ISSN 0276-8275

WTTLonline.com

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

Washington Tariff & Trade Letter®

Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301.570.4544 Fax: 301.570.4545

Vol. 32, No. 36 **September 10, 2012**

U.S. Groups File Suit Against WTO COOL Ruling

In an unusual attempt to block a World Trade Organization (WTO) ruling through a U.S. court, a group of nonprofit organizations and businesses filed suit in Denver U.S. District Court Sept. 1, claiming a recent WTO decision against U.S. Country of Origin Labeling (COOL) rules violates U.S. law (see **WTTL**, July 9, page 4). "The Country of Origin Labeling Act is not a barrier to trade of any kind," the complaint said. It seeks "a declaration that the World Trade Organization has no authority to override U.S. law and that its decision concerning the Country of Origin Labeling Act is void in the United States and throughout the world."

> The plaintiffs, including the Made in the USA Foundation, Inc., the Ranchers-Cattlemen Action Legal Fund United Stockgrowers of America (R-CALF USA) and Melonhead, LLC, which operates Mile High Organics, filed the case against the WTO itself, U.S. Trade Representative (USTR) Ron Kirk and Agriculture Secretary Tom Vilsack. The suit claimed the court had jurisdiction to hear the case under six sections of U.S. Code (USC) 28: Section 1330 (actions against foreign states), Section 1331 (federal question), Section 1337 (interstate and foreign commerce), Section 1346 (United States as a defendant), Section 1361 (action to compel officer of the United States to perform his duty) and Section 1366 (construction of references to laws of the United States).

Wolf Explains Proposed Addition of Notification Requirements

Bureau of Industry and Security (BIS) Assistant Secretary Kevin Wolf says a proposal in the agency's "transition rules" to add a congressional notification requirement is only intended to maintain the "status quo" for certain items transferred to the Commerce Control List (CCL) from the U.S. Munitions List (USML). The proposed notification requirement, which would apply to Major Defense Equipment moved to the 600-series in the CCL, drew broad criticism in industry comments on the transition proposal (see **WTTL**, Aug. 13, page 1).

"The Arms Export Control Act has requirements for major defense equipment involving congressional notification, and we wanted to stay consistent with that statutory obligation even though these items wouldn't technically be subject to the Arms Export Control Act," Wolf told the President's Export Council Subcommittee on Export Administration (PECSEA) Sept. 6. "The thought was to maintain the status quo with respect to those items even if they become 600-series items. It was no more complicated than that," Wolf noted. Also at the meeting, a PECSEA benchmarking working group reported the results of a survey of exporters, showing

Published weekly 50 times a year except last week in August and December. Subscription in print or by e-mail $697 a year. Combo subscription of print and e-mail is $797. Additional print copies mailed with full-price subscription are $100 each.

that many feel the current export control system is a burden and an obstacle to expanding their exports. "Most exporters who responded to the questions did see a negative impact in terms of competitiveness in the current export control system. There was a pretty uniform response that deemed export restrictions were a negative impact," said working group chairman Kathleen Palma, senior counsel for GE Aviation. "This data, at least initially, points to the need for additional focus on simplification of the system, particularly for the smaller exporters," she said.

> Wolf praised the report. "I feel somewhat vindicated," he said. "Taking this and voluntarily translating it into some method of being able to answer the perennial question I get from the Hill, which is: 'Prove it to me there's a problem. Show me that anything needs to be changed. Go away and leave us alone until you can prove to me that there's some aspect of the system that needs reform and until you can I'm not going to help you; in fact, I'm going to fight everything you're doing because it's a giveaway to country X'," Wolf said. "Taking these themes and other data is only helpful to the larger effort," he added.

BIS Under Secretary Eric Hirschhorn reiterated the administration's concern over the House version of the 2013 National Defense Authorization Act (H.R. 4310), which would authorize the transfer of satellite controls back to Commerce. "Unfortunately, the House version contains some provisions that could certainly delay or cripple the broader export control reform initiative or otherwise are problematic," Hirschhorn said.

Hirschhorn also explained the next step for the new definition of "specially designed" and the transition rule. "We expect that those will go with the first 38(f) notification [to Congress] because we're required to indicate how items are going to be controlled once they move from the U.S. Munitions List to the Commerce Control List," he said. "So in fulfillment of that requirement, that's kind of what the transition rule, specially designed, and the specific category line-up, which we'll also combine, how it will look in the 600 series on the CCL. That's our contribution to the State Department notice of what's happening," he told the PECSEA.

