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# 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

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## Commerce Cedes Foreign Availability Authority

The Bureau of Industry and Security (BIS) appears to have given away to an interagency committee Commerce's statutory authority to make foreign availability determinations and to decontrol controlled items when there is foreign availability. This past summer it agreed to establish an interagency mechanism for evaluating foreign availability petitions using classified guidelines. The agreement appears to cede Commerce's authority under Section 5 of the Export Administration Act (EAA) to make foreign availability decisions and also by-passes the rules for making such determinations in Section 768 of the Export Administration Regulations (EAR).

> "My office with DoD, the State Department, and the Energy Department reached agreement this summer on criteria for evaluating foreign availability outside of 768 but within an interagency context to create a mechanism for the review of either self-initiated or petitions from industry for any item controlled for any reason," Kevin Kurland, director of BIS Office of Technology Evaluation, told the agency's Sensors and Instrumentation Technical Advisory Committee Oct. 28.

"There are written guidelines in place now that would allow that," he said. "It doesn't have the same mechanisms as 768 in terms of the secretary making a formal decontrol determination. There is no automatic removal. There is no specific statutory deadlines that we are following, but it does create for the first time a mechanism for the interagency to provide comments to us and, where there are differences of opinion, for the National Security Council to get engaged so we can reach agreement on whether or not we can go forward with a Commerce determination or not," Kurland explained.

The criteria for reviewing these petitions will be the same as in the EAA, he indicated. They include "available from non-U.S. source, sufficient quantity, comparable quality, evaluation of economic trends data, looking at foreign export control practices. So it's basically an institutionalizing of that review for broader controls," Kurland claimed.

## Customs Claims $1 Billion Lost to Trade Preference Abuses

Customs believes the U.S. is losing about $1 billion in tariff revenue annually due to illegal claims for duty-free treatment under trade preference programs and free trade agreements (FTAs) or inadequate documentation. Because of this lost revenue, Customs is making compliance with trade preference requirements its top enforcement priority for 2009, according to Janet Labuda, director of Customs' textile and apparel policy and programs division. With the



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end of quotas on imports of apparel from China Jan. 1, 2009, Customs is shifting the resources that were used to investigate illegal apparel transshipments to trade preference enforcement, she told the U.S. Association of Importers of Textiles and Apparel (USA-ITA) Nov. 5.

> Customs investigations of questionable trade preference and FTA duty claims has found a violation rate of 35-37%. While Labuda conceded this rate may be high because the investigations targeted suspicious claims, she said Customs expects to find more violations as it steps up its investigation of these imports.

"We are going to take a hard look at these transactions," Labuda said. While some of the cases investigated by Customs involved outright fraud, many involved insufficient documentation to show the origin of components, including the yarn-forward rule for apparel, to demonstrate that an import qualified for duty-free treatment under the rules of origin in FTAs or trade preference programs. "If there is no document trail, we are going to deny the claim," Labuda said. When questionable imports arrive at U.S. ports, CBP will not detain them while it conducts a verification of its eligibility for tariff-free treatment, she noted.

In fiscal year 2008, which ended Sept. 30, textile and apparel imports claiming duty-free treatment under FTAs or preference programs totaled $21 billion, 4% less than the year before, she reported. Imports under NAFTA from Mexico accounted for 30% of this trade, while CAFTA countries, without Costa Rica, were responsible for 27%. Imports also came in under the Africa Growth and Opportunity Act (AGOA). Inspections of factories in AGOA countries found 36% with discrepancies of some sort, mostly involving insufficient documentation. She said CBP expects to find more problems under new rules that will allow CAFTA and NAFTA countries to use cumulation to qualify for tariff-free treatment under their FTAs.

## Supreme Court Hears Challenge to Eurodif Ruling

Justices of the Supreme Court seemed to struggle with the difference between manufacturing and processing under the antidumping law and what constitutes a sale as they listened Nov. 4 to lawyers debating lower court rulings in the *Eurodif* case. Despite the government's claim in its petition for certiorari about the national security implications of the antidumping order against low-enriched uranium(LEU) from France, national security was mentioned only once indirectly by Eurodif's lawyer, Caitlin Halligan of Weil, Gotshal & Manges, who told the court that issue had been resolved by Congress (see **WTTL**, April 28, page 2).

