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## DDTC Unveils Draft Proposal to Amend Brokering Regulation

Six years after State's Directorate of Defense Trade Controls (DDTC) first said it planned to review the brokering rules in the International Traffic in Arms Regulations (ITAR) and nearly five years after a federal court in the *Yakou* case added more confusion to the regulations, DDTC has unveiled a draft proposal to amend the ITAR definition of brokering, its registration requirements and exemptions. The agency posted the draft on its website in advance of the Dec. 4 meeting of its Defense Trade Advisory Group (DTAG), where the draft will be a main topic on the agenda. The draft proposes a new exemption for brokering activities performed by a broker for a registered manufacturer or exporter as long as certain conditions are met.

Defense exporters have complained for years about DDTC's implementation of the 1996 amendments to the Arms Export Control Act (AECA), which added new restrictions and penalties on U.S. citizens involved in brokering arms. DDTC originally planned to issue guidelines on the rules, but then decided to amend the ITAR instead (see **WTTL**, March 26, 2007, page 2).

Under the proposed definition in Section 129.2 "broker" means "any person (as defined by Section 120.14 of this subchapter) who engages in brokering activities." "Brokering activities" would mean "any action of an intermediary nature to facilitate the manufacture, export, re-export, import, transfer or retransfer of a defense article or defense service." Identified as covered activities are such services as financing, transporting or freight forwarding, soliciting, promoting, negotiating, contracting, finding of potential suppliers or customers and "any other action to assist a transaction involving a defense article or defense service."

"Brokering activities include any such activities by any U.S. person wherever located, by any foreign person located in the United States, by any foreign person located outside the United States who engages in brokering activities involving a U.S.-origin defense article or defense service, by any foreign person located outside the United States who engages in brokering activities involving the import into the United States of any defense article or defense service, or by any foreign person located outside the United States who on behalf of a U.S. person engages in brokering activities involving any defense article or defense service," the draft says.

## WTO Ministerial to Underscore Doha Stalemate Since July 2008

Unless some dramatic breakthrough aimed at reinvigorating the Doha Round comes out of the World Trade Organization (WTO) Ministerial Conference in Geneva Nov. 30-Dec. 2, trade

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observers see little chance that the round will be completed in 2010 as world leaders have professed to be their goal. Because the ministerial has been deliberately planned to avoid formal negotiations on the round, any significant movement would have to come from offstage talks that trade ministers are expected to hold on the sidelines of the meeting.

As trade ministers, nongovernment organizations, business representatives and reporters gather for the ministerial, they will be confronted with the fact that little or no progress has been made since talks collapsed in July 2008. In meetings with trade officials ahead of the ministerial, WTO Director General Pascal Lamy has tried to emphasize the points where “modest” progress has been made in the last 17 months, but other diplomats in Geneva are more negative. “Nothing” has been done since July 2008, one trade official told WTTL.

“Good progress has been made this year on trade facilitation and the outlines of a new agreement are beginning to take shape,” Lamy told one meeting. WTO spokesman Keith Rockwell also points to progress, citing December 2008 papers that captured agreements reached as of July 2008 and technical work and scenario testing. But Rockwell concedes that technical progress alone “is not enough to get the deal done.” Here is the state of play on key issues:

**Agriculture:** Negotiators will soon be ready start “scheduling” specific commitments for liberalizing trade in farm goods, but political-level decisions are still needed. Talks lately have focused on the special safeguard mechanism (SSM), one of the issues that caused the talks to collapse in 2008. Negotiators are trying to understand how SSM triggers would work to allow countries to raise tariffs when farm imports surge, the timelines and size of safeguard tariffs and how SSMs would affect trade flows. An SSM decision will be both political and technical, Rockwell said. Special products is still an area of concern for some governments, he noted.

**Non-Agriculture Market Access (NAMA):** Progress on NAMA since July 2008 is “almost absolutely nothing,” one trade official told WTTL. The negotiators have focused on non-tariff barriers (NTB) in the past year, but big questions on tariff cuts still await political decisions. The expected end to NAMA talks after tariff-cutting modalities are agreed on has put pressure on officials to understanding what the cuts will produce and what flexibilities might be applied. The results of talks on sectoral agreements have been “subliminal,” Lamy said. U.S. officials continue to insist sectoral deals are needed to get political support to approve any final Doha agreement. Bilateral talks on specific tariffs and products haven’t produced much so far.