Macau Man Pleads Guilty to Export Violations Before New Trial

After winning an appellate court ruling that overturned his conviction on two charges and remanded his conviction on two others, Chi Tong Kuok decided not to pursue a new trial. Kuok, a resident of Macau, China, pleaded guilty July 31 to conspiracy to export defense items without approved licenses. As part of the plea agreement, sources say the government will support a sentence that would apply the time Kuok has already served toward a new sentence. He has been held in jail nearly 40 months since his arrest in June 2009 and is expected to get a new sentence of about 46 months.

> According to the court docket in the San Diego U.S. District Court, Kuok admitted he and others conspired to purchase and export defense articles, including communication, precision location and cryptographic equipment, without a State license. Kuok was caught in a government sting operation attempting to cause $1,700 to be sent to the U.S. for the purchase and unlicensed export of a KG-175 Taclane Encryptor, which had been developed by General Dynamics.

Kuok had been convicted on charges that included "attempting to cause" an illegal export of a defense item in violation of the Arms Export Control Act (AECA). After he was sentenced to 96 months in prison, Kuok appealed his conviction. In a precedent-setting ruling in January, the Ninth Circuit Court of Appeals reversed that conviction (see **WTTL,** Feb. 6, page 1). The appellate court vacated his convictions on two counts and remanded to the district court for a new trial on two other counts. In ruling on his appeal and citing earlier decisions, the Ninth Circuit said there is "no general federal 'attempt' statute." It said a defendant can only be found guilty of an attempt to commit a federal offense if the statute defining the offense also expressly proscribes an attempt. Neither the general criminal law nor the AECA contain such a provision, the appellate court found. Kuok's new sentencing is scheduled for Oct. 15.

Few Comments on Transfer of Training and Auxiliary Equipment

BIS and State proposals to transfer items from Category XIII (auxiliary military equipment) and Category IX (military training equipment) on the U.S. Munitions List (USML) to the Commerce Control List (CCL) elicited few comments, but the main companies affected by the proposals did not hesitate to voice their concerns. For example, Lockheed Martin questioned why so few Category XIII items were being moved to the 600 series on the CCL. "Jurisdictional clarity will provide few benefits for U.S. exporters if items that no longer warrant control as munitions items continue to be identified on the USML," it wrote. The company also cited the lack of definitions of terms that were introduced in the proposals.

> "Several new terms have also been introduced in the proposed rule (e.g., 'multi-layer camouflage systems,' 'soldier systems,' 'tooling,' etc.) without sufficient definitions, which will make it more difficult for U.S. exporters to identify at which point in the process a license may be required," Lockheed stated. "In addition the proposed rule is lacking 'bright lines' in a number of entries, which will make it more difficult for exporters to assess the jurisdictional status of individual articles," Lockheed Martin said.

DRS also cited the lack of specific definitions. It referred to Export Control Classification Number (ECCN) 0C617a, which includes materials, coatings and treatments for signature suppression. "The phrase 'signature suppression' is undefined and lacking in any positive criteria as to what level of suppression would be required to be captured by this ECCN," it wrote.

Boeing's main comment on Category IX concerned the .y.99 paragraph, which it considers an unnecessary catch-all (see **WTTL**, Aug. 13, page 3). "This paragraph would control any item that: (1) was transferred from the USML to the CCL via a commodity jurisdiction determination; (2) is not currently listed on the CCL; and (3) would otherwise be controlled under one of the ECCNs because, 'for example, the item was 'specially designed' for a military use'," it wrote. "In our opinion, recapturing those items represents an unnecessary roll-back in control that is contrary to the objectives and intent of the current export reform effort," it stated.

APEC Ministers Target Environmental Goods for Tariff Cutting

Before the heads of state of countries participating in the Asia-Pacific Economic Cooperation Forum (APEC) met in Vladivostok, Russia, high-level ministers gathered and approved a statement that included approval of a proposed list of environmental goods that should have their tariffs cut to 5% or less. The list still needs to be approved by APEC leaders who are meeting Sept. 8-9. Among their other agreements, the ministers repeated their support for concluding the long-stalled Doha Round, negotiating the expansion of the Information Technology Agreement and finding other paths toward trade liberalization as the Doha talks continue.

> "This is an historic achievement. Currently, over $1 billion in U.S. environmental goods exports to the Asia-Pacific region face tariffs above 5 percent," said Deputy USTR Demetrios Marantis, who represented the U.S. at the meeting.

