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U.S. Appeals Court Finds Beef Hormone Retaliation Violates U.S. Law

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A United States appeals court this week ruled that retaliatory duties imposed on imports from the European Union in a fight over market access for U.S. beef have been in place illegally since July 2007 because the Office of the U.S. Trade Representative failed to meet the procedural requirements of the underlying law.

In an Oct. 13 decision, the United States Court of Appeals for the Federal Circuit upheld a 2009 decision by the U.S. Court of International Trade (CIT) that the duties terminated in July 2007 when USTR failed to obtain a written request from the domestic beef industries to continue them.

The appeals court ruled in *Gilda Industries Inc. and Nestle Waters North America, Inc. vs. U.S.* that the CIT had rightfully decided that USTR had thereby failed to meet the requirements Section 2417(c) of the Trade Act of 1974. It governs the review of the necessity of retaliatory duties that the U.S. imposes under Section 301 of U.S. trade law in four-year increments.

Under these provisions, a "particular action" of implementing a retaliation list will terminate if a representative of the petitioners or beneficiaries does not submit to the Office of the U.S. Trade Representative a written request for its continuation within the last 60 days of a four-year period for which the action has been in place.

The duties have been in place since 1999 when the World Trade Organization authorized the U.S. to retaliate against the EU for its failure to implement a WTO ruling that the EU ban on beef raised with artificial growth hormones was not justified for scientific reasons.

USTR obtained the required request by the domestic beef industry for continuation of the duties in 2003, which marked the end of the first-four year period for which the duties were in place. But it failed to do so in 2007.

At the CIT and the appeals court, the U.S. government unsuccessfully argued that it did not have to seek the written request from the domestic beef industry after the first four-year period because the requirements of Section 2417(c) only apply to the initial action of imposing the retaliation list, but not to its continuation.

But the courts ruled that the statute lays out a mandatory requirement that an action be terminated if neither the petitioner nor any other representative of the domestic industry benefiting from such action has asked for a continuation after a four-year period and leaves no room for discretion on the part of USTR.

The case was brought by Gilda Industries and Nestle Waters, whose products were taken off the USTR retaliation list in March 2009, as part of a U.S.-EU interim settlement of the underlying beef hormones dispute (*Inside U.S. Trade*, Jan. 16, 2009).

As a result of the decision, Gilda Industries, which imports toasted bread from Spain, is entitled to \$285,000 in refunds of duties collected from July 29, 2007 to March 23, 2009, according to Peter Herrick, Gilda's lawyer in the case.

The ruling could open the door to potentially as many as 100 lawsuits by importers seeking refunds for the roughly \$350 million of duties collected since July 29, 2007, if the CIT decides the lawsuits are filed within the two-year statute of limitations, he said.

Fifty pending lawsuits by importers seeking refunds have been stayed by the CIT until the appeals court decision was issued and a "majority, if not all of them" were filed within the statute of limitation, he said.

Under the CIT's residual jurisdiction, the statute of limitations for cases filed is two years from the date that an action is accrued, Herrick said. In this case this would be July 29, 2009, two years after July 29, 2007.

But Herrick said it could be argued that the statute of limitations should be considered to end after the two-year period starting in September 2009, when the CIT rejected Gilda Industries' petition that everyone affected by the duties should be represented in a class action suit.

According to Herrick, the CIT has previously ruled in at least one case that the statute of limitations does not begin to run when a request for class action status is pending.

He said the statute of limitations issue is likely to come up when he goes back to the CIT to ask for an order to get the refunds for the other importers that have filed law suits. He said he will only raise this issue if the government objects to his request on statute of limitations grounds.