

# Washington Tariff & Trade Letter®

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

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## BYRD CAN'T APPLY TO NAFTA IMPORTS, APPELLATE COURT RULES

Antidumping and countervailing duties collected on imports from Canada and Mexico cannot be distributed to domestic U.S. producers under the Byrd Amendment, the Court of Appeals for the Federal Circuit (CAFC) ruled Feb. 25. The ruling affirmed in part an April 2006 Court of International Trade (CIT) decision which said Byrd can't apply to imports from Canada and Mexico because the amendment didn't specifically cover imports from those two countries as required by the NAFTA Implementing Act (NIA) (see **WTTL**, April 10, 2006, page 1).

Although the original suit was brought by groups representing Canadian softwood lumber, magnesium and hard red spring wheat, the CAFC said the permanent injunction issued by the CIT can apply only to hard red spring wheat. The complaint by the Canadian lumber industry is moot because the Softwood Lumber Agreement between the U.S. and Canada returned collected duties to Canada, while the magnesium industry's claim is moot because Canada's only producer, Norsk Hydro Canada, has exited this business and no longer faces injury from Byrd distributions, the CAFC ruled in *Canadian Lumber Trade Alliance v. U.S.*

Section 408 of the NIA says no amendment to U.S. trade law can apply to Canada or Mexico unless it specifically includes those two countries under its provisions. The Continuing Dumping and Subsidies Offset Act (CDSOA), the Byrd Amendment's formal title, didn't include this specific mention. U.S. domestic industry had argued that the amendment was part of an appropriations bill and thus not subject to the NIA restriction.

"Though Congress might have exercised its spending power to assist domestic producers without also amending title VII of the Tariff Act of 1930, and though the Canadian Wheat Board might not have had any recourse to challenge Customs' actions in that event, Congress did in fact choose to enact the CDSOA as an amendment to the trade laws, subject to the constraints imposed by section 408 of the NIA. Therefore the Canadian Wheat Board does in fact have recourse to challenge Customs' actions in this case," the CAFC ruled (emphasis in original).

## WTO TELECOMMUNICATIONS AGREEMENT UPDATE POSSIBLE AFTER DOHA

With prospects for the Doha Round still uncertain, World Trade Organization (WTO) members are looking at a possible post-Doha agenda, which could include an update of the 10-year-old Basic Telecommunications Agreement (BTA). New and emerging communications networks could drive new negotiations to update the WTO agreement, said speakers at a Feb. 20 - 21 WTO symposium on the anniversary of the accord. "We need a second round of agreements to

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start preparing the world for this next decade," said Jose Rizek, executive director of the Dominican Republic's telecommunications regulator. A key issue, however, will be how to balance any new WTO rules with the International Telecommunications Union's (ITU) International Telecommunications Regulations (ITRs).

The BTA sought to improve connectivity, reduce a significant negative balance of payments for traffic settled under the ITR, and to lower the price of international voice traffic. Its provisions succeeded in opening the market to investment, innovation and access, but "are so not with the current technology," Don Abelson, the former chief U.S. negotiator on the agreement told the symposium. Internet issues, next generation networks, competition, telecommunications, speech, public safety, and national security can be dealt with in the WTO, said Abelson, who spent 23 years as a USTR. trade negotiator and seven as head of the Federal Communications Commission's international bureau.

The WTO would become an arbiter of the process, transparency, non-discrimination, and the principals on adoption of technical specifications, but it wouldn't replace technical standards writing regimes such as the ITU, one official said. The WTO has the capacity to set parameters and guidelines for how standards are developed and how they are implemented under existing rules on technical barriers to trade (TBT), he said.

It is still unclear what telecommunications liberalization, if any, will emerge from Doha Round services negotiations. Thus, the U.S. is still focusing on what is achievable in the round. For example, Washington hopes to use the round to reach a compromise with the European Union on the classification of telecommunications services, one official said. U.S. suppliers of value added services, including those that tie telecommunications and computer services, reportedly feel the WTO General Agreement on Trade In Services (GATS) classification list is out of date. New negotiations would go beyond the request for offers that are currently on the table in the Doha services talks, an official said.

## **DESPITE COMPLAINTS, NAFTA ACCOUNTS FOR 55% OF OHIO'S EXPORTS**

The pledge Feb. 26 by Democratic presidential candidates Hillary Clinton and Barak Obama, during their debate in Ohio, to withdraw from the North American Free Trade Agreement (NAFTA) if Canada and Mexico refuse to renegotiate the deal came in a state where exports are dominated by trade with those two countries. In 2006, the latest year for which Census broke down the numbers, 55% of Ohio's exports went to NAFTA partners – 48% to Canada and 7% to Mexico. The largest share of manufactured exports involves shipments of auto parts to Canada.

