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BIS Technical Corrections Do Much More

The Bureau of Industry and Security (BIS) amended the Export Administration Regulations (EAR) in the June 4 Federal Register under the heading of “technical corrections,” but the changes go beyond such simple revisions. The final rule attempts to clarify agency policy on foreign exports that contain “*de minimis*” levels of U.S. components, as well as rules on machine tools and “unnecessary” notification requirements. The fix to the *de minimis* rules corrects a December 2008 change in the EAR that contained erroneous instructions, BIS said.

In the new rules, BIS said all items, regardless of the level of foreign content, are subject to the EAR if they are physically located in the U.S. “This rule removes Sec. 734.3(b)(4), which delineates a category of items not subject to the EAR (‘foreign made items that have less than the *de minimis* percentage of controlled U.S. content based on the principles described in Sec. 734.3 of this part’), because the provision could be erroneously read as applying the *de minimis* exclusion to foreign made items that are located in the United States,” it said.

Another change clarifies accuracy controls on numerically controlled machine tools subject to Export Control Classification Number (ECCN) 2B001. BIS said it believed the EAR language was consistent with how industry uses the term “capacity.” “Nevertheless, some parties have indicated that they find the language set forth in ECCN 2B001 confusing,” it acknowledged. “Therefore, BIS is revising the entry to state that the NP reason for control does not apply to ‘turning machines under 2B001.a with a capacity no greater than 35 mm diameter’,” it stated.

The agency also has removed what it calls an “unnecessary” requirement for exporters to receive delivery certifications from foreign governments and submit those certifications to BIS for items subject to export licenses for national security reasons after the national security control is removed. “Amended Sec. 748.13(b) provides that if the national security export control is removed from the item that is the subject of a license that is issued, the requirement to obtain the delivery verification is removed as well,” BIS stated. Because the license requirements are imposed by the EAR, “BIS would be aware of their removal regardless, and therefore would not need written notice from the licensee on this subject,” the agency said.

Administration Has Trouble Finding Candidate for Import Post

After 18 months in office, the Obama administration is still having trouble finding a candidate to fill the post of Commerce assistant secretary for import administration, the official who



oversees the department's handling of antidumping and countervailing duty complaints. The task of filling the position has been difficult because several proposed candidates were disqualified because they either were registered lobbyists, a nearly blanket bar to jobs in the administration, or were actively involved in trade cases that presented insurmountable conflicts of interest, explained Commerce Under Secretary for International Trade Francisco Sanchez. "I'm still looking," he told reporters June 2.

"The naming of an assistant secretary has been a little challenging," Sanchez said. "I have found some wonderful candidates, but for one reason or other, haven't been able to go forward with them," he said. "Some have been registered lobbyists, that's been a challenge. Others, because they are so engaged in the community of antidumping petitions and countervailing duty, had too many conflicts. So they were clearly skilled, but they would have to conflict out" of cases, he added.

Commerce's import administration office has not been burdened by a heavy workload of new cases. Since Jan. 1, only two antidumping cases and one countervailing duty petition have been filed with the office. At this pace, 2010 could set a record for the lowest number of trade complaints since review of trade complaints was transferred to Commerce from Treasury in 1979. The low caseload is due, in part, to the sharp decline in imports in 2009, which would make it hard for petitioners to show rising imports were a cause of injury during the last twelve-month period of investigation. Its greatest task is dealing with administrative reviews of past orders and sunset reviews for orders that have been in place for five years.

WTO Report on China Finds Mixed Progress toward Reforms

It seems almost impossible to write a report about China that doesn't praise what the Chinese have already accomplished in trade and economic reforms, while expressing disappointment with what hasn't been achieved. The World Trade Organization's (WTO) Trade Policy Review of China, discussed by members at a May 31-June 1 meeting, followed that pattern, with an extensive exposition on what Beijing has done well and a litany of concerns about where progress is still needed. Several countries, including the U.S. and European Union (EU), said the report should have been more critical about many Chinese policies (see story page 3).