The ministers directed officials to continue "employing different, fresh and credible negotiating approaches aimed at achieving a successful multilateral conclusion of Doha Round." They said they "are encouraged by the potential for nearer term outcomes including on trade facilitation and other development related issues." They renewed their commitment to refrain from raising new barriers to investment or trade, imposing new export restrictions or implementing WTO-inconsistent measures to stimulate exports. "We continue to address the next generation trade and investment issues identified in 2011, including capacity-building and sharing of best practices on global supply chains, facilitating and enhancing participation of small and medium-sized enterprises in global production chains, and promoting effective, non-discriminatory, and market-driven innovation policy," they declared.

A Scope Number Is A Number Is A Number, Court Rules

Specifications for a product subject to an antidumping order have to reflect the actual imported product and not a nominal standard, the Court of Appeals for the Federal Circuit (CAFC) ruled Sept. 7. The decision reverses a Court of International Trade (CIT) ruling that upheld Commerce's scope ruling in an administrative review of imports of stainless steel plate in coils (SSPC) from Belgium. The case involved a dispute over whether a scope order's specifications apply to nominal numbers or actual numbers. The court, in *Arcelormittal Stainless Belgium N.V. v. U.S.,* agreed with the respondent's complaint that the scope determination should not apply to their SSPC, which was less than the 4.75 mm thickness cited in the scope ruling.

> "Commerce concluded that the industry's practice of using nominal thicknesses when ordering SSPC rendered the scope of the antidumping duty order ambiguous," the appellate court noted. "But antidumping duty orders apply to goods as imported, not as they may have been ordered. Thus, the proper context in which to interpret the scope of the antidumping duty order is the industry practice regarding *delivered* products," it ruled.

"Here, Commerce's broad reading of the SSPC order is in conflict with the plain language of the order itself, which unambiguously precludes nominal merchandise meeting the specified dimension when read in light of industry practice regarding delivered products and Commerce's previous decision in *Carbon Steel Plate*. Thus, Commerce was not justified in finding the order ambiguous," the three-judge panel determined. "Because the primary purpose of an antidumping order is to place foreign exporters on notice of what merchandise is subject to duties, the terms of an order should be consistent, to the extent possible, with trade usage. Thus, a finding of no ambiguity for unmodified numbers may be rebutted by sufficient evidence showing that actual measurements are not customarily used in the relevant industry," it stated.

Subsidiary of Chinese Firm Settles OFAC Charges

The U.S. subsidiary of a Chinese trading company has agreed to pay a $402,000 civil fine to settle Office of Foreign Assets Control (OFAC) charges that it had violated the Iranian Transactions Regulations (ITR) and the Weapons of Mass Destruction Proliferators Sanctions Regulations (WMDPSR), OFAC announced Aug. 22. While it reached the agreement with OFAC, Grand Resources USA, Inc. (GR-Duratech) of Houston, Texas, continued to claim it did not violate U.S. trade sanctions. OFAC claimed the violations occurred in 2005 and 2009.

> According to OFAC, GR-Duratech in 2005 negotiated a sale of graphitized petroleum coke to a company in the United Arab Emirates (UAE), knowing that the goods were for delivery to Iran. After negotiating the terms of the sale and the related letter of credit, GR-Duratech referred the sale to its parent company, Grand Resources Co., Ltd. in Beijing, and later received a commission payment for the sale, OFAC said.

* * * Briefs * * *

EXPORT ENFORCEMENT: Mohammad Reza Hajian of Tampa pleaded guilty July 11 in Tampa, Fla., U.S. District Court to one charge of conspiracy to violate International Emergency Economic Powers Act (IEEPA) and Iranian Transaction Regulations (ITR). He admitted he exported roughly $10 million worth of computers and related equipment, including Hitachi Data Systems Universal Storage Platform, to Iran without Treasury licenses from 2003 through 2011. Hajian also pleaded guilty to same charge on behalf of his computer companies -- Nexiant LLC, RH International LLC, and P & P Computers LLC.

MORE EXPORT ENFORCEMENT: FBI agents arrested a Canadian citizen July 31 in Spokane, Wash., on two-year-old warrant from sealed indictment that accused him of conspiracy to export gyroscopes to China. FBI shared sealed indictment of Kevin Zhang, aka Zhao Wei Zhang, with Canadian law enforcement. Zhang and government have agreed to keep discovery under protective order.