ISSN 0276-8275

WTTLonline.com

Washington Tariff & Trade Letter®

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

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Vol. 31, No. 4 **January 24, 2011**

Criminal Fines for EAR Violations Surged in 2010

Bureau of Industry and Security (BIS) export enforcement led to a seven-fold increase in criminal fines and forfeitures in fiscal year (FY) 2010 compared to the year before, the agency said in its annual report to Congress. The increase came despite a lower number of criminal convictions, suggesting that judges are getting tougher than before in imposing penalties. In FY 2010, which ended Sept. 30, 2010, BIS investigations produced criminal convictions of 31 individuals and businesses, as compared to 33 in FY 2009. Nonetheless, penalties for these convictions came to $12,298,900 in criminal fines, more than $2 million in forfeitures and more than 522 months of prison time. In FY 2009, courts imposed just $455,409 in criminal fines, more than $1.5 million in forfeitures and 886 months of imprisonment.

Administrative penalties almost doubled, as well. In FY 2010, BIS completed 53 administrative cases against individuals and businesses and imposed more than $25.4 million in civil fines. This compared to 54 cases and more than $14.5 million in fines the year before. Of the 2010 cases, 14 involved antiboycott violations and penalties of $380,975, as compared to three antiboycott cases that involved $124,475 in penalties in FY 2009.

The number of export licenses processed by BIS increased only slightly in FY 2010, after a decrease the year before. Processing times got a little slower, it reported. During the year, BIS processed 21,660 applications valued at about $66.2 billion. This marked an increase of 6% from the 20,351 processed in FY 2009 with a value of about $62.4 billion. The agency approved 18,020 applications (83%), returned without action 3,513 (16%), and denied 127 (less 1%). These percentages remained nearly static from 2009. In FY 2010, BIS' average processing time to review a license application was 29 days compared to 26 days in 2009.

China's Hu Brings More Reform Promises to Washington

Chinese leader Hu Jintao took a page from the Japanese playbook of the 1980s during his state visit to Washington Jan. 19-20, announcing $45 billion in export and investment deals for U.S. companies to placate American complaints about China's closed markets, currency manipulation and violations of intellectual property rights. The ploy mostly worked, with Obama administration officials and business groups kowtowing to Hu to make his visit very chummy. Hu got a sterner reaction in his meetings with members of the House and Senate, who continue to play "bad cop" to the administration's "good cop" in relations with China. Hu and President Obama issued a 41-point joint statement touching on almost every issue in the bilateral relationship

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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.

from nuclear and military cooperation to trade, investment and people-to-people exchanges. Many portions of the statement reiterated agreements reached in December during the meeting of the U.S.-China Joint Commission on Commerce and Trade (JCCT) (see **WTTL**, Jan. 17, page 3). Several additional side agreements were also announced, including plans to construct a Classical Chinese Garden at the U.S. National Arboretum in Washington and a five-year extension of the loan of two pandas to the National Zoo in Washington. Except for the garden and pandas, it is not clear whether China will implement any of its promised commitments.

> U.S. complaints about the undervaluation of the Chinese rinminbi were raised during talks between Hu and Obama, but in public statements, at least, Obama never charged China with manipulating its currency. "I told President Hu that we welcome China's increasing the flexibility of its currency," Obama said at the joint press conference with Hu. "But I also had to say that the RMB remains undervalued, that there needs to be further adjustment in the exchange rate, and that this can be a powerful tool for China boosting domestic demand and lessening the inflationary pressures in their economy," he added.

The joint statement "acknowledged the importance of fostering open, fair, and transparent investment environments to their domestic economies and to the global economy and reaffirmed their commitment to the ongoing bilateral investment treaty (BIT) negotiations." The leaders said they would use the JCCT "in a cooperative manner to work towards China's Market Economy Status in an expeditious manner." They said China welcomed discussion of "ongoing reform of the U.S. export control system, and its potential implications for U.S. exports to its major trading partners, including China, consistent with U.S. national security interests."

At a meeting with U.S. business executives, Hu claimed "all companies registered in China are given national treatment." He said "in terms of innovation products, accreditation, government procurement, IPR protection, the Chinese government will give them equal treatment." In a message to Chinese firms, he said Beijing will support their effort to invest and do business in the U.S. "I do believe that President Obama and the U.S. administration will provide a level playing field for Chinese companies to make investments here in the United States," he said.

