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BIS HASN'T BRIEFED ENFORCEMENT OFFICIALS ON CHINA RULE

Critics of the final China catch-all regulation that the Bureau of Industry and Security published June 19 question whether the agency has briefed its own staff in the Office of Export Enforcement (OEE) or other law enforcement agencies on the rule. "BIS is saying little about coordination of compliance mechanics now that the rule is law," said attorneys Donald Weadon and Carol Kalinoski in an article in the July issue of ***The Export Practitioner***, the affiliate of WTTL. "As of this writing, BIS has yet to brief OEE agents on the regulation and its intricacies," they claim. They also question whether Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE) have been briefed on the rule.

> They stressed the importance of obtaining product-specific