

Vol. 31, No. 1

January 3, 2011

Wolf Call-In Show Addresses EAR Reform Proposals

To increase transparency and make comments on recently proposed changes to the Export Administration Regulations (EAR) more useful, Bureau of Industry and Security (BIS) Assistant Secretary for Export Administration Kevin Wolf will answer questions about the proposals in a weekly teleconference call with industry. This is “not a press conference, not a speech, but opportunity to respond to specific questions,” Wolf said during his first call Dec. 22.

The teleconferences will have a restricted format, with all questions having to be submitted in advance and no opportunity for listeners to ask the BIS official questions directly. Wolf said he was limiting questions to the two notices published in the Dec. 9 Federal Register: a proposal to create a new License Exception Strategic Trade Authorization (STA) and a call for comments on “tiering” the Commerce Control List (CCL). Wolf will continue the calls until the week the comments are due, Feb. 7 (see **WTTL**, Dec. 13, page 1).

“Part of the motivation for these calls is in talking to outside world, relatively straightforward questions have come up, that the answers [to which] would make comments more helpful,” Wolf said. In response to one question, Wolf deflected concern about the new documentation requirements for the License Exception STA, saying license exception is optional. “If someone wanted to come in get a license under the traditional methods they would be able to,” he said. “STA doesn't need to be used -- if a license is not now required or wouldn't be required, there's no reason to use STA. This is only for situations when a license is required for a particular export to a particular destination,” he explained.

ITA to End “Zeroing” in Antidumping Administrative Reviews

Dumping margins on scores of imports that are subject to antidumping orders could be reduced or eliminated as the result of an International Trade Administration (ITA) proposal in the Dec. 28 Federal Register to end the use of “zeroing” in antidumping administrative reviews. The long-anticipated move, if adopted as proposed, would bring the U.S. into compliance with a raft of World Trade Organization (WTO) rulings that have found the use of “zeroing” in antidumping administrative reviews inconsistent with WTO rules. ITA in 2006 dropped the use of zeroing in original investigations also based on WTO rulings against the practice. The proposal is expected to draw sharply opposing comments from import-sensitive industries that are heavy users of the antidumping law and lawyers who have represented respondents in trade cases. While the WTO has consistently rejected the use of zeroing in both investigations and reviews,



U.S. courts, particularly in *Corus Staal* and *Timkin*, have said the agency has discretion to use the practice (see **WTTL**, Aug. 2, page 1). Under current practice, ITA usually compares transaction-specific export prices and average normal values and treats as “zero” transaction-specific export prices that exceed the average normal value. This method tends to increase the calculated dumping margin and the antidumping duties imposed on subject imports.

“In response to the findings of inconsistency identified above, the Department now proposes to modify its methodology for calculating weighted average margins of dumping and assessment rates to provide offsets for non-dumped comparisons while using monthly average-to-average comparisons in reviews in a manner that parallels the WTO-consistent methodology the Department currently applies in original investigations,” the agency stated.

“Except where the Department determines that application of a different comparison method is more appropriate, in reviews, the Department proposes to compare monthly weighted average export prices with monthly weighted average normal values and to grant an offset for such comparisons that show export price exceeds normal value in the calculation of the weighted average margin of dumping and assessment rate,” it explained. “Where the weighted average margin of dumping is zero or de minimis, no antidumping duties will be assessed,” it said. “Any changes in methodology will be applicable in any determinations made pursuant to section 129 of the URAA (19 U.S.C. 3538) in connection with the above-referenced WTO disputes, and in all reviews pending before the Department for which a preliminary result is issued more than 60 business days after the date of publication of the Department's Final Rule and Final Modification,” ITA stated.

ITA’s proposal comes as the U.S. apparently has lost another WTO case against zeroing. Brazil says it is optimistic about preliminary WTO panel findings in its complaint against U.S. zeroing procedures used in the review of the dumping order on orange juice imports from Brazil. The panel’s interim report was circulated confidentially Dec. 20. Brazil “welcomes with satisfaction the panel determinations,” a Brazilian press release said. The U.S. and Brazil have until Jan. 12 to comment on the preliminary findings. The final report will be circulated Feb. 21.

U.S. to Continue Managed Approach to Open Chinese Markets

U.S. trade policy for China in 2011 will continue to be a mix of cooperative negotiations and selective use of the World Trade Organization (WTO) dispute-settlement process, the U.S. Trade Representative’s (USTR) office indicated in its annual report to Congress Dec. 23 on Beijing’s compliance with its WTO accession obligations. The report came just a few days after smiling U.S. and Chinese officials lauded progress they made on several complaints highlighted in the report following the meeting of the Joint Commission on Commerce and Trade (JCCT) (see **WTTL**, Dec. 20, page 2). The annual report notes these JCCT results.

