www.WTTLonline.com

# Washington Tariff & Trade Letter®

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

Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301-570-4544 Fax 301-570-4545

Vol. 27, No. 50 December 17, 2007

## WASSENAAR ADOPTS UNDERSTANDING ON RISK-MANAGEMENT

With the aim of providing advice to countries that are adopting export controls and licensing procedures for the first time, the Wassenaar Arrangement, the multilateral regime on conventional arms and dual-use exports, adopted at its Dec. 4-6 Plenary Meeting a "Statement of Understanding on End-Use Controls for Dual-Use Items." The non-binding advice "recom-mends the application of flexible risk management principles to all three phases of end-use controls – pre-license, application procedure and post-license – in order to subject sensitive cases to a greater degree of scrutiny," the regime announced.

> Wassenaar also completed one of the most extensive editorial revisions of its control lists since its founding in 1996. "Participating States also worked actively to make the existing control text more easily understood and 'user-friendly' for commercial exporters and licensing authorities," the ministerial statement noted. This effort produced 2,500 editorial changes to regime's control lists.

Many of the "best practices" identified in the understanding on end-use controls reflect policies and procedures already followed by the Bureau of Industry and Security (BIS) and the Directorate of Defense Trade Controls (DDTC). These include outreach to the exporting community, imposing conditions on licenses, requiring delivery verification certificates, and monitoring end-user obligations. Advice to exporters is also given. "The proper evaluation of each indi-vidual export licence application is important to minimize the risk of undesirable diversion," the understanding states. "Based on an intelligent risk management the sensitivity of an export transaction should be analysed case by case. Participating States may, as appropriate, apply this Statement of Understanding also to exports of items other than dual-use items," it adds.

Among the significant number of substantive amendments made to the control lists, were changes to controls on low-light level and infrared sensors. There were also changes for items that could be used by terrorists, such as devices to initiate explosions and specialized equipment for the disposal of improvised explosive devices, plus equipment to help protect civil aircraft from Man-Portable Air Defence Systems attacks.

## DEMOCRATS WANT MORE CONCESSION IN DOHA RULES TEXT

Having already won significant concessions in the draft Doha Round agreement on rules, congressional Democrats want more (see **WTTL**, Dec. 3, page 3). While the Democrats want changes in the draft to tighten trade remedy rules, other Word Trade Organization (WTO) members are complaining the text has given too much to the U.S. Congressional staffers who



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

recently returned from Geneva say they found strong opposition from other countries to the draft. "It is very clear that we are completely isolated," one source reported. The battle over proposals to changes WTO rules on antidumping, subsidies and safeguards is a reprise of the fight that took place at the end of the Uruguay Round in 1993. In the U.S., the same divide is being seen again between petitioning industries, particular steel and lumber, and those representing importers and foreign producers.

> "As currently drafted, the chairman's text does not meet the mandate set out by Congress," wrote Finance Committee Chairman Max Baucus (D-Mont.) and Sen. Jay Rockefeller (D-W.Va.) along with Ways and Means Committee Chairman Charles Rangel(D-N.Y.) and Rep. Sander Levin (D-Mich.) in a joint letter to U.S. Trade Representative (USTR) Susan Schwab and Commerce Secretary Carlos Gutierrez Dec. 12. The draft text "would weaken existing trade remedy laws in a number of crucial areas and take a major step backward from the status quo reached at the end of the Uruguay Round," the wrote.

In an opposing Dec. 12 letter to Schwab and Gutierrez, a group of 41 major U.S. corporations and trade associations also complained that the draft was a "step backward," but they claim it's a step away from existing WTO rules. The changes proposed by Rules Negotiating Committee Chairman Guillermo Valles go too far in tightening the rules and "represent a major step backward from the current WTO framework," the letter argued. The draft, "if put in place, would result in the increased abuse of trade-remedy rules as unfair barriers to trade, rendering virtually meaningless the new market access you are seeking to negotiate in agriculture, manufacturing and services," the companies and associations warned.

