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Concerns Raised about Data from China in Trade Cases

Members of the trade bar – both on the respondent and petitioner sides – are raising alarms about the accuracy and, in some cases, honesty of trade information being filed in antidumping and countervailing duty cases as well as administrative reviews involving Chinese goods. The issue was the subject of a D.C. Bar Association meeting and several members of the group reportedly are trying to come up with recommendations on how to address the problem. The topic is extremely sensitive because complaints have involved some U.S. law firms representing Chinese respondents and their role in verifying the allegedly bogus data submitted.

For now, sources say Commerce's International Trade Administration (ITA) is taking a case-by-case approach to the problem. In some situations, when ITA staffers have been unable to verify information during visits to China, the submissions have been rejected and the agency has applied "adverse-facts-available" to the imports. In at least one case, it rejected data as fraudulent. One lawyer said he was worried that ITA "will look at everything [from China] with a jaundiced eye" because of the erroneous filings.

U.S. lawyers are cautious in assigning blame for the bad data. "We can't determine who is engaging in fraud: the Chinese government, Chinese lawyers or the Chinese firm," one attorney told WTTL. Another attorney put the blame on Chinese lawyers who he said have solicited business among potential Chinese respondents. Complaints have also been made against some U.S. law firms that have participated in these cases. One lawyer accused these firms of serving as a "mail drop" for the Chinese and failing to verify data that they are certifying to be true.

According to several trade attorneys the problem is fueled by pressure Chinese exporters are putting on American law firms to cut their prices for representing them in trade remedy cases. With new trade complaints becoming rare – only three filed in 2010 – there is increased competition among law firms to get trade work. Some Chinese firms apparently don't care if ITA rejects the submissions because they think the cards are stacked against them already at Commerce, one attorney said. "Why participate if the system is rigged?" he asked.

Controls Not Hindering "Green" Exports, BIS Claims

Don't blame U.S. export controls for problems U.S. firms have in exporting "green" products and technology, the Bureau of Industry and Security (BIS) says in essence in a report issued Aug. 16 on the impact controls have on trade. Green technology that currently requires an



export license accounted for only .05% of total U.S. goods exports in 2008 -- \$697.4 million out of \$1.3 trillion, the agency says in the report, "Critical Technology Assessment: Impact of U.S. Export Controls on Green Technology Items." But those licenses represented 22.5% of the value of all export licenses handled by the agency that year.

While BIS admits the report is not an "exhaustive assessment" of all green technology that may be affected by dual-use export controls, it says the report is "an attempt to anticipate ways that BIS can support the creation of green jobs and advances in green technology through facilitation of secure trade in this important area, while mitigating national security concerns."

The report identifies 80 Export Control Classification Numbers (ECCNs) under which green technology products and materials would require an export license for certain destinations. BIS admits the total value of exports under these ECCNs represents much more than just green technology, but it used the total to estimate the potential effect of dual-use export controls on green technology trade, including items that can be used to create products that contribute to clean energy, energy efficiency, and other environmental or green initiatives and technologies.

Still, the report shows that certain key areas in the sector do face controls, including certain products and technology associated with wind power, solar power, alternative fuel vehicles, water purification and energy efficiency. As a result, it won't stop exporters of specific products from being concerned about competition and future rules.

The report acknowledges industry complaints about lengthy processing times and the difficulty in obtaining export licenses for carbon fiber and machine tools needed for the production of wind turbines and lighter-weight, energy-efficient commercial composite aircraft structures and engine components. It notes that two U.S. companies that produce tape laying and tow/fiber placement machines are considering moving production overseas because of the increased demand for wind turbines. BIS cites another case where a German maker of controlled Metal-Organic Chemical Vapor Deposition equipment sold this equipment to a customer that was denied an export license for the same equipment from a U.S. producer.

Mexico Ups Ante in Ongoing Trucking Dispute

Sixteen years and counting since the North American Free Trade Agreement (NAFTA) went into effect, U.S. authorities continue to be paralyzed in efforts to resolve a trucking dispute with Mexico to the satisfaction of anyone. Last year, in response to Congress' defunding a pilot program to allow Mexican truckers into the U.S., Mexico imposed sanctions against U.S. exports, and on Aug. 18, it revised the target list to cover 99 products, including 38 new items, that will be hit with tariffs ranging from 5% to 25%. The \$2.6 billion in U.S. exports that face the tariffs range from potatoes, pork, cheese and oranges to toilet paper, pens and pencils.

