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. 31, No. 3 **January 17, 2011**

CCL Items Can't Avoid Three-Tier Classification, Wolf Says

Although the Bureau of Industry and Security (BIS) has not completed the process of placing all items on the Commerce Control List (CCL) into a three-tier control system, exporters should not assume that everything on the CCL will fall below tier 3, BIS Assistant Secretary for Export Administration Kevin Wolf said during his latest call-in program Jan. 12. While the 29 Export Control Classification Numbers (ECCNs) identified as being excluded from the agency's proposed License Exception Strategic Trade Authorization (STA) appear headed to tier 1, BIS still wants comments on their status, he said.

> The government is "not yet to analyzing the tier 3 status of anything on the CCL," Wolf said. "You should focus on whether any of the 29 ECCNs fall within the scope of tier 1 criteria. The principal purpose, focus, request is whether they're in tier 1 or they're not," he advised (see **WTTL**, Jan. 10, page 1).

Wolf disagreed with a question that suggested that all items on the CCL should be considered below tier 3, the lowest level of controls under the three-tier system. A dual-use item could be classified in a tier because of its use with another tiered item, he indicated. "You should take into account the extent to which something on the CCL makes a significant contribution to the indigenous development, production, use or enhancement of a tier 1, 2 or 3 item," he said.

He said BIS is going through the same tiering process as State's Directorate of Defense Trade Controls (DDTC) is undertaking in its review of the U.S. Munitions List (USML), but acknowledged the slightly different language BIS and DDTC are using in defining the three tiers. "Both the USML and the CCL are being reviewed and screened against the same three tiers. We may have used slightly different wording, but the intent was the same," Wolf said.

Signs Point to Continued Doha Deadlock This Year

No spark of life has appeared in negotiations needed to complete the Doha Round in 2011, as the U.S. and major developing countries remain polarized over market access. "We're all out of process," Deputy U.S. Trade Representative (USTR) Michael Punke told reporters Jan. 14 in Geneva. Trade officials in Geneva have succeeded in "restarting the engines" of the Doha talks in the past few months but are not actually negotiating a deal, he indicated. Punke also repeated U.S. complaints that developing countries such as Brazil, China and India haven't made adequate market access offers. Concessions are imbalanced against the U.S., Punke said. "India, China and Brazil all have the benefit of most favored nation access to concessions that

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.

were made by the U.S. and other developed countries in the Uruguay Round 16 years ago, and in many cases that has created opportunities for them to develop global class industries," he said. "We will not come into the negotiation and increase the imbalance as part of an effort to decrease the imbalance," Punke argued.

> "We expect that Brazil will embrace responsibilities that are commensurate with the degree that it has been a beneficiary of participating in the global economy," Punke said. He complained about Brazil not joining the Information Technology Agreement (ITA). "It's not reasonable for Brazil to expect access to international markets if it's not able to participate in an agreement like the ITA, which has literally dozens of developing country participants," he declared.

The U.S. was "somewhat disappointed" with talks with China in December in Washington, Punke reported. The U.S. had previously given the Chinese a list of products to the eight-digit Harmonized Tariff Schedule level of specificity where it wanted additional market access, Punke noted. China did not come prepared to engage in specific discussion, he said. "It's no longer going to be sufficient, if we want to be successful in 2011, to simply come in and repeat past talking points," he said. The signals we received from India have been "very mixed," Punke said. Talks in New Delhi in July were "extremely constructive," Punke added. "We felt like we were on the cusp of entering into" critical discussions and negotiations but then we came back and they never materialized, he said.

Commerce Approves ThyssenKrupp FTZ Application

Commerce's Foreign Trade Zone Board rejected concerns of its own staff, the United Steelworkers and domestic steel companies and approved Dec. 20 the application of ThyssenKrupp to establish a Foreign Trade Zone (FTZ) subzone at its plant in Calvert, Ala. A staff report in April 2010 had recommended limiting the benefits for the plant to exports only, but the final approval placed just three restrictions on ThyssenKrupp (see **WTTL**, April 12, 2010, page 2).