Although many other WTO countries have voiced concerns about the threat of growing imports from China, they are not seeking changes in the WTO trade remedy rules to provide more protection against those imports, sources report. If the U.S. insists on getting additional concessions in the rules text, other WTO members are saying they will expect the U.S. to pay for them in other areas, such as agriculture, tariffs and services, one source noted.

## U.S. OFFICIALS BRING BACK BASKETFUL OF AGREEMENTS WITH CHINESE

Two back-to-back meetings of Cabinet-level U.S. and Chinese officials in Beijing Dec. 11-13 produced a couple of dozen agreements, most of which say the two countries have agreed to keep talking. For the Chinese, the meetings of the Joint Commission on Commerce and Trade (JCCT) and the Strategic Economic Dialogue (SED) succeeded in creating several bilateral mechanisms that supposedly would provide more assurance about the safety of Chinese toys, food, feeds, drugs and medical products exported to the U.S. Beijing also succeeded in not having to say anything about revaluing its currency.

> Bureau of Industry and Security (BIS) Under Secretary Mario Mancuso signed an agreement on "Guidelines for U.S.-China High Technology and Strategic Trade Development." As with the other agreements, the guidelines, which were not released publicly, appear only to promise continued dialogue between BIS and its Chinese counterparts without any changes in licensing policies. "The guidelines also recognize the critical role of end-use visits in ensuring the protection of U.S. national security interests in the enhancement of high technology trade," a BIS press release said without elaborating on what that means.

The U.S. and Chinese government descriptions of the various memoranda and agreements that were signed, but not released, cite numerous provisions that "outline the importance of working cooperatively", "expanding cooperation and collaboration', undertaking "reviews" and "assessments", to "expand their dialogue" and "continue communication". The agreements touch on such areas as food and feed safety, drug and medical device safety, tourism, illegal logging, alcohol and tobacco, biofuels, HIV/AIDs, agriculture science and technology, WTO talks on environmental goods and services, software, counterfeit goods, standards testing, sales of U.S.

securities in China and access to the Chinese financial services market, and transparency in administrative rulemaking. One agreement will allow six U.S. pork producers to resume shipments to China. Beijing's concern about the safety image of Chinese products was clearly the top priority for Chinese officials in the talks. The Chinese also appear intent on doing everything possible to avoid confrontations or disputes before the Beijing Olympics in 2008.

> "To me, the handling of the food and product safety issues emerging in recent months is proof of the effectiveness of the SED," said Treasury Secretary Henry Paulson Jr. at the close of the SED meeting. "We had a very healthy discussion about China's progress rebalancing its economy, expanding domestic consumption and moving away from export led growth," he noted. "The Chinese recognize growing inflationary pressure in their economy and that a more flexible currency expands their ability to use monetary policy to stabilize their economy," Paulson said. He also conceded that "we have made modest progress in the financial services area."

## USTR WARNS OF CHINESE 'BACKSLIDING" ON TRADE LIBERALIZATION

China has nearly implemented all trade liberalization commitments it made in its WTO accession agreement, but the USTR's annual report on Beijing compliance with these obligations warns about signs that the Chinese are backsliding in their move toward open trade. "Evidence of a possible trend toward a more restrictive trade regime appears most visibly in a series of diverse Chinese measures over the past two years signaling new restrictions on market access and foreign investment in China," said the report, which was released Dec. 11 while U.S. and Chinese official were together in Beijing at the JCCT and SED meetings (*see story above*).

> Almost all of China's WTO commitments were supposed to be implemented by the end of 2006. "Although not complete in every respect, China's implementation of its WTO commitments has led to significant increases in U.S.-China trade, including U.S. exports to China, while deepening China's integration into the international trading system and facilitating and strengthening the rule of law and economic reforms that China began nearly three decades ago," report states.