In releasing the list, the Mexican government claims the U.S. still "fails to meet their obligations regarding cross-border transport services," according to an unofficial translation. "In accordance with NAFTA, the suspension of benefits of equivalent effect may be kept until we reach a mutually satisfactory agreement on the resolution of the dispute," it says.

The opposing views on the trucking issue -- and the tension blocking Washington's ability to resolve the dispute -- are seen in the reactions to the latest changes in the retaliation list. "We are extremely disappointed that our top volume export market has taken this action, but we're more disappointed that the United States is not living up to its trade obligations," said National Pork Producers Council President Sam Carney. On the other hand, Teamsters General President Jim Hoffa said, "Instead of slapping additional tariffs on U.S. goods, Mexico should be living up to its end of the bargain by making sure its drivers and trucks are safe enough to use our highways." U.S. Trade Representative (USTR) Ron Kirk issued a statement saying he was disappointed with Mexico's actions. "Following President Obama's direction, Department of

Transportation Secretary Ray LaHood and I have worked with other agencies and stakeholders in Congress seeking to resolve this issue in a way that addresses safety concerns and upholds our trade obligations,” Kirk said, repeating the same assertion administration officials have been making for over a year (see **WTTL**, May 18, 2009, page 4).

U.S. Not Eager to Enter ITA-II Talks after WTO Victory

With a favorable World Trade Organization (WTO) dispute-settlement panel report under its belt, the U.S. is not ready to enter negotiations to update the Information Technology Agreement (ITA) or an ITA-II, U.S. trade officials indicated after the WTO released the panel’s report Aug. 16 (see **WTTL**, Aug. 16, page 3). “We have not made any decision on whether to expand the ITA or not,” one U.S. trade official, speaking on background. For now, he said, the U.S. wants information technology issues to be addressed in the Doha Round talks on non-agriculture market access (NAMA). “We continue to support the Doha NAMA negotiations, in general, and we’ve always supported a sectoral initiative on electronic products,” he said.

The WTO panel’s findings, which have been widely known since June, agreed with complaints from the U.S., Japan and Taiwan that tariffs the European Union (EU) placed on three products -- set-top boxes, flat-panel displays and multifunction digital machines -- were inconsistent with its obligations under the ITA. The EU has argued that newer technologies are not covered by the accord and has pressed for talks on an ITA-II to address new products and technologies.

As U.S. officials are reading the panel report, all new generations of information technologies under the ITA are eligible for tariff-free treatment just as the original items. The panel report, however, doesn’t make such a great leap. The 489-page report goes into a detailed examination of the wording of the “headnote” the EU published when it revised its tariff schedule to reflect the concessions it made in the ITA and changes that the World Customs Organization made to nomenclature used in the Harmonized Tariff Schedule (HS). The EU headnote said that “any product” in the ITA annex that is “not specifically provided for in this Schedule...shall be bound and eliminated as set forth in paragraph 2(a) of the Annex to the Declaration, wherever the product is classified.”

“Due to the informal nature of the plurilateral technical discussions that took place during the negotiation and implementation of the ITA, there is no formal record of ITA participants’ discussions on how modifications would be incorporated into Members’ WTO Schedules,” the panel stated. “Almost all ITA participants included an identical or similarly worded headnote in their WTO Schedules but there is no express requirement in the ITA itself or elsewhere to do so. The origin of the idea for including a headnote as an aspect of the implementation of the ITA is not clear,” it added.

“In summary, the relevant object and purpose with respect to this dispute is the general object and purpose of the WTO Agreement and the GATT 1994 as a whole, which is to provide security and predictability in the reciprocal and mutually advantageous concessions negotiated by parties for the reduction of tariffs and other barriers to trade,” the panel said. The EU’s concessions require duty-free treatment for any automated data processing machine and parts “that perform at least one specified function that involves accepting or delivering data in a form (codes or signals) that can be used by the automatic data-processing machine or automatic data-processing machine system,” it declared.