**Services:** Only incremental progress has been reported in services talks in 2009. Talks in small groups and bilateral meetings have largely focused on clarifying the messages from the “signal-ing conference” held in July 2008. There has been minimal progress in discussions on the rules of the General Agreement on Trade in Services (GATS), subsidies, emergency safeguards and government procurement, Lamy reported. Meanwhile, a proposed waiver on services for least-developed countries is now on the table.

**Cotton:** The situation on cotton may actually be worse than it was in July 2008, said one executive following the talks. Positions have hardened, he said. The four African cotton-growing nations known as the C-4 are taking a closer look at dispute settlement, he noted. Some sources claim the U.S. doesn’t accept the Hong Kong Ministerial accord to treat cotton separately and ambitiously, while others say the C-4 are making new demands. The U.S. claims the issue also depends on China and India, which are large cotton producers.

**Environmental Goods and Services:** Some new proposals have emerged in these negotiations, the chairman of the talks, Ambassador Manuel Teehankee of the Philippines, told WTTL. Saudi Arabia in November offered a proposal on carbon-capture technologies. Argentina has submitted one linking products relevant to climate change and clean energy. A group of nine countries, including the U.S., proposed a package involving 153 different products.

**Rules:** New draft texts on antidumping, subsidies, as well as a roadmap on fisheries subsidies, were circulated in December 2008 and the negotiating group is working on those texts. Talks



on fisheries subsidies “have been difficult,” Rockwell admitted, citing disputes over special and differential treatment, boat sizes, and how to determine what is an artisanal fisherman. The U.S. practice of “zeroing” in antidumping cases remains controversial and new questions have arisen about the increased use of subsidies by all nations as part of economic rescue packages to counter the impact of the 2008-2009 recession.

## **U.S. to Be Target of Pressure to Reengage in Doha Talks**

Even before the WTO Ministerial formally starts, the U.S. will begin coming under pressure from developing countries to become reengaged in the Doha Round and show it is serious about completing the round. On Sunday, Nov. 29, the day before the ministerial’s opening session, Brazilian Foreign Minister Celso Amorim will host a mini-ministerial of the 20 developing countries that have banded together as the G-20, along with trade ministers from the African Group, the African, Caribbean and Pacific (APC) countries and other least-developed countries. The session is expected to produce a statement urging everyone to increase their efforts in the talks, but the main target will be Washington.

“Part of the objective of having these developing-country meetings is also to put pressure on the U.S.,” one diplomat told WTTL. It will be a combination of psychological and political pressure, he said. “It’s an occasion to raise awareness, make people ask, ‘why is the WTO bogged down in this negotiation for so many years’,” he said. The diplomat contends the answer is because everybody but the U.S. agrees to the terms of the deal on the table.

The G-20 communique will express the group’s views on the state of the WTO and the round without singling out any specific country, one source explained. The group, however, is concerned that the U.S. has not yet sent a new Deputy U.S. Trade Representative to Geneva to fill the vacancy created by the retirement of Peter Allgeier. The Senate Finance Committee failed on Nov. 21 to report out President Obama’s nominee for that post, Michael Punke, and his nominee for chief agriculture negotiator, Islam Siddiqui. One diplomat complained that the U.S. “doesn’t have a theme yet” for what it wants to negotiate in the round. He also said negotiators recognize that the Doha Round is low on Obama’s priority list after health care, Afghanistan and the Copenhagen conference on climate change, which Obama is attending.

The Cairns Group of agricultural exporting nations also will meet before the start of the ministerial and will “again reiterate” the importance of securing an ambitious and balanced outcome in 2010. A meeting of the G-33 group of less developed countries will produce statements emphasizing the need to maintain a balance in the round and the focus on development.

Meanwhile, Allgeier’s “three-zeros” proposal for reaching a Doha deal is getting a cool reception in Geneva, according to sources (see WTTL, Nov. 23, page 1). Allgeier’s proposal “is being mischievous,” one diplomat said. “That’s not going to fly,” said another high ranking developing country official. He said adding a fourth zero that would require the U.S. and European Union (EU) to give up their trade distorting farm subsidies might prompt Brazil to abandon its demand for flexibilities in industrial tariff talks.

## **State Proposal Clarifies Rules on Data Sent or Taken Abroad**

Business travelers have long complained about the different treatment given to controlled data sent outside the U.S. electronically compared to data taken abroad on a laptop computer. They have also objected to conflicting advice they have received on the subject. To clarify the issue, State proposed an amendment in the Nov. 24 Federal Register to the International Traffic in Arms Regulations (ITAR) to declare that data sent or taken outside the U.S. will both be exempt from export licensing rules under certain conditions. “The exemption will explicitly allow hand carrying technical data by a U.S. person employed by a U.S. corporation or a U.S. Government agency to a U.S. person employed by that U.S. corporation or to a U.S.