According to Census data for 2007, total exports from Ohio to the world have grown 42% since 2003. With \$42.4 billion in exports, Ohio ranks eighth among all states in export value. Exports account for almost 10% of the state's gross domestic product. In a related area of trade concern in Ohio, the state's exports to China grew 102% from 2003 to 2006 to \$1.3 billion, and China was poised to become the third largest export market for Ohio in 2007.

While saying initially that she "had no intention of wading into presidential politics and debates," U.S. Trade Representative (USTR) Susan Schwab Feb. 27 said "since this would be a negotiation, it would be interesting to hear what export industry or industries would have to be sacrificed during the course of the renegotiation." She noted that exports accounted for 40% of the growth in U.S. GDP in 2007. Now is not the time to be shutting the door on imports or "having doors shut in our face by quote 'opting out of' existing trade agreements," she said.

Clinton and Obama said they wanted to reopen NAFTA to have labor and environment provisions added to the accord. It is unlikely that Canada or Mexico would agree to that, but if they did, they could raise the stakes for the U.S. by insisting that Washington ratify the conventions of the International Labor Organization (ILO), which the U.S. has never done,

repeal anti-union "right to work" laws in several states or end discrimination on the basis of country of origin under the International Traffic in Arms Regulations.

## **OPPOSITION BLOCKS COSTA RICA'S ACCESSION TO CAFTA-DR**

As expected, opponents to the Central American-Dominican Republic Free Trade Agreement (CAFTA-DR) in Costa Rica have succeeded in blocking legislation needed to implement Costa Rica's participation in the pact (see **WTTL**, Oct. 15, page 1). Despite a national referendum in October that voted to support the trade deal, opponents have used stalling tactics, including filibusters, in the Legislative Assembly to prevent votes on bills needed to amend Costa Rican laws, including its telecommunications law, to comply with CAFTA-DR requirements.

Because of the delay, the U.S. and the other five CAFTA members agreed Feb. 27 to give Costa Rica an extension of the deadline by which it had to implement the agreement. CAFTA-DR, which took effect on March 1, 2006, required implementation within two years. That deadline would have been March 1, 2008. The agreement gave Costa Rica until Oct. 1, 2008 to join the pact.

Costa Rican President Oscar Arias' party doesn't have a majority in the assembly and has had to form a coalition with other parties to obtain the 38 votes needed in the 57-member assembly to pass legislation. Even with the coalition, CAFTA-DR supporters can't stop a filibuster. In addition, opponents of deal have either challenged or plan to challenge to the country's Constitutional Court the constitutionality of each of 13 bills required to implement the agreement; further delaying the process. So far, only two of the measures have been approved.

"Costa Rica has been working hard to adopt the measures required to carry out its obligations under the CAFTA-DR," said USTR Susan Schwab in a statement. "While it has already made considerable progress, the Costa Rican government needs more time to complete its legislative and regulatory process before the CAFTA-DR can enter into force," she added.

The seven month extension "is a wake-up call" and gives the assembly a new deadline to aim for, one Costa Rican official told **WTTL**. Without full participation in CAFTA-DR, Costa Rica faces the prospect of some companies moving to other Central American countries to take advantage of the agreement's benefits. Some textile factories have already moved, while other factories have reduced their employment, the official noted. Costa Rica, however, is experiencing an economic boom, driven in part by expanding tourism and investments by large hotel chains. "We are not under any false premise that we can keep enjoying the same conditions without CAFTA," the official said.

## **U.S. WANTS MINISTERS' MEETING TO ADDRESS SERVICES**

The U.S. is stepping up pressure to have trade ministers address services when they meet for a hoped for "breakthrough" in Doha Round talks on agriculture and non-agriculture market access (NAMA) talks possibly in April. In what one diplomat called a "refreshingly frank" letter to negotiators in Geneva, USTR Susan Schwab spelled out what the U.S. wants ministers to do when they meet. With support from the European Union (EU), Washington wants ministers to hold a so-called "signaling conference" sometime around the talks on agriculture and NAMA to produce a ministerial statement on the goals in the services talks (see **WTTL**, Feb. 18, page 5).