> Most of the questions from the bench came from Justices Stephen Breyer, Antonin Scalia, John Paul Stevens and Chief Justice John Roberts. In addition to the distinction between manufacturing and processing, their questions focused on whether Commerce should be given deference to decide that issue under the Court's *Chevron* doctrine; whether common law treatment of sales should be applied; whether substantial transformation should matter or the fungibility of a raw material; and whether past trade cases or Commerce regulations provide adequate guidance to importers on these questions.

The justices raised questions about several different scenarios to help them understand the distinction between the import of a manufactured product, which is covered by the antidumping law, and a processing service or tolling, which is not and which the Court of Appeals for the Federal Circuit and the Court of International Trade said the LEU imports were.

Justice Breyer asked about North Dakota wheat that is sent to Canada for grinding into flour and sent back to the U.S. Justice Stevens asked about cloth sent abroad to be made into a suit. Justice Scalia asked about wool sent to Europe and brought back as sweaters, and Chief Justice Roberts asked about raw rocks sent to Antwerp and imported as polished diamonds. Deputy Solicitor General Malcolm Stewart responded to Breyer's wheat case by saying, "I think that Commerce's determination suggests, without squarely holding, that it would treat that as a sale of goods because it would involve substantial transformation of the original item." Breyer

said,"I agree with you, and I just wonder, what I would like to know, is if any businessman involved in any of these or related things before this decision of the Commerce Department would have thought that that is how the Commerce Department would have treated such a transaction?" Scalia interrupted Stewart's response to ask, "common law would have treated it that way, you say?" Then he added, "That's pretty good authority."

> Roberts pressed Stewart to "articulate precisely what your test is, because you have been going back and forth between whether the raw materials are fungible and whether there is a fundamental transformation in the product." Stewart replied: "I think the thrust of the Commerce Department's determination was that substantial transformation was enough, but that the case was much easier by virtue of the fact that the producer – the enricher – dealt with fungible goods and also had substantial discretion to decide how much of the feedstock would be used."

Justice Stevens returned several times to the Chevron-related question of Commerce's discretion to interpret the Trade Act. "Do you contend the word 'sold' is an ambiguous term, requires construction by a particular agency?' he asked. Stewart answered, "It is ambiguous at the margins." Then Stevens said, "Do you think Congress intended the ambiguity to be resolved by an agency rather than judges applying the rules of common law and the rules of sales law generally?" Steward said, "Yes, and I think this is a statute that has been around for, I believe, close to 90 years now; and in order for it to remain efficacious in this area, Commerce has to be able to adapt its principles to new forms of transactions. Again, that doesn't mean that Commerce's discretion is limitless, but it has some discretion at the margins."

## OFAC Ends U-Turn Financial Deals in U.S. for Iran

The U.S. Nov. 6 stepped up pressure on Iran by revoking the ability of all Iranian banks and financial institutions to conduct so-called "U-Turn" financial transactions through U.S. banks. U-turn transactions allowed U.S. banks to process payments involving Iran indirectly if they began and ended with a non-Iranian foreign bank. "Given Iran's conduct, it is necessary to close even this indirect access," said Treasury Under Secretary for Terrorism and Financial Intelligence Stuart Levey at a press briefing on the action.

> "In recent months, many U.S. institutions have refused to host these U-turn transactions for Iran," he said in his prepared statement. "Still, the exemption was used by Iran as a hook to solicit foreign banks to process transactions through the United States on its behalf, sometimes with requests to substitute another bank or code word for the Iranian institution. With today's action, Iran's potential to manipulate U.S. financial institutions has been significantly curtailed," he said.

Treasury had previously designated Iranian state-owned banks Melli, Mellat, Sepah, Future Bank and the Export Development Bank of Iran for their roles in Iran's weapons proliferation activities, as well as Bank Saderat for providing support to terrorism. "While these banks are already prohibited from taking advantage of the U-turn authorization, today's action ends this exception for all remaining Iranian banks, both state-owned and private, including the Central Bank of Iran," Treasury said.

