ISSN 0276-8275

WTTLonline.com

A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Trade Laws and Export Controls

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

Vol. 28, No. 34 **September 1, 2008**

"Taking" Is Not "Sending", DDTC Says in Opinion on Data

Taking defense-controlled data overseas on a laptop computer doesn't qualify for the same license exemption given to the sending of such data electronically, State's Directorate of Defense Trade Controls (DDTC) said in an Aug. 21 advisory opinion. In response to a request for clarification of the license exemption in Section 125.4(b)(9) of the International Traffic in Arms Regulations (ITAR), a member of the DDTC response team rejected the argument that sending and taking had the same meaning under the regulations.

> "The 125.4(b)(9) exemption does not cover the employee taking or carrying ITAR controlled data on his laptop, on a CD, or in hard copy," wrote Stephen Geis, a response team member who works for DDTC contractor Lionel Henderson & Co. "Sending means transmitting the data from the U.S. by whatever means to the employee who is in a foreign country. The logic behind this is to maintain 'accountability' by the responsible authorities in the registered company for the export of the technical data," he added.

Industry sources say DDTC has received numerous requests for clarification of the licensing requirements for data on laptops carried abroad. In some cases, the DDTC advice has not been consistent, one source said. These frequent questions apparently have started to bother DDTC staffers. "Please do not respond to this email with more argument," Geis told the unnamed requestor. "I've dealt with this issue a dozen times, and my guidance comes straight from the Director of Licensing," he said.

In its request for clarification of the exemption in Section 125.4, the requestor noted that in a separate part of the ITAR the words "sending" and "taking" are used together to describe actions subject to export controls. "The basis for the request is the unexplained and apparently inadvertent distinction in the ITAR between the section 125.4(b)(9), which uses only the word 'send' in describing the scope of what is authorized for export without a license under the exemption, and section 120.17(a)(1), which uses both the words 'sending' and 'taking' as part of the definition of what constitutes an 'export'," the requestor stated.

Senior Officials Eye New Doha Round Talks in September

World Trade Organization (WTO) members may make another stab at trying to save the Doha Round in September, government and industry sources suggest. U.S. Trade Representative (USTR) Susan Schwab met with WTO Director-General Pascal Lamy August 21 and 22 in

Published weekly 50 times a year except last week in August and December. Subscription in print or by e-mail $647 a year. Combo subscription of print and e-mail is $747. Additional print copies mailed with full-price subscription are $100 each.

Washington and discussed the next steps in the round, which suffered a serious set back July 30 when a meeting of trade ministers collapsed (see **WTTL**, Aug. 18, page 2). Schwab shared with Lamy several ideas, thoughts and discussions she has floated recently with other trade ministers, reported Deputy Assistant USTR Gretchen Hamel. Senior U.S. officials are ready to work in September using progress made in July to set the stage for another ministerial meeting, Hamel said.

> While in Washington, Lamy also met with U.S. business groups. In those sessions, he indicated that he would like the G-7 group, which includes the U.S., European Union, Canada, Japan, Brazil, India and China, to meet in early September, said Frank Vargo, vice president of the National Association of Manufacturers (NAM). The aim is to keep the motor running on the talks and for more detailed discussion on the thornier issues, Vargo said.

Two of those thorny issues are the agriculture special safeguard mechanism (SSM) and cotton. The U.S. and India will have to come up with an agreement on SSM, a Latin American diplomat told WTTL. Cotton would be the obvious next step, he said. "I would be surprised if the U.S. came up with something on cotton without the SSM," he said. Demanding sectorals as a payoff for the SSM, is another way for U.S. officials to say they don't want to conclude Doha, the diplomat said. "If they come with something on sectorals that actually tries to bind countries to the sectorals, then there's no resumption of the round," he said. Because sectorals will require domestic discussions and support in each country, it will be impossible reach a Doha deal before those discussions are held, he added.

Sectoral agreements remain a prime goal for U.S. industries. If senior officials "can find agreements" in quiet discussions, including on sectorals, then a restart of the Doha talks might be possible, Vargo said. The form of a restart likely would be a ministerial meeting, he suggested. The key question is: "Will Brazil, China and India agree to negotiate sectoral agreements which would take tariffs down to zero?" he noted. Although Brazil has indicated its willingness to negotiate, neither China nor India has signaled in that direction, Vargo said.

