilston-Kalin Communications, LLC. All rights reserved. Reproduction, copying, electronic retransmission or entry to database without written permission of the publisher is prohibited by law.

Published weekly 50 times a year except last week in August and December. Subscription in print or by e-mail is \$647 a year. Combo subscription of print and e-mail is \$747. Additional print copies mailed with full-price subscription are \$100 each. Circulation Manager: Elayne F. Gilston

was \$197,930, the indictment indicated. Wong worked for True World Food Chicago LLC, a subsidiary of Wong's then-employer, True World Food, Inc.. The subsidiary entered a guilty plea to a single Lacey Act violation on Dec. 10, 2007. According to the plea agreement, Wong between November 2005 and May 2006, purchased the fish for True World from Virginia Star Seafood Corporation, which was charged in the same indictment as Wong.

## U.S. TO GIVE EU MORE TIME TO COMPLY WITH WTO GMO RULING

The U.S. asked the World Trade Organization (WTO) Jan. 17 to create an arbitration panel to decide how much compensation Washington is due from the European Union (EU) for its continued failure to comply with a 2006 panel ruling that said its restrictions on the marketing of genetically modified organisms (GMO) violated WTO rules. But the U.S. immediately told the WTO that it was suspending that request as part of an agreement with the EU to give Europe more time to come into compliance.

In an example of Orwellian newspeak, the USTR's office now refers to the case as the U.S.-EU "biotech" dispute rather than the GMO dispute, which had taken on a Frankensteinian connotation among antitrade activists. "The United States remains very concerned with EU treatment of agricultural biotech products," said USTR spokeswoman Gretchen Hamel. "At the same time our goal is to normalize trade in biotech products, not to impose trade sanctions on EU goods," she added.

In December 2006, the EU agreed to come into compliance by Nov. 21, 2007. The U.S. agreed to extend that deadline to Jan. 11. "We have agreed with the EU to suspend for a limited period the proceedings on our WTO request for authority to suspend concessions in order to provide the EU an opportunity to demonstrate meaningful progress on the approval of biotech products," Hamel said. The U.S. will evaluate EU progress over the coming months to see if it is "normalizing trade against a set of benchmarks and timelines," a USTR statement said.

"If the United States decides to pursue WTO proceedings on the EU's compliance, the United States would file a formal consultation request with the EU, followed by a request for the establishment of a WTO compliance panel," it added. Meanwhile, in preparation for possible retaliation, the USTR's office is publishing a Federal Register notice asking for recommendations on specific EU exports that could be the target of potential retaliation.

## CIT UPHOLDS ITC'S "REPLACEMENT/BENEFIT TEST" IN BRATSK

Domestic price changes after the period of investigation (POI) in antidumping cases involving commodities may be used to support arguments that non-subject imports could not be another cause of injury to the domestic industry, a Court of International Trade (CIT) ruling Jan. 15 suggests. In ruling on a challenge to the International Trade Commission's (ITC) remand determination in *Bratsk Aluminum*, CIT Senior Judge Nicholas Tsoucalas upheld the ITC's use of a "replacement/benefits" test to demonstrate that dumped imports of silicon metals from Russia were the cause of injury to domestic U.S. producers (Slip Op. 08-5).

The Bratsk case raised considerable concern among some trade lawyers and ITC members when an earlier appeal to the Court of Appeals for the Federal Circuit (CAFC) resulted in a decision that said the ITC has to weigh the impact of non-subject imports in injury determinations involving commodities (see *WTTL*, April 23, 2007, page 2). Tsoucalas' decision came on a challenge to the ITC's remand determination in March reasserting its injury finding.

The ITC conceded that it can't look at post-POI prices to make determinations, but said it did examine domestic and non-subject prices after the preliminary dumping order on silicon metals from Russia to see if its judgment was confirmed. The ITC's replacement/ benefit test examined whether non-subject imports would have replaced the Russian imports and whether

the benefit of the dumping order to the domestic industry would have been negated if such replacement occurred. "In sum, the data supports the ITC's conclusion that even if the non-subject imports replaced some of the subject imports, the domestic industry would nonetheless have derived a price benefit from imposition of the antidumping duty order," Tsoucalas wrote.

The post-POI data "may be interpreted as a strong indication of a true and substantial benefit to the domestic industry resulting from Commerce's preliminary affirmative determination," he added. "The stronger domestic numbers, following as they did the preliminary determination, appear to show a direct and real world cause and effect relationship, and are therefore more valuable than if they were merely the product of a statistical or theoretical model or of an educated guess on the part of the ITC," the judge declared.

## **U.S. FILES ANOTHER ARBITRATION REQUEST ON CANADIAN LUMBER**

Pushed by the impact the U.S. housing crisis is having on building suppliers and lumber producers, the U.S. Trade Representative's (USTR) office is raising new complaints about aid the Canadian government and provinces are giving to lumber mills and workers, claiming the assistance violates the 2006 Softwood Lumber Agreement (SLA). The USTR Jan. 18 filed a request for a second international arbitration to resolve complaints the U.S. has about new benefits Quebec and Ontario have provided to lumber producers. "Quebec and Ontario have put in place several assistance programs that provide grants or other benefits to softwood lumber producers that violate the SLA's anti-circumvention provisions," a USTR statement said.

The U.S. and Canada are already in the midst of a separate arbitration process that Washington initiated in August 2007 over other Canadian benefits for lumber producers (see **WTTL**, Aug. 13, page 3). A hearing in that dispute was held in New York City on Dec. 12 before a tribunal of the London Court of International Arbitration. The tribunal is expected to issue a decision in February.