"Through the first few years after China's accession to the WTO, China made noteworthy progress in adopting economic reforms that facilitated its transition toward a market economy. However, beginning in 2006 and continuing throughout 2007, progress toward further market liberalization began to slow," the USTR contends. "It became clear that some Chinese government agencies and officials have not yet fully embraced key WTO principles of market access, non-discrimination and transparency," it adds.

"Differences in views and approaches between China's central government and China's provincial and local governments also have continued to frustrate economic reform efforts, while China's difficulties in generating a commitment to the rule of law have exacerbated this situation," the report suggests. There is also a broader problem, it notes. "At the root of many of these problems is China's continued pursuit of problematic industrial policies that rely on excessive Chinese government intervention in the market through an array of trade-distorting measures," the report charges.

## LACHMAN CONTINUES FIGHT OVER MEANING OF "SPECIALLY DESIGNED"

Two years after they were sentenced to fines and probation following their conviction on charges of exporting controlled equipment to India without a license, Walter Lachman, Maurice Subila Jr. and Fiber Materials, Inc. (FMI) are back in court seeking a new trial (see **WTTL,** March 19, page 1). Their appeal to the First Circuit Court is being opposed by the government, which has filed its own cross appeal claiming the sentences imposed on the executives and the company were too lenient and not in keeping with the Federal Sentencing Guidelines. Lachman

and FMI claim they have new evidence to show that licensing officers in what was then the Bureau of Export Administration (BXA) agreed with their understanding of the meaning of "specially designed." Lachman and FMI want to recall Commerce witnesses who they claim will testify that their testimony in the original case was based on incorrect information.

> Their legal battle over the meaning of "specially designed" dates back to 1995 when they were convicted for exporting a control panel for a hot isostatic press to India without a license. The government had argued that the control panel was specially designed for a use that was subject to controls.

In a brief filed in the appellate court Nov. 20, the U.S. Attorney's office in Boston rejected Lachman's arguments and also argued for the imposition of stiffer sentences for the defendants, including jail time. "The sentences of probation are unreasonable in this case involving national security implications and Guidelines ranges in excess of 41 months," the government declared. It said the court erred in considering the export to have a *de minimis* impact on national security. "The so-called newly discovered evidence cited by defendants is in fact neither 'newly discovered' nor 'evidence' that would be admissible at a retrial," the government argued. "There is an inherent contradiction in their argument: the evidence which they claim is newly discovered concerns an 'exclusive use' interpretation which they say pervaded government and industry by 1988," it stated.

The new evidence apparently is an affidavit by former Commerce licensing officer Surendra Dhir recanting his original testimony in the case on the need for a license for the panel. According to consultant William Root, who has served as an advisor to FMI, Dhir's testimony was "his personal opinion which was without precedent, in his head, not written down anywhere, and always not clear." Root also cites trial testimony that said Dhir's superiors had overruled his opinion. "His August 15, 2007, supplementary affidavit acknowledged that he had been unaware of an exclusive use definition in the EAR of 'specially fabricated,' which was the predecessor term to 'specially designed,' and that he recognized the relevance of that definition," Root noted in a written analysis of the government's appellate brief.

## ITT REACHES AGREEMENT WITH ARMY TO AVOID DEBARMENT

In the latest chapter of ITT Corporation's $100 million settlement with the government for violation of the Arms Export Control Act, the company Oct. 11 entered into a administrative compliance agreement with the U.S. Army. The agreement sets out the remedial actions the company must take as an Army contractor to avoid being debarred from doing business with the Army. According to the agreement, ITT has already taken many of steps required under the agreement, including the naming of an independent monitor (see **WTTL**, April 2, page 2).

> "The Army has determined that the terms and conditions of this Agreement, if complied with, provide adequate assurances that the interests of the Government will be sufficiently protected to preclude the necessity of debarment or suspension of ITT Corporation," the agreement states. It notes that ITT has appointed attorney John S. Pachter, a government contract specialist with the law firm of Smith, Pachter & McWhorter of Vienna, Va., to be an independent monitor to oversee its compliance with the terms of the deal.