The WTO secretariate's examination of China found many of the same problems that have been cited in other reports by governments and industry. These include Beijing's enforcement of intellectual property rights (IPR), its lack of transparency, domestic standards, tariffs and export restrictions. China's own response to the report detailed all the steps it is taking to address these concerns.

"Since its previous Trade Policy Review in 2008, China has continued the gradual liberalization of its international trade and investment regime," the report said. It also noted that "China's dependence on export-led growth, particularly as a global platform for exports of manufactured products, left it vulnerable to the effects of the global economic recession that began in late 2008." China's exports fell 16% in 2009 and imports dropped 11%.

While China aims to reduce its domestic savings rate, diversify the economy, improve its capital market and relax foreign direct investment restrictions, other factors are working against that goal, the report said. "The structurally high propensity to save in China at the household and enterprise level impedes efforts by the authorities to boost domestic demand so as to achieve a more balanced growth path for the economy, including increasing the consumption of imported goods and services," it said. The report also highlighted some of China's progress.

"Although some aspects of China's trade policy regime remain unclear (e.g. apparent lack of criteria regarding the publication of regulations), China has continued to adopt measures to increase the transparency of its trade and trade-related policies, practices, and measures," it noted. On the other hand, the lack of transparency in China remains a problem, the report

stated. "Some aspects of China's trade policy regime remain complex and opaque," the report said. "The complexity and opacity can leave scope for administrative discretion and thus corruption," it added. "I don't think the questions are prompted so much by lack of transparency as by increasingly extensive trade interests," one trade official noted. Many of complaints about transparency are generated by commercial interests, he said.

The report also focused on China's increasing use of export restrictions. "Export restrictions, explicit or implicit, are a major feature of China's trade regime," the report said. "The main explicit restrictions involve: export prohibitions; export quotas; export licensing requirements; and export taxes." The U.S. and EU are very concerned that China controls 90% of rare earth minerals and restricts exports. "Although the Government increased its export restrictions on rare earth by, for example cutting export quotas or increasing export taxes, it has imposed domestic production caps on rare earth and is considering levying an environmental tax on the production/extraction of natural resources" over the next five years, the report said.

The WTO secretariat also concluded that China has made progress on IPR protection but has more to do. In its portion of the report, China pointed out that the number of inspections of businesses for copyright enforcement rose from zero in 2006 to 782,670 in 2008. The number of operations shut down as a result rose from zero in 2006 to 36,601 in 2008, it said. China also complained about how other countries are targeting Chinese goods in trade cases that Beijing considers protectionist. "China remains the most targeted country of various trade remedy measures," the report by China said. "Statistics from the WTO show that in 2008, WTO members initiated a total of 71 antidumping investigations against China, accounting for 33.7% of the total in that year; the number of countervailing investigations against China was 11 in 2008, accounting for 68.8% of the total," the Chinese pointed out.

Concerns Raised About Slowdown in China's Reforms

The U.S. and several of China's other major trading partners, particularly the EU, voiced concerns during a WTO Trade Policy Review of China's trade policies May 31-June 1 about what they view as a slowdown in Beijing's trade reforms (see story page 2). The EU and U.S. "were unreservedly critical" of China's liberalization efforts over the last few years, one trade official in Geneva reported. Some countries that are benefitting from trade with China, however, were more supportive of Beijing's efforts, including New Zealand, Brazil, ASEAN members, Japan and South Korea. "Things look very different ... if you're in Asia than if you're sitting in North America or Europe," the official said.

The U.S. disagreed with the report's broad assertion that China has maintained its long-term strategy of gradually opening up its economy to international trade and foreign direct investment since 2008, said Deputy U.S. Trade Representative (USTR) Michael Punke in a prepared statement. The report's assertion should be qualified, he said.

China made noteworthy progress in adopting economic reforms in the years following WTO accession, Punke said. "However, beginning in 2006, progress toward further market liberalization began to slow," he said. Punke claimed new restrictions on market access and foreign investment are caused by a continued pursuit of "problematic industrial policies that relied on excessive government intervention" through trade distorting measures. An EU official also said Chinese reforms are markedly slowing. The level of state interference in the economy is still noticeable and less and less compatible with China's level of economic development, the EU official said.