Government agency outside the United States as long as certain criteria in [ITAR] Sections 125.4(b)(9) and 125.4(b)(9)(i) through (iii) are met,” the agency explained in the notice. The new wording would cover technical data, including classified information, regardless of media or format. The proposed change to ITAR Part 125 would say:

“This exemption is subject to the limitations of Sec. 125.1(b) of this subchapter and may be used if: (i) The technical data is to be used outside the United States solely by U.S. persons; (ii) If the U.S. person outside the United States is an employee of the U.S. Government or is directly employed by the U.S. corporation and not by a foreign subsidiary; and (iii) The classified information is sent or taken outside the United States in accordance with the requirements of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed).”

\* \* \* **Briefs** \* \* \*

CORRECTION: In its appeal to D.C. U.S. Court of Appeals seeking to overturn a BIS denial order, Micei International is not claiming BIS lacks authority to issue denial order barring Micei from receiving export licenses for items on Commerce Control List, as suggested in WTTL article (see WTTL, Nov. 23, page 1). It is claiming that BIS, under IEEPA, lacks authority to impose punitive denial order barring Micei from exporting any item from the U.S., even items not controlled by the CCL.

TAIWAN: Defense in Nov. 23 Federal Register amended Defense Acquisition Regulations System (DFARS) to add Taiwan to list of designated WTO countries that have joined WTO Government Procurement Agreement and are eligible foreign suppliers to department. Taiwan joined procurement pact in July.

ANTIDUMPING: For second time this year, CIT judge has ruled that ITA has violated trade law by limiting number of respondents in antidumping cases that get individual examination (see WTTL, Aug. 24, page 2). “In this case, because Commerce’s respondent selection decision was based on a statutory construction at odds with the clearly expressed intent of Congress, it must be set aside, along with the dumping margin of 2.01% that was assigned to the non-selected respondents and that resulted directly from that unlawful decision,” ruled CIT Judge Timothy Stanceu in case involving administrative review of imports of stainless steel bar from India (slip op. 09-134).

EXPORT ENFORCEMENT: BIS imposed \$700,000 civil fine and compliance audit requirement on Novamet Specialty Products Corporation as part of settlement agreement to resolve BIS charges that firm committed 32 violations of EAR with export of nickle powder without licenses to Taiwan, Singapore, Thailand, the Dominican Republic, Mexico and Israel. Exports to India and Israel allegedly were made while license applications were pending at BIS. Agency claims firm had knowledge of need to license for China because it had previously obtained license. Novamet neither admitted nor denied BIS charges.

MORE EXPORT ENFORCEMENT: Jacques Monsieur, a Belgian national and resident of France, pleaded guilty Nov. 23 in Mobile, Ala., U.S. District Court to conspiracy to export of F-5 fighter jet engines and parts to Iran (see WTTL, Sept. 7, page 4). He was caught in sting operation set up by federal agents.

INDIA: At White House press conference Nov. 24 with President Obama, Indian Prime Minister Singh said he and Obama agreed on early and full implementation of bilateral Civil Nuclear Cooperation Agreement. “Our strategic partnership should facilitate transfer of high technologies to India. The lifting of U.S. export controls on high-technology exports to India will open vast opportunities for giant research and development efforts,” Singh said.

EXPORT-IMPORT BANK: Febe Durango-Rueda, 52, a Colombian national, pleaded guilty in D.C. U.S. District Court Nov. 20, to conspiracy to defraud Ex-Im of more than \$1 million and mail fraud. She had filed false documents with Bank for loan guarantee to support export of special medical equipment to Colombia but then exported goods of lesser value. As part of plea agreement, she promised to pay \$139,064 forfeiture and make full restitution to Ex-Im of \$1,332,081.

FCPA: John Joseph O’Shea of Pleasanton, Calif., former general manager of unnamed Sugar Land, Texas, company that is subsidiary of Swiss firm, was arrested Nov. 18 on 18-count indictment issued by Houston federal grand jury. He was charged with conspiracy to violate FCPA through payment of illegal bribes to Mexican government officials to secure contracts with the Comisión Federal de Electricidad (CFE), Mexican state-owned utility. Bribes allegedly helped O’Shea’s firm win contracts worth \$81 million.