The agreement says ITT has adopted a code of conduct, establish top management involvement in contract compliance, set up ethics and compliance training and taken other steps that were required under the term of agreement. It also outlines the accounting procedures the firm must follow to track and report the spending of $50 million in night vision research it must conduct under the terms of the deferred prosecution agreement it reached with the Justice Department in March. "Contractor further agrees to provide the Independent Monitor quarterly reports detailing the monies spent as part of offsetting the deferred prosecution monetary policy," it states. The independent monitor will have to submit quarterly reports on ITT's action, including the training it conducts and the number of calls it gets to its "hotline" for employees to

report illegal activities. "The contractor will not unilaterally release any press release related to this Agreement without first obtaining Army approval," it also requires. [**Editor's Note**: Copy of ITT compliance agreement will be sent to WTTL subscribers on request.]

## ITA MAY REAPPLY SOME NME RULES TO RUSSIAN IMPORTS

Russia may have thought that being declared a "market economy" in 2002 by the Commerce Department meant it would avoid the constructed value treatment it faced in dumping cases when it was considered a "non-market economy"(NME). In a pending new shipper review, however, the International Trade Administration (ITA) has said it reserves the right to go back to treating some Russian costs as NME costs because they are affected by government monopolies which may be distorting prices. The impact of this policy is likely to be seen in the agency's preliminary determination due Dec. 17 on the new shipper review of EuroChem, a Russian supplier of urea, which would become subject to the antidumping order imposed in1987 on solid urea from Russia and Ukraine.

> ITA staffers have argued that the statute says the agency can "normally" use a company's books and records to determine costs, if those records are maintained in accordance with home-country accounting rules and records that reasonably reflect the cost of production. They claim that in the memo graduating Russia to market-economy status ITA explicitly retained authority to evaluate the usefulness of particular costs in making normal-value calculations.

"The statute's explicit use of the word 'normally' indicates, however, that there may be circumstances where the Department could reasonably determine that the use of the respondent's recorded costs is inappropriate," an ITA staff memo explains. "In such cases, the Department has the discretion to calculate the costs of production by some other reasonable means," it adds. "Furthermore, we are not drawing any conclusions with respect to whether the government's involvement in the natural gas sector constitutes a countervailable subsidy, but rather evaluating the level of distortion in the marketplace to determine if we can rely on prices in the domestic market for purposes of calculating respondent's cost of production," it states.

EuroChem's new shipper request received an endorsement from 32 U.S. agriculture associations. "Russian fertilizer companies are privately owned and controlled and comprise one of the largest fertilizer producing sectors in the world," the farm groups wrote in a letter to Commerce. The "prohibitively high" antidumping duties imposed on Russian and Ukrainian urea, create import barriers that "simply deprive U.S. farmers of additional supply options for fertilizer competitvely priced in the world marketplace and unnecessarily burdens them with significantly higher costs of production," the argued.

## OPINIONS DIVIDED ON LEGAL TREATMENT OF CHINESE EXPORTERS

An ITA request for public comment on whether it can provide market-oriented enterprise (MOE) treatment to individual Chinese exporters in antidumping cases and what methodology to use in calculating their costs of production has attracted 27 comments and revealed the continuing sharp divide over the legal treatment of China in trade remedy cases. As with previous ITA calls for comments on how to treat China, the comments were split between domestic industries that have filed complaints against Chinese imports and domestic users of Chinese goods, particularly apparel importers and retailers.

The U.S. Association of Importers of Textiles and Apparel (USA-ITA) claimed ITA clearly has statutory authority to treat certain Chinese firms as MOEs. The association notes that the Trade Act has a two-prong test for when it can deviate from using normal values in calculating home market costs: when the goods come from a nonmarket economy and available information does not permit the normal value to be determined using market economy methodology. "From the statutory language, it is clear that the mere fact that an antidumping proceeding involves an

NME is not, by itself, sufficient reason for the Department to deviate from the standard methodology for calculating normal value," USA-ITA wrote.