As with past annual reports on Chinese WTO compliance, the new report attempts to balance praise for China’s market reforms with continuing complaints about areas where Beijing isn’t meeting its obligations. All of China’s accession commitments were supposed to have been completed by Dec. 11, 2006, the report notes. While China made significant progress toward meeting that deadline, “increased government intervention seemed to emerge in 2006, as China’s progress toward further market liberalization began to slow,” it argues.

In 2011, the U.S. “will continue to place particular emphasis on reducing Chinese government intervention in the market,” the report says. “Moreover, based on the willingness that China’s leadership displayed for the past two years to work cooperatively and pragmatically with the new administration on contentious issues, the United States is optimistic that concrete progress is again obtainable in 2011,” it adds. “In addition, as the United States has repeatedly demonstrated, when bilateral dialogue is not successful in resolving WTO-related concerns, the United States will not hesitate to invoke the dispute settlement mechanism at the WTO where appro-

priate,” it warns. The report says most complaints that it identifies were raised by U.S. industry in response to a USTR call for comments on China’s trade practices and may merit WTO attention, but they do not constitute a determination that Beijing is violating its WTO commitments. “The report does not provide an exhaustive analysis of the many areas in which China’s WTO compliance efforts may have or may have not, in the view of the U.S. Government, satisfied particular commitments made in China’s WTO accession agreement,” the report says.

While the report cites the latest JCCT results, it also points out areas of continuing concern. “In 2010, the prevalence of interventionist policies and practices, coupled with the large role of state-owned enterprises in China’s economy, continued to generate concerns among U.S. stakeholders about the direction of China’s reform,” the report notes. “Major issues included China’s indigenous innovation policies, serious problems with intellectual property rights enforcement, and China’s slow movement toward accession to the WTO Government Procurement Agreement, as well as continued market access barriers and discrimination against foreign enterprises in many sectors of China’s economy,” it states. Complaints also cited Beijing’s policies toward foreign service providers, international standards and direct selling.

Congress Comes Up Short on Trade Legislation

The difficulty in getting trade legislation through Congress was demonstrated again as lawmakers adjourned for the year Dec. 22 after passing only a six-week extension of the Trade Adjustment Assistance Act (TAA) and the Andean Trade Preferences Act (ATPA) but failing to act on extension of the Generalized System of Preferences (GSP) and a miscellaneous tariff bill (MTB). The Senate by unanimous consent adopted an amendment offered by Sen. Scott Brown (R-Mass.) to the Omnibus Trade Act of 2010 (H.R. 6517), extending TAA to Feb. 13 and ATPA to Feb. 12 and dropping the GSP and MTB provisions of the bill (see **WTTL**, Dec. 20, page 4). The House, which passed the full measure the week before, accepted the amended version.

Love prevailed in the short-term extension of ATPA, assuring that Colombian flowers imported for Valentine’s Day won’t get hit with new tariffs. TAA’s fate still hangs on objections that Sen. Charles Grassley (R-Iowa) reportedly has to state staffing requirements for TAA programs. GSP was the victim of complaints that Sen. Jeff Sessions (R-Ala.) has to tariff-free treatment of sleeping bags from Bangladesh which compete with an Alabama company that makes the bags. MTB appears to have suffered from the tougher anti-earmark stand of Senate Republicans. GSP has lapsed on several occasions in past years, and Congress has had to provide retroactive tariff waivers when it finally has renewed the law.

Pressure Mounts for WTO Case on China’s Rare Earth Restraints

The Chinese Ministry of Commerce’s Dec. 28 announcement that it will cut export quotas for rare earth minerals in the first half of 2011 has increased pressure on the Obama administration to launch a WTO complaint against the export restrictions. The USTR’s office has been weighing a WTO case on the issue since the middle of 2010, and in its annual report on China’s WTO compliance, the office warned that such a complaint is still possible (see **WTTL**, June 21, page 1). “Going forward, the United States will continue to pursue vigorous engagement with China on this issue and will not hesitate to take further actions, including WTO dispute settlement, if appropriate,” the report warns (see story page 2).

Rare earth exports were discussed during the meeting of the Joint Commission on Commerce and Trade (JCCT) Dec. 14-15. Chinese officials defended the export restrictions as based on environmental concerns. The heavy environmental damage caused by the mining and processing of rare earth has curbed or eliminated production in most other countries. “Environmental concerns are the sole reason why China reduced the output of rare earth,” Chinese Commerce Minister Chen Deming told a press conference after the JCCT meeting. “While we reduced the output volume of rare earth, we also imposed restrictions on the amount of rare earth to be

used in domestic industries,” he said through an interpreter. “Such a practice is consistent with our WTO commitments,” he claimed. “We haven’t restricted exports of rare earth to any country. What we have done is to reduce the volume of exports,” he argued.