Brazil Wants Cross Retaliation in Cotton Case

An early sign of the potential consequences of a Doha Round failure is seen in Brazil's renewal of its request to the WTO for authority to retaliate against the U.S. for its illegal subsidies for upland cotton. The U.S. and Brazil had agreed to suspend WTO arbitration of the potential amount of sanctions due to Brazil while a potential Doha deal was looming. With the collapse of ministerial talks in July, Brazil again has asked a WTO arbitration panel to decide how much it can retaliate, with amounts ranging from $4 billion to $100,000, said a trade diplomat familiar with the dispute.

> When Brazil first requested retaliation authorization in 2005 it indicated it wanted to cross-retaliate in sectors besides goods. Suspension of concessions and other obligations only on U.S. goods "is neither practicable nor effective," Brazil wrote in its 2005 filing, which was resubmitted to the WTO the week of Aug. 18. Brazil wants to suspend tariff concessions and related obligations on goods, copyrights and related rights, trademarks, industrial designs, patents, protection of undisclosed information and a sectoral concession on a list of services.

Brazil likely would not be allowed to cross-retaliate in intellectual property (IP) or services, if retaliation within goods could meet the value of the approved retaliation, said Neil Turkewitz, executive vice president of international matters at the Recording Industry Association of America. Brazil and the U.S. likely have sufficient trade in goods to absorb the retaliatory measures, precluding the need for cross-sector retaliation in IP, he said. Meanhwhile, the U.S. continues to object to Brazil's demands for retaliation, claiming it has ended the subsidies on cotton that were the subject of the dispute. "The findings adopted by the WTO dispute

settlement body in both the original panel proceedings and the compliance proceedings are completely outdated," said Assistant USTR Sean Spicer. "During the time the arbitration has been suspended, cotton prices have risen substantially, and are expected to remain high," he said. "The United States is not making payments tied to cotton production. Therefore, there is no basis to say that U.S. payments are today having any impact on cotton prices," he argued. "Given the opportunity presented in the Doha negotiations, we have emphasized all along the importance of delivering reform in agricultural trade through negotiations rather than litigation," Spicer said.

> Brazil has used cotton as a bargaining chip in the Doha Round negotiations, so it was willing to delay retaliation, said one observer in Geneva. "The Brazilians have clearly dragged their feet," he said. Its move now could indicate that they don't believe the negotiations are moving in the short term, he said. If negotiations pick up again, the process of determining retaliation could be dragged out again, he suggested.

EU Blocks WTO Action on Information Technology Complaint

The European Union (EU) July 29 blocked the initiation of a World Trade Organization (WTO) case against its alleged violation of the multilateral Information Technology Agreement (ITA). Under WTO rules, the EU gets one shot at delaying the formation of a dispute-settlement panel. The U.S., Japan and Taiwan asked for the formation of a panel after consultations failed to resolve their complaint against the EU's decision to impose tariffs on certain information products they claim are subject to tariff-free treatment under the ITA (see **WTTL**, June 2, page 3). A second request, possibly at the Sept. 23 meeting of the Dispute Settlement Body, will automatically establish the panel.

> "The EU committed to bind and eliminate duties on ITA products in its WTO tariff schedules," said U.S. Trade Representative (USTR) Susan Schwab in a statement August 18. "We believe that these duties are inconsistent with the EU's commitments on these products, and that they discourage technological innovation in the IT sector," she added.

The EU has raised tariffs – ranging from 6% to 13.9% – on three groups of products: (1) cable or satellite boxes capable of accessing the Internet, (2) flat panel displays for computers, and (3) computer printers that can scan, copy and/or fax. It claims new functionalities in these products mean they are no longer eligible for tariff-free treatment under the ITA. Certain duties on these products have been temporarily suspended. "The ITA is not a bilateral agreement and changes to its criteria cannot be made as a result of bilateral litigation," the EU said in May when the U.S. first asked for consultations over the dispute.

Softwood Lumber Rule Will Generate 400,000 Filings Annually

New reporting requirements for softwood lumber imports will require an estimated 400,000 filings annually by 210 importers who will spend 266,000 hours a year completing the paperwork, Customs and Border Protection (CBP) projected in its Aug. 25 Federal Register notice announcing an interim final rule with the new reporting and recordkeeping requirements. Each party subject to the new rules will have to file an average of 1,905 reports, which will take an average of 40 minutes to complete, it estimated as part of the economic impact analysis it is required to do under the Paperwork Reduction Act. Despite this workload, CBP said the new regulations "do not meet the criteria for a 'significant regulatory action'."