> The primary restriction will require the company to apply "privileged foreign status" to ferrosilicon, molybdenum and titanium entering the subzone. Under privileged foreign status these materials will maintain the same tariff status as when they enter the subzone, and Customs will apply duties to those components in finished steel shipped from the subzone even though they may have undergone a transformation in the zone. The other conditions limit the subzone grant to five years and require the reporting of unspecified data.

Court Sustains ITC Views on Injunctive Relief in 337 Cases

The International Trade Commission (ITC) is not required to follow the rules of district courts in weighing injunctive relief in the form of exclusion orders in Section 337 cases involving patent-infringing imports, the Court of Appeals for the Federal Circuit (CAFC) ruled Dec. 21 in *Spansions Inc. v. ITC*. The legal standard for denying injunctive relief based on the public interest under the Trade Act is different from the standard that applies to patent-law cases in district courts, the appellate court ruled. The precedent-setting decision sustains the ITC's 2009 determination that seven firms infringed two semiconductor patents held by Tessera, Inc. and its imposition of a limited exclusion order. The CAFC said the Supreme Court's 2006 opinion in *eBay, Inc. v. MercExchange LLC* doesn't apply to ITC actions under 337.

"As contrasted with the remedial scheme established by Congress for proceedings before the Commission, the statutory remedies available in proceedings before the district courts are quite different," the court ruled. "Given the different statutory underpinnings for relief before the Commission in Section 337 actions and before the district courts in suits for patent infringement, this court holds that *eBay* does not apply to Commission remedy determinations under Section 337," it declared. "The Commission is not required to apply the traditional four-factor test for injunctive relief used by district courts when deciding whether to issue the equitable remedy of a permanent injunction. Unlike the equitable concerns at issue in *eBay*, the Commission's issuance of an exclusion order is based on the statutory criteria set forth in Section 337. Spansion's argument that the term 'public welfare' is so 'broad and inclusive' that Congress must have intended it to include the traditional equitable principles reflected in the *eBay* standard is unpersuasive when viewed in the context of Section 337," the CAFC ruled.

U.S. May Use Investment Rules to Leverage Chinese Currency

China's hopes for investing more of its nearly $3 trillion in foreign reserves in higher-profit U.S. companies and resources rather than low-yielding U.S. Treasury bills may depend on it moving quicker to appreciate its currency, Treasury Secretary Timothy Geithner hinted Jan. 12. In a speech ahead of Chinese President Hu Jintao's state visit to the U.S. Jan. 19, Geithner noted that investment along with liberalization of export controls and ending China's nonmarket economy status were three of China's primary negotiating goals. "We are willing to make progress on these issues, but our ability to move on these issues will depend, of course, on how much progress we see from China," Geithner said in his prepared remarks.

> One former Treasury official told WTTL that he doubted the U.S. would change its stated policy of openness to foreign direct investment in the U.S. Nonetheless, he conceded the process for reviewing foreign investments through the Committee on Foreign Investment in the U.S. (CFIUS) offers broad discretion to determine which investments might pose national security risks (see story below).

"We believe it is in China's interest to allow the currency to appreciate more rapidly in response to market forces," Geithner said. "And we believe China will do so because the alternative would be too costly – for China and for China's relations with the rest of the world," he added. Geithner's speech, as well as talks by Commerce Secretary Gary Locke and Secretary of State Hillary Clinton, continued the Obama administration's effort to balance criticism of Chinese trade and currency policies with praise for progress that it has made in opening its economy. Locke noted that U.S. exports to China rose 34% in 2010 and could reach $100 billion in 2011.

Report Warns of Chinese Role in Telecommunications

Just ahead of Chinese President Hu Jintao's state visit to Washington, a new report from the U.S.-China Economic and Security Review Commission (USCC) Jan. 11 warns that China's growing influence and control of manufacturing of telecommunications equipment could pose a national security risk for the U.S. "China is poised to become the world's number one end-to-end supplier of telecom, cable, and mobile wireless equipment, much like AT&T and IBM dominated technology sectors in the past," says the report.