> Nucor, the steel mini-mill giant, submitted 424 pages of comments, including attachments, opposing MOE treatment of any Chinese firms. "Given the Chinese government's ownership and control over land, labor, finance and capital, and many companies themselves, it is simply not possible for a Chines company to be market-oriented," Nucor said. It also cited the administrative burden of such an inquiry. Even if permitted under trade law, "such a test cannot be applied in any way that would not be administratively unworkable, requiring an outlay of staff and resources that the Department simply does not have," it argued.

The Committee to Support U.S. Trade Laws challenged the legal authority for an MOE ruling. "The Department lacks the legal authority to grant market-oriented status to individual Chinese enterprises," the group contended. It also claimed China's WTO accession protocol did not "envision or authorize market-oriented treatment of individual Chinese respondents." Thus, the U.S. has no legal obligation to grant such status and China has not right to demand it.

* * * BRIEFS * * *

EXPORT ENFORCEMENT: Mine Safety Appliance Company of Pittsburgh, Pa., agreed to pay $470,000 civil fine to settle 107 BIS charges that its branch office in United Arab Emirates exported safety and protection gear to Iran and Syria without licenses. Firm made voluntary self-disclosure of exports.

MORE EXPORT ENFORCEMENT: BIS imposed $18,000 civil fine on Elettronica Aster S.p.A. of Milan, Italy, for allegedly aiding and abetting export of instrument landing system from U.S. through Italy to Iran without approved license. Firm neither admitted nor denied charges.

MORE EXPORT ENFORCEMENT: Cryostar-France SA of Hesingue, France, will pay $66,000 civil fine in settlement with BIS for allegedly participating in conspiracy to export cryogenic pumps from U.S. to Iran without licenses. BIS also imposed two-year denial of export licensing privileges, but suspended order and said it would waive sanction if firm remains in compliance with EAR.

FCPA: Robert W. Philip former Chairman and CEO of Schnitzer Steel Industries, Inc., will pay more than $250,000 to settle SEC charges related to his role in illegal bribes firm paid to government officials in China and South Korea. In October 2006, Schnitzer paid $7.7 million in disgorgement to settle related SEC charges and its Korean subsidiary paid $7.5 million criminal fine (see **WTTL**, Oct. 23, 2006, page 4).

SUDAN: Senate Dec. 12 by unanimous consent approved Sudan Accountability and Divestment Act (S. 2271) which would authorize state and local governments to divest assets in companies that conduct certain business operations in Sudan and also would prohibit U.S. government contracts with such companies. House has already passed similar measure.

EAR: BIS amended EAR in Dec. 12 Federal Register to expand License Exceptions Temporary Imports, Exports, and Reexports (TMP) and Baggage (BAG) to allow for certain temporary exports and reexports of technology by U.S. persons to U.S. persons or their employees traveling or temporarily assigned abroad.

ITAR: DDTC in Dec. 13 Federal Register amended ITAR provisions governing voluntary self-disclosures. New rules, which went into effect Dec. 13, impose 60-calendar day deadline on exporters after they make initial notification to DDTC of violation to submit full disclosure to ensure timely submissions. Other changes clarify what must be submitted in self-disclosure.

USTR: Assistant press secretary and speechwriter Steve Norton will join D.C. law firm of Stewart and Stewart Jan. 15 as senior communications advisor.

TRADE FIGURES: U.S. merchandise exports in October jumped 14.6% from last October to $101 billion, Commerce reported Dec. 12. Services exports rose 11.5% from year ago to $40.6 billion. Goods imports were ahead 9% to $167.9 billion from October 2006. Services imports increased 9% to $31.6 billion.

**EDITOR'S NOTE**: In keeping with our regular schedule of 50 issues a year, there will be no issues of ***Washington Tariff & Trade Letter*** on Dec. 24 and Dec. 31, 2007. Our next issue will be Jan. 7, 2008. Until then, we wish all our readers a HAPPY HOLIDAY and a HEALTHY AND PROSPEROUS NEW YEAR.