Chen said China is talking with other countries about developing new technologies and methods to explore, mine and produce rare earth in an “environmentally friendly manner,” and to find ways to recycle the materials. He also pointed out that China has 31% of the world’s reserve of rare earth but provides more than 90% of the world’s supply. “It will really be a lack of conscience for a country to complain about such a fact and try to politicize the matter,” Chen declared.

* * * **Briefs** * * *

BIS: Douglas Hassebrock (pronounced Has-se-brock) has been named director of office of export enforcement. He was assistant director for investigations at Recovery Accountability and Transparency Board, which is also from where BIS deputy assistant secretary for export enforcement Donald Salo came. Hassebrock, who is Lt. Colonel in the U.S. Air Force Reserves, formerly was special agent in office of Interior Department’s inspector general and assistant special-agent-in-charge of Energy Department’s technology crimes section. Hassebrock started his law enforcement career with Air Force office of special investigations. Presentation he made while working for accountability board on his approach to use of technology in criminal enforcement can be seen on YouTube.



WASSENAAR ARRANGEMENT: Annual Plenary meeting Dec. 9-10 approved changes to multinational control list, including: in Category 1, excluding controls on composites in finished items; Category 2, replacing “allowing for” with “capable of”; Category 3, raising output performance parameters for analog-to-digital converters; Category 4, adding exclusion note for “civil aircraft” to electronic composite equipment and excluding computers specially designed for civil aircraft application from radiation hardened controls; Category 5, adding controls on electronic assemblies for information security items; Category 6, adding new entry for laser acoustic detection equipment; Category 7, adding note that says controls on linear accelerometers do not apply to those intended for measurement of only vibration and shock; Category 8, editorial changes; Category 9, adding new entry for technology for adjustable flow path systems.

WIND TURBINES: USTR’s office Dec. 22 said it has asked China for formal WTO dispute-settlement consultations over Beijing’s subsidies for its domestic wind turbine industry and domestic content requirements for government purchases of wind turbines. “Import substitution subsidies are particularly harmful and inherently trade distorting, which is why they are expressly prohibited under WTO rules,” said USTR Ron Kirk said in statement. “These subsidies effectively operate as a barrier to U.S. exports to China,” he added. Case stems from Section 301 petition United Steelworkers filed against several Chinese programs aimed at bolstering domestic “green” technologies (see **WTTL**, Sept. 13, page 3).

NOMINATIONS: Senate adjourned Dec. 22 *sine die* without confirming nominations of Eric Hirschhorn to be BIS under secretary, Michael Punke to be deputy USTR, Islam Siddiqui to be USTR’s chief agricultural negotiator and Francisco Sanchez to be ITA under secretary. They remain in office under recess appointments that President Obama made early in 2010 (see **WTTL**, April 5, page 1). Unless Obama renominates them and incoming Senate confirms them, their terms in office will expire at end of 2011.

EXPORT ENFORCEMENT: PPG Paints Trading (PPG Paints), Chinese subsidiary of PPG Industries, Inc. (PPG), of Pittsburgh, Pa., pled guilty in D.C. U.S. District Court Dec. 21, to conspiring to violate IEEPA and EAR with export and reexport of high-performance coatings from U.S. to Chashma 2 Nuclear Power Plant in Pakistan via China. PPG Paints will pay \$2 million criminal fine, serve five years corporate probation and forfeit \$32,319 in gross proceeds for three illegal exports. In separate settlement with BIS, PPG and PPG Paints also agreed to pay total civil penalties of \$1,750,000 and conduct audit of 2011 and 2012 export transactions of PPG and its business units in U.S. and China. In addition, PPG Industries entered into cooperation and non-prosecution agreement with Justice under which department agreed not to bring charges related to this matter against PPG or its affiliates.

MORE EXPORT ENFORCEMENT: Yuri Montgomery, who was charged with violating September 2000 Denial Order by handling exports for Macedonia’s Micei International, has reached settlement with BIS. Agency imposed \$340,000 civil penalty but will let him pay only \$17,500. Micei faces separate charges, but case is on hold pending outcome of suit in DC U.S. District Court (see **WTTL**, Sept. 13, page 3).

VISA FORM I-129: Deadline for using new form extended to Feb. 20 (see **WTTL**, Nov. 22, page 1).