WTO Remains Split over Geographical Indications Registry

World Trade Organization (WTO) negotiators have created a composite text of proposals on what a registry for geographical indications (GI) of wines and spirits should look like, but after 13 years of talks they have made no progress toward bridging differences over what legal weight such a registry should have. The composite draft was discussed Jan. 13 during an informal meeting of the full WTO membership. Negotiators at the meeting mainly focused on procedural issues, such as the deadline for comments on the draft, most of which is in brackets indicating that there is no agreement on the language.

> The GI registry is supposed to list wines and spirits that are linked to particular places, such as Bordeaux or Burgundy. Creation of the registry is a leftover mandate from the Uruguay Round and is now part of the Doha Round. The draft text was assembled from "all proposed wordings in a single body of text," negotiating group chairman Darlington Mwape said. Producing the draft text "has not been easy," he told negotiators. The talks are "showing first elements of success," but remain "extremely fragile and delicate," said Mwape, who is Zambia's ambassador to the WTO.

The text, which deals with how a GI term would be "notified" to the WTO and which countries would do it, is the first of six aspects of the system, he explained. It reflects the disagreement between members, including European Union (EU) countries and Switzerland, that want the registry to prevent the use of GI names on products from outside the region of their origin, and others, including the U.S., Australia, New Zealand, Japan and Argentina, that want it merely to identify those names. A compromise has been floated by Hong Kong, but talks haven't yet

focused on bridging the gaps between the various positions, one trade official said. The debate has become "a little bit more subtle," the official said. It is no longer just black and white about whether a term registered in the system has zero impact or 100% impact, he said. Other main areas envisaged for talks deal with the legal consequences of registration, participation in the agreement, commitments or obligations arising from a term's registration, how the system would be run, special treatment for developing countries and whether the registry is voluntary.

> The registry's legal effect is a key question, the official said. Countries are now free to enforce GI protection within their borders, but they aren't totally free to completely protect a term. The question is about rights or obligations to protect somebody else's GIs, he said. The dispute over wine and spirits mirrors EU efforts to extend GI protection to other products. The EU claims over 100 nations support its proposal. Talks on GI extension are technically separate, he said.

Wolf Tries to Ease Industry Worries about STA Burdens

In his weekly teleconference call Jan. 19, Bureau of Industry and Security (BIS) Assistant Secretary for Export Administration Kevin Wolf tried to calm exporters' concerns about the added burdens that would come with the agency's proposed License Exception Strategic Trade Authorization (STA). As soon as BIS proposed the STA in December, industry representatives began questioning the administrative hurdles in using the exception, including special destination control statements that would have to be attached to each export. We're "not trying to do something more burdensome than a license application," Wolf said. At the same time, the government is trying to "enhance and ensure compliance" with the regulation, he said.

> One questioner expressed the concern that exporters, carriers and other agents often print the export documentation in bulk for each port and each destination. In response, Wolf said this was a "terrific comment to make in regards to burden." As far as documents, the proposed rule "doesn't mention airway bills or bills of lading" or other documents created by carriers or other agents, he noted.

He also tried to assure exporters that they wouldn't be responsible for subsequent reexports that violated the terms of the STA exception. The subsequent reexporter would be the one responsible for any violation, if it is done without the knowledge of the original exporter, he explained. However, "knowledge" in the Export Administration Regulations (EAR) is defined as the "awareness of high probability," he pointed out. Another question asked if the STA could be broadened to include exports that needed a license originally and are now being sent back to the country of origin? That's an "interesting idea," Wolf said, suggesting that was exactly the type of comment or suggestion BIS wants.

Fewer But Bigger Defense Offset Contracts in 2009, BIS Reports

Fewer U.S. defense exporters entered into offset agreements with foreign government buyers in 2009 than the year before, but the value of those deals was larger and the percentage with offset provisions was greater than in 2008, BIS said in its annual Offsets in Defense Trade Report released Jan. 14. In 2009, the most recent period covered, 13 firms reported entering into 56 offset contracts for the sale of defense items and services. These contracts, signed with 21 countries, were valued at $10.68 billion, of which $6.69 billion or 62.7% went back to buying countries in the form of offsets, BIS reported.