The new reporting and recordkeeping requirements on softwood lumber imports were slipped into the 2008 Farm Bill enacted in June over President Bush's veto (see **WTTL**, May 19, page 3). Title VIII, section 803 of the bill requires CBP to establish and maintain an importer

declaration program for certain softwood lumber products and requires importers to submit export price information. Customs will periodically verify if the export price information submitted by the importer matches the export price stated on export permits issued by Canadian provinces. False statements on these records will be subject to legal penalties. Congress also required reports to be submitted to it on the operation of the new requirements.

* * * Briefs * * *

BIS: Operating Committee Chairman Brian Nilsson moving as of Sept. 2 to White House National Security Council on detail to work in counterproliferation strategy office. Dave Flynn will become acting OC chief.

MANDATORY SNAP: As of Oct. 20, 2008, all export and reexport license applications, classification requests, encryption review requests, License Exception AGR notifications and related documents will be required to be submitted electronically to BIS through its Simplified Network Application Process (SNAP-R) system, agency announced in final amendment to EAR published in Aug. 21 Federal Register. On case-by-case basis, BIS may authorize continued use of paper submission based on five specific criteria. Documents submitted in support of any license application must be in PDF format.

ENTITY LIST: BIS published final rule in Aug. 21 Federal Register expanding Entity List to allow agency to include on list parties "where there is reasonable cause to believe, based on specific and articulable facts, that an entity has been involved, is involved or poses a risk of being involved in activities that are contrary to the national security or foreign policy interests of the United States or is acting on behalf of such an entity." Exports to entities on list will require approved license. Addition, removal or modification of name on list will be decided by interagency End-User Review Committee.

ANTIDUMPING: Court of Appeals for Federal Circuit Aug. 25 issued ruling in *SKF v. U.S.* upholding ITA's 2004 changes to its "model-match" methodology. "The new model-match methodology not only reflects a reasonable interpretation of the statute but also comports with our precedent," court said, citing its decision in *Cemex, S.A. v. United States*. "Thus, Commerce's decision to seek out product matches based on the most similar products rather than constructed values does not contravene the statute," it ruled.

EXPORT ENFORCEMENT: Atmospheric Glow Technologies Inc., privately-held plasma technology firm located in Knoxville, Tenn., pleaded guilty Aug. 20 to ten-count indictment charging it with unlawfully exporting ITAR technology to Chinese national working on company-funded research project at University of Tennessee. Two researchers are subjects of separate pending charges (see **WTTL**, May 26, page 4).

MORE EXPORT ENFORCEMENT: BAX Global, Inc., of Oak Creek Wis., has agreed to pay $20,000 fine to settle BIS charge that it exported HLA Tissue Typing Trays to Syria without required export license.

MORE EXPORT ENFORCEMENT: Advanced Micro Devices of Austin, Texas, voluntarily disclosed to BIS that it released controlled technology to one Russian and one Ukrainian without deemed export license. In settlement with BIS, it agreed to pay $11,000 civil fine to settle two agency charges, which it neither admitted nor denied.

MORE EXPORT ENFORCEMENT: "The BIS is taking a hard-line with license exceptions being used to evade licensing requirements," BIS Deputy Assistant Secretary for Export Enforcement Kevin Delli-Colli said in BIS press release announcing administrative settlement with Johnson Trading & Engineering Company Ltd. of Taiwan. "The conditions and restrictions on all EAR license exceptions should be strictly adhered to by both exporters and consignees," he advised. In settlement, Johnson agreed to pay $90,000 civil penalty to settle charges that it knowingly caused unlicensed export of computer chips to China via Taiwan using license exception. After initial $20,000 payment on fine, it will make $20,000 payments every 60 days, with final $30,000 of fine suspended if it remains in compliance with EAR. BIS also imposed five-year denial order on firm, but agreed to suspend order if Johnson stays in compliance for five years. Johnson also agreed to implement internal export controls compliance program fully within six months based on BIS Export Management System (EMS) Guidelines and to conduct audit of its export compliance program.

MORE EXPORT ENFORCEMENT: By attempting to export 210 riot helmets classified under ECCN 0A979.3 to Venezuela without license, Cargoland Air and Ocean Cargo, Inc. of Doral, Fla., committed one violation of EAR, BIS said in Charging Letter to firm. In administrative settlement, Cargoland agreed to pay penalty of $36,000, which it will pay in 12 monthly installments of $3,000.