The EU said more needs to be done to improve transparency and predictability of the regulatory environment, including the increased use of public consultations on some proposed legislative measures. "Public consultations should be systematically held for all new measures with an effect on trade," an EU official said. "An illustrative example was the draft notice on the indigenous innovation scheme which was initially about to enter into force on 10th of May, the

same date as the deadline for comments. This is neither good regulatory practice nor in line with the pro-transparency statement that the Chinese delegation has made today,” he stated.

China’s exchange rate policies weren’t pressed during the review apparently because countries believe the U.S. and China reached an understanding during their recent talks in Beijing. The problem of Chinese currency manipulation is serious, but there’s no way to deal with it in the WTO, one diplomat said.

“Members remained concerned over certain aspects of China’s export regime, notably restrictions, licensing, quotas, export taxes and partial VAT rebates,” said Ambassador Bozkurt Aran of Turkey, chairman of the WTO Trade Policy Review Body, in his prepared remarks. China’s “export barriers have not been falling at the same pace as its import barriers, and could potentially distort markets,” he said. Aran said members asked China to provide details on plans to levy a tax on its natural resources and export-related subsidy programs of local governments.

Chinese Refuse to Delay Indigenous Innovation Rules

In talks with U.S. trade officials the week of May 24, Chinese officials rejected an American request to delay implementation of proposed rules to encourage indigenous innovation in favored Chinese industries. The best Washington could get from Beijing was a commitment to accept comments on the proposed rules from the U.S. government and industry. American companies and trade associations have already filed comments, so it is not clear what additional concessions the U.S. won. “We did not get an affirmative answer on suspending” the regulations, Commerce Under Secretary Francisco Sanchez said June 2.

“The first thing we want to be able to do is comment on the policy and let industry have time to comment before it’s actually implemented,” Sanchez told the Washington International Trade Association. “The Chinese have agreed to allow some time for comment by industry,” he added.

Indigenous innovation was on the agenda of May 24-25 meeting of the Strategic and Economic Dialogue (SAED) (see **WTTL**, May 31, page 2). It also was discussed at vice ministerial-level talks Sanchez and Deputy USTR Demetrios Marantis held after the SAED as part of a mid-year review of the Joint Commission on Commerce and Trade (JCCT). “It’s not an unworthy goal of the Chinese to want to increase innovation,” Sanchez said. “We don’t have any quarrel with the Chinese government wanting to foster innovation, but we do have concern that as they go about trying to do that, that they do it in a way that doesn’t really go with the spirit of free and fair trade,” he added. “Because innovation and the development of innovation is so important to them, this is not an issue that we will resolve in one meeting or two meetings,” he said.

* * * Briefs * * *

USTR: USTR Ron Kirk cancelled plans to attend APEC trade ministerial meeting in Japan after he was involved in car accident June 2 in Dallas. “Ambassador Kirk was taken to a local hospital where he was treated for minor injuries and released. No one was seriously injured in the accident,” his office reported. Deputy USTR Demetrios Marantis will lead U.S. delegation instead and will be joined by Deputy USTR Michael Punke, Assistant USTR Wendy Cutler and other USTR officials.

EXPORT ENFORCEMENT: Juwhan Yun, aka Jw Yun, 69, of Short Hills, New Jersey, a naturalized U.S. citizen, pled guilty May 24 in Miami U.S. District Court to attempting to export RD-180 rocket propulsion system and technology to South Korea without license. He had been indicted in April 2009 (see **WTTL**, May 11, 2009, page 4). Yun was previously convicted of conspiring to export Sarin gas, sentenced to 39 months in prison and debarred from exporting defense items.

MORE EXPORT ENFORCEMENT: Mohammed El-Gamal pleaded not guilty at May 27 arraignment in D.C. U.S. District Court to indictment charging him with exporting or attempting to export computer equipment, including integrated circuit boards containing strong encryption software, to Libya in 2006.