> The report worries that consumers, including the U.S. government under Buy America rules, might think they are buying domestic products that are really from China. "Hypothetically, a U.S. buyer may not realize that a product designated as domestic under Buy America and Trade Agreements Act rules, and purchased from a domestic U.S. company, may still be partly or largely sourced from an overseas supplier," it notes.

"Government buyers and commercial providers must develop both a keener sense of component-level make-ups and capabilities/risks of telecom and technology products being sold to the U.S. government, and work together to mitigate or limit risks," it suggests. "U.S. government organizations must also become adept at tracking the dynamics of the global telecom and technology markets, to include maintaining a watchful eye on mergers, acquisitions, technology trends, and other business context changes that may have profound strategic meaning for government business," it adds. The report recommends development of incentives for returning critical vulnerable supply chain elements back to the U.S. for manufacturing by U.S. companies.

Ex-Im Ready to Match Low-Interest Competition

The Export-Import Bank is ready to match the low export financing rates that governments such as China and Brazil are offering their exporters, but it will need good documentation showing what those competing terms are, Bank President Fred Hochberg told WTTL Jan. 13. The first application of this new policy came in the bank's decision to match a Chinese financing offer to help General Electric win a nearly $500 million contract to sell 150 locomotives to Pakistan.

> "The hard thing always is to get good documentation of what the terms are," he told WTTL. "In this case, in Pakistan, we knew specifically what the loan terms were and we were able to match them," he said. "I am hoping that the news of this will get out so that if there are American companies out there, they don't lose heart, they sharpen their pencils and get a good bid, and if they think financing is an issue, let us know what those terms are and let us see if we can match them," he added.

White House Has July 1 Goal for Implementing Korea FTA

The Obama administration wants the Korean-U.S. (Korus) Free Trade Agreement (FTA) implemented by July 1 so it will be in place at the same time as Korea's FTA with the European Union (EU), according to U.S. Trade Representative (USTR) Ron Kirk. The formal launch of the administration's push for congressional approval of the pact is likely to be announced in the president's State of the Union address Jan. 25, Kirk indicated Jan. 13. At the same time, the White House is opposing efforts by some House Republicans to tie a vote on the Korean deal together with the pending FTAs with Panama and Colombia.

> "Our goal is to have this agreement presented to Congress, go through hearings and voted on before the EU agreement goes into effect July 1," Kirk told an audience in Washington. "Everything we are doing in terms of finalizing the text is with that July 1 goal in mind," he said.

Later Kirk told reporters he expects the Korean pact to move through Congress under fast-track rules even though the agreement was modified after fast-track negotiating authority expired. "We are operating under the assumption that we still got fast-track authority," he told reporters later. "At least, we haven't had anyone raise any objection that it doesn't," he added. Under fast-track rules, Congress essentially has 90 days to act on an FTA bill once it is introduced, meaning the Korus FTA must be sent to Congress no later than April 1 to meet the July 1 goal.

Kirk also made it clear that the administration opposes tying Korea, Panama and Colombia into one legislative package. It wants to be able to amend the Panama and Colombia deals as it did the Korean accord to show Democratic members that the accords have been improved since they were first negotiated. The reason the administration has been able to get bipartisan as well as union support for the Korus FTA is "because we took the time to do it right," he said. "Let's not short-circuit that process with Panama and Colombia," he continued. "They're just as important and we are committed to them. We are working through that process, but we think, as attractive as it might sound to some, that it would be a huge mistake to force feed all of the trade agreements into one lump bill along with Korea," Kirk declared.

* * * Briefs * * *

TRADE FIGURES: U.S. goods exports in November, including record food exports, were up 18.5% from November 2009 to $113.5 billion. Goods imports rose 15.3% to $164.7 billion. Services exports reached $46.2 billion, up 6.6% from year earlier, as services imports went up 5.7% to $33.3 billion.

EXPORT ENFORCEMENT: Former NASA employee Kue Sang Chun, 66, of Avon Lake, Ohio, was charged in criminal information Jan. 10 with one count of exporting infrared focal plane array detectors and infrared camera engines to Korea without license from State. He was not accused of taking technology or related materials from NASA Glenn Research Center where he worked, Justice said.