The new policy will not prevent payments for transactions subject to licenses issued by the Office of Foreign Assets Control (OFAC). The new policy would not affect "funds transfers by U.S. depository institutions, through intermediary third-country banks, to or from Iran or for the direct or indirect benefit of the Government of Iran or a person in Iran arising from several types of underlying transactions," Treasury said These exceptions are: a non-commercial remittance to or from Iran (e.g., a family remittance not related to a family-owned enterprise); exportation to Iran or importation from Iran of information and informational materials; a travel-related remittance; payment for the shipment of a donation of articles to relieve human suffering; or an underlying transaction authorized by OFAC through a specific or general license. "Allowable funds transfers would include, for example, payments arising from over-

flights of Iranian airspace, legal services, intellectual property protection, and authorized sales of agricultural products, medicine, and medical devices to Iran pursuant to the Trade Sanctions Reform and Export Enhancement Act," the department advised.

## USTR to Launch Pacific Trade Talks Despite Election

The U.S. Trade Representative's (USTR) office is moving ahead with plans to begin talks to join the a Trans-Pacific Strategic Economic Partnership (TTP) without waiting to get new marching orders from the incoming Obama administration. The U.S. is scheduled to hold its first meeting with TTP partners Brunei, Chile, New Zealand and Singapore in March, although the session is expected to be only an organizational meeting without any substantive proposals discussed. The Bush administration considers the TPP "an important opportunity for jobs for U.S. workers," Deputy USTR John Veroneau told the Council of the Americas Nov. 6. "The next administration should speak for themselves," he said (see **WTTL**, Sept. 29, page 4).

> In September, the U.S. announced that it was entering talks to join the TTP, which was formed in 2006. "Expanding into Asia reaffirms our support for global trade," Veroneau said. "The TPP initiative will place the U.S. along with like-minded countries who have similar high standards," he said; noting that "Australia, Peru and Vietnam are now interested in the TPP."

Chile's Ambassador to the U.S. Mariano Fernandez noted that Chile, a TTP member, has free trade agreements with 57 countries. "When the U.S. became interested in joining us small countries in TPP, this was a big deal," he said. "It is important to include more of Latin America. We want Peru included in the agreement. The FTA is an important signal for the system," Fernandez added.

Roy Ferguson, New Zealand's ambassador to the U.S., said his country was "delighted that the U.S. would want to be involved in TPP negotiations." He said the TTP differs from the Asia-Pacific Economic Cooperation Forum (APEC) because it is "built from the bottom up." He acknowledged the past opposition in the U.S., primarily from dairy and beef interests, to the opening of free trade talks with New Zealand. "It is unfortunate that the U.S. meat and dairy industry is misguided," he said. "The U.S. market is already open for lamb. The U.S. has the second largest dairy industry after the EU. New Zealand is ninth. The U.S. produces five-times as much milk as New Zealand. New Zealand will not and cannot flood the U.S. market with milk," Ferguson asserted.

## * * * Briefs * * *

ANTIBOYCOTT: American Rice, Inc., of Houston, Texas, has reached settlement with BIS to pay $30,000 civil fine to resolve complaints that it failed to report 15 requests for information related to the Arab League boycott of Israel. BIS claimed firm did not report that it had received letters of credit with boycott requests from Banque Banorabe for sales in United Arab Emirates.

EXPORT ENFORCEMENT: Federal grand jury in Minneapolis, Minn., Oct. 28 indicted three men who were caught in government sting operation trying to export carbon-fiber materials to China through Hong Kong and Singapore. Indictment named Ping Cheng, 45, of Manhasset, N.Y.; Kok Tong Lim, 36, of Singapore; and Jian Wei Ding, 50, of Singapore.

NIGHT VISION CAMERAS: BIS is drafting final report on its review of foreign availability of thermal imaging cameras in China, Kevin Kurland, director of BIS Office of Technology Evaluation, told agency's Sensors and Instrumentation Technical Advisory Committee Oct. 28 (see **WTTL**, Sept. 8, page 1). Resistance to the decontrol of cameras apparently is already rising from DTSA. BIS staff held initial interagency meeting on its review on Sept. 4, and at follow up meeting Oct. 2, it circulated draft final report with its preliminary findings, Kurland reported.

NUCLEAR FACILITIES: BIS in Oct. 31 Federal Register issued final Additional Protocol Regulations (APR) to implement the U.S. agreement with International Atomic Energy Agency (IAEA) on civil nuclear fuel cycle-related activities. Final rules describe reporting requirements for such facilities and procedures for giving IAEA complimentary access to sites.