Separately, USTR Susan Schwab Jan. 15 wrote to Canadian Trade Minister David Emerson asking for assurance that a new \$1 billion Canadian program announced Jan. 10 and known as the Community Development Trust would be consistent with Canada's obligations under the SLA and not provide illegal subsidies to the Canadian forestry industry. Emerson responded with a statement assuring the U.S. that Canada will abide by the SLA. "The government is taking steps to ensure that the Community Development Trust is implemented in a way that fully respects Canada's international trade obligations," he said. "This will be explicitly stated in the agreements to be negotiated with individual provinces and territories," he added.

## **JUSTICE FCPA ADVISORY OPINION OKAYS FOREIGN INVESTMENT**

A Justice advisory opinion Jan. 15 on the Foreign Corrupt Practices Act (FCPA) said the department won't take enforcement action against an unnamed Fortune 500 company that had asked for advice on plans that one of its foreign subsidiaries has for acquiring a majority interest in a company that manages public services for a major unidentified foreign municipality. The target investment has 56% government ownership and 44% private ownership. The requestor said it had identified two principal FCPA-related risks tied to the private partner's legal obligations in government privatization efforts and potential legal restrictions on the ability of the manager of the target investment to participate in negotiations on the sale.

The requestor told Justice it had taken steps to assure that those limitations did not apply and had also conducted due diligence to make sure other parties to the transaction were not subject to prohibitions. Justice said it based its decision on several important factors, including that the requestor had (a) "conducted and documented reasonable due diligence; (2) promised to maintain that documentation in the U.S.; (3) "required and obtained transparency through adequate disclosures to the relevant government entities" through the public tender process; (4)

will obtain from the foreign private partner “representations and warranties regarding past and future anti-corruption compliance;” and (5) will retain the contractual rights to discontinue its business relationship with the foreign private partner “in the event of breach of their joint venture agreement, including violations of anti-corruption laws.”

## GAO REPORTS CRITICIZE U.S. SANCTIONS PROGRAMS

Two reports from the Government Accountability Office (GAO) have found fault with the Bush administration’s enforcement of trade sanctions against Iran and Cuba. A December report said Treasury’s and Customs’ emphasis on enforcing the Cuban sanctions may be diluting their effort to enforce other trade sanctions. Then on Jan. 17, the GAO issued another report saying U.S. sanctions against Iran may not be having the impact that Washington claims. “U.S. officials and experts report that U.S. sanctions have specific impacts on Iran; however, the extent of such impacts is difficult to determine,” the Iran report states. “Other evidence raises questions about the extent of reported economic impacts,” it adds.

The dubious effect of the Iranian sanctions isn’t due to a lack of enforcement actions against firms that violate those restrictions. Between 2003 and 2007, Treasury filed 94 civil penalty cases against companies violating Iran sanctions. State has taken action in 111 cases, with almost one-half involving Chinese entities selling sensitive goods to Iran.

“Iran’s global trade ties and leading role in energy production make it difficult for the United States to isolate Iran and pressure it to reduce proliferation activities and support for terrorism,” the agency notes, conceding that multilateral efforts to target Iran have recently begun. The GAO recommends that export agencies conduct an assessment of the effectiveness of their Iran sanctions programs and their resource allocation.

Regarding sanctions against Cuba, the GAO said it found that Customs and Border Protection (CBP) in 2007 inspected 20% of arrivals from Cuba compared to 3% of arrivals from other countries. “Our analysis of CBP data and interviews with CBP officials show that this intensive inspection of travelers and the numerous resulting seizures of small amounts of Cuban-made products have sometimes occupied a majority of the airport’s secondary inspection facilities and delayed inspections of other passengers, straining the agency’s resources for accomplishing its priority mission: keeping terrorists, criminals, and inadmissible aliens out of the country while facilitating the flow of legitimate trade and travel,” the GAO declared. It also found that Treasury’s Office of Foreign Assets Control (OFAC), which administers more than 20 sanctions programs, “has conducted more investigations and issued more penalties related to the Cuba embargo than for all of the other sanctions programs it administers.”

### \* \* \* BRIEFS \* \* \*

GAMBLING: Antigua and Barbuda’s Finance Minister Errol Cort met Jan. 17 with USTR Susan Schwab to discuss WTO ruling granting Caribbean nation authority to retaliate against U.S. for WTO-illegal restrictions on online gambling. No progress was reported. They agreed “discussions should continue,” USTR spokeswoman said (see **WTTL**, Jan. 7, page 4).

SOCKS: CITA Jan. 18 said it intends to apply safeguard measure against imports on cotton socks from Honduras. “The substantial increases in imports of cotton socks from Honduras found during the investigation have led CITA to move forward with the safeguard process in accordance with the [CAFTA] Agreement,” said Deputy Assistant Secretary of Commerce Matt Priest.

GRAPHITE ELECTRODES: SGL Carbon LLC and Superior Graphite Co. Jan. 17 filed antidumping petitions at ITC and ITA against imports of small diameter graphite electrodes from China.

FCPA ENFORCEMENT: Gerald Green, 75, and his wife Patricia Green, 52, of West Hollywood, who are co-owners of Film Festival Management, Inc., were indicted Jan. 16 by L.A. federal grand jury on charges that they violated FCPA by allegedly paying bribe to Thai official to obtain contract to manage Bangkok international film festival.