WTO Director General Pascal Lamy initially was concerned about overloading the mini-ministerial with issues outside of agriculture and NAMA. Now "there is new willingness on the part of Lamy to embrace services," one source said. "The big question is India," a European services official said. India has to call a general election before the end of March 2009 and is likely to call it at the end of 2008. Indian Commerce Minister Kamal Nath reportedly is keen to run for election, the services official said. Nath comes from a very rural state, which means "it's going to be difficult to give anything on agriculture," the official said; adding, "At

least he will have to insist on sensitive products." Nath and EU Trade Commissioner Peter Mandelson will meet March 7 in London to discuss bilateral issues and Doha. The Indians are aware that they are not going to get everything they want in Mode 4 at the WTO, the services official said, referring to services talks on the movement of people under service rules. Opponents of a signaling conference have not agreed to a meeting before the "green room" sessions on agriculture and NAMA, the European official reported. A compromise may puts the conference after the green room meeting, but before a meeting of the WTO General Council. "There is an intense process of preparation for this conference on services," the official said.

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SUDAN: BIS is Feb. 28 Federal Register amended EAR to increase number of end-uses for which "tools of trade" may be exported temporarily to Sudan under License Exception TMP and raise control thresholds for computers to reflect current technology. In addition, revisions reflect different roles of humanitarian non-government organizations and peacekeepers in Sudan. Separately, SEC in Feb. 15 Federal Register proposed procedures for investment companies to report to Commission their divestment of investments in Sudan of companies subject to U.S. sanctions under Sudan Accountability and Divestment Act or state divestment laws. Act bars civil, criminal, or administrative action against any registered investment company that makes such divestment, using credible information, as long as divestment is reported to SEC.

OFAC: Treasury agency imposed \$200,000 fine on Key Bank National of Cleveland, Ohio, for allegedly handling one account of person or entity in Iran. Bank, which neither admitted nor denied OFAC charge, "has significantly enhanced its policies, procedures and training in the area of anti-money-laundering in recent years, which includes transactions which fall under OFAC-related regulations," company spokesman told WTTL in e-mail. "Key has worked closely with OFAC to bring this matter to conclusion. This fine, which was paid by Key in December, 2007, involves a single customer relationship and transactions that occurred between 2002 and 2004," spokesman explained.

EXPORT ENFORCEMENT: Selex Sistemi Integrati, Inc. of Overland Park, Kansas, as successor company to Alenia Marconi Systems, has agreed to pay \$13,200 civil fine to resolve BIS charges that AMS exported instrument landing system through Italy to Iran without approved license and made false statement on SED. Selex neither admitted nor denied charges.

SHRIMP: WTO panel Feb. 29 ruled in favor of Thailand's complaint that U.S. acted inconsistent with WTO Antidumping Agreement by using "zeroing" in antidumping case against imports of frozen warm water shrimp from Thailand and in applying enhanced continuous bond requirement (EBR). Under dispute-settlement rules, "in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the United States has acted inconsistently with the provisions of the *Anti-Dumping Agreement* and the *GATT 1994*, it has nullified or impaired benefits accruing to Thailand thereunder," panel concluded. U.S. is expected to appeal.

ANDEAN TRADE: Senate Feb. 28 and House Feb. 27 approved 10-month extension of Andean Trade Preferences Act (see **WTTL**, Feb. 18, page 4).

UREA: ITA has decided not to use non-market economy (NME) methods to determine gas prices as part of new-shipper determination it has made on Euro-Chem, as producer of solid urea from Russia, despite claims by U.S. industry that prices are distorted by government intervention (see **WTTL**, Dec. 17, page 3). "We find that it is not clear that any potential distortions which may remain in domestic Russian gas prices are sufficient to warrant a finding that EuroChem's reported costs of producing urea do not reasonably reflect the costs associated with the production and sale of the merchandise," ITA staff memo advised.

BEDROOM FURNITURE: CIT Judge Donald Pogue is still not completely satisfied with ITA's implementation of his previous remand order in antidumping case against imports of bedroom furniture from China. In ruling Feb. 27, he affirmed two revisions agency made to final dumping determination but remanded back four others for further review, including selection of surrogate companies, valuation of cardboard, and computation of financial ratios (Slip Op. 08-24).

BISNIS: After 16 years of operation, Commerce's Business Information Service for Newly Independent States (BISNIS) is closing due to loss of funding. Program, which supported trade with ex-USSR republics, was funded under Freedom Support Act, which expired in September 2007. "We now pass the baton to our colleagues in the Commercial Service," said BISNIS Director Philip de Leon.