Dispute Risks Future of Softwood Lumber Agreement

Washington’s intensifying complaints about Canada’s compliance with the 2006 Softwood Lumber Agreement (SLA) have raised concerns that the U.S. may be planning to withdraw from the pact. USTR Ron Kirk is coming under increasing pressure from members of Congress, particularly Senate Finance Committee Chairman Max Baucus (D-Mont.), and U.S. producers to

act against allegations that British Columbia (BC) is violating the SLA by selling good timber at the same price it is selling distressed trees that have been damaged by a beetle infestation in the province. At the beginning of August, Kirk told reporters he would announce his decision on the BC issue within 30 days.

Kirk raised concerns about BC policies in a recent letter to Canadian Trade Minister Peter Van Loan and in a meeting with Van Loan in Canada in July. He also sent an interagency team to BC in July to discuss the issue. Kirk met Aug. 17 with Canadian Ambassador Gary Doer. "Ambassador Kirk expressed the U.S. Government's concerns with British Columbia's pricing policies," a USTR spokesperson told WTTL in an e-mail.

Some trade lawyers are warning that the BC case could become a pretext for withdrawing from the SLA and allow the U.S. to claim the withdrawal is based on Ottawa's breach of the accord. If the U.S. claimed it was withdrawing based on a breach of the SLA, the "peace clause" in the deal would be nullified, and U.S. lumber producers would be able to file antidumping and countervailing duty complaints immediately against Canadian imports. With the collapse of the U.S. housing industry, both U.S. and Canadian lumber producers have been suffering and numerous mills on both sides of the border have closed.

At this point, the U.S. industry may feel it would benefit more from trade cases, even at the preliminary stage, than from the restrictions on Canadian exports under the agreement, one source suggested. In addition, Canadian exporters may be more vulnerable to complaints because they have lowered prices to compensate for the export fees imposed under the SLA and benefitted from federal and provincial subsidies since the accord went into effect.

In his Aug. 18 letter to Kirk, Baucus said, "The Provincial Government of British Columbia is selling government-owned timber used for softwood lumber production at firesale stumpage prices that the Agreement reserves for salvage-grade timber." He said these actions circumvent the SLA's intent, effectively nullifying the effect of the export charges imposed under the accord. "I therefore urge you to initiate consultations immediately with Canada under the Agreement to remedy this circumvention," Baucus wrote.

* * * Briefs * * *

IRAN: Treasury in Aug. 16 Federal Register published Iran Financial Sanctions Regulations to implement new restrictions imposed with enactment July 1 of new Iran Sanctions Act.

ANTIDUMPING: Court of Appeals for Federal Circuit Aug. 12 reversed and remanded CIT ruling on ITA's policy on exclusion of sales. "Commerce's statement of a general preference for exclusion of sales outside the ordinary course of trade where, as here, the data are for like products sold by other respondents, is reasonable," appellate court ruled in *Thai I-mei Frozen Foods Co., Ltd., v. U.S.*

SANCTIONS: In settlement with Justice, OFAC and Manhattan District Attorney's office, Barclays Bank PLC of London agreed to forfeit \$298 million for violating IEEPA and TWEA related to illegal transactions for customers from Cuba, Iran, Sudan and other countries sanctioned by OFAC. It will forfeit \$149 million to U.S. and \$149 million to N.Y. District Attorney's office to settle all claims.

PERU: No progress reported in talks Assistant USTR Everett Eissenstat held Aug. 19-20 in Lima, Peru, on U.S. complaints that Peru is not complying with U.S.-Peru FTA requirements on environmental protections. "Both governments agreed to convene the second meeting of the Forest Sector Subcommittee the week of September 6, 2010. Following the Subcommittee meeting, both governments will hold an open session with stakeholders," USTR's office said.

AIRBUS: U.S. appealed two findings Aug. 19 of WTO dispute-settlement panel's ruling on U.S. complaint against European subsidies for Airbus. Appeal challenges findings that launch aid granted to Airbus over course of 40 years was not part of ongoing program of assistance and that certain launch aid contracts were not export subsidies. EU has also appealed ruling (see WTTL, July 26, page 2).

EDITOR'S NOTE: In keeping with our regular schedule, there will be no issue of *Washington Tariff & Trade Letter* on Aug. 30. Our next issue will be dated Sept. 6.