This compares to 2008, when 15 U.S. defense contractors reported entering into a total of 53 new offset agreements with 17 countries with offsets valued at $3.66 billion. This was 58.29% of the $6.3 billion in export contracts they reported to BIS (see **WTTL**, Jan. 18, 2010, page 3). During 2009, reported offset agreements ranged from a low of 9% of contract value to a high of 128.6 %, BIS said. Offset deals require defense exporters to provide countries that are buying their weapons and equipment with special benefits as a condition for the sale. Such sales may

require co-production in the country doing the buying, subcontracting, technology transfer, training, licensing of production, foreign investment or purchases. “In 2009, almost half of the signed offset agreements reported by U.S. industry contained liquidated damage penalties for non-performance of the offset obligation. Potential penalties include liquidated damages, increases in the obligation amount, reduction of the value of the signed export sales contract, and exclusion from consideration of future contracts,” BIS said.

From 1993 to 2009, 49 U.S. firms reported entering into 736 offset contracts worth $108.22 billion with 46 countries and offsets valued $75.90 billion. BIS amended offset reporting rules in 2009 to require companies to assign the appropriate North American Industry Classification System codes (NAICS) to each offset-related defense export sales contract and to each offset transaction reported. Previously, BIS required industry to classify offset transactions and defense export sales by broad industry descriptions, the agency noted.

NAFTA Panel Remands Pipe Case to ITC

The decision of U.S. Steel Corp. to use the NAFTA binational dispute mechanism instead of the Court of International Trade to challenge an International Trade Commission (ITC) injury determination has produced a mixed result. In a Jan. 18 ruling, a binational panel rejected its complaint that the ITC wrongly refused to cumulate imports of certain welded large diameter line pipe from Mexico with imports from Japan, but the panel remanded the case to the ITC to reopen its review to examine data not properly filed in the original decision. The panel said the ITC “decision not to cumulate subject imports from Mexico and Japan was within the scope of its discretion and that U.S. Steel is barred from raising the issue of apparent discrepancies in the Mexican producers’ reported capacity trends, having failed to exhaust its administrative remedies before the Commission.”

After the ITC’s original determination, one Mexican respondent, Procarsa, told the commission it had filed incorrect information on its capacity in its questionnaire submission. “The Commission [should] have an opportunity to reconsider its findings and determination in light of this new evidence,” the panel said.

* * * Briefs * * *

SOFTWOOD LUMBER: U.S. has won ruling from London Court of International Arbitration (LCIA) tribunal, which said aid Quebec and Ontario gave to their lumber producers violated 2006 Softwood Lumber Agreement, USTR’s office announced Jan. 21. If Canada does not remedy violation, U.S. would be authorized to impose extra $59.4 million in duties on lumber imports from Canada. Three days earlier on Jan. 18, U.S. asked for third LCIA arbitration to hear complaint that Canada is violating SLA because British Columbia allegedly is underpricing timber it sells from public lands. Canadians have claimed lumber qualifies as “grade 4" distressed timber because it has been damaged by infestation of mountain pine beetle. Bilateral consultations have failed to resolve dispute (see **WTTL**, Oct. 11, page 4).

ZEROING: U.S. lost another WTO case over “zeroing” Jan. 18 in dispute-settlement panel decision that U.S. violated WTO rules when it used methodology in antidumping investigations of imports of stainless steel plate in coils, stainless steel sheet and strip in coils and diamond sawblades and parts from Korea (see **WTTL**, Jan. 3, page 1).

CUBA: President Obama ordered Jan. 14 departments of State, Treasury and Homeland Security to revise regulations within next two weeks to ease restrictions on religious and educational groups traveling to Cuba, remittances by non-family members and licensing of charter flights.

HOUSE: Ways and Means Committee Democrats selected Rep. Jim McDermott (D-Wash.) to serve as ranking member of trade subcommittee.

VEU: BIS in Jan. 18 Federal Register added CSMC Technologies Corporation (CSMC) and its three facilities in Wuxi to list of validated end-users in China. In same notice, it revised authorization for Advanced Micro Devices China, Inc., adding three buildings in Shanghai and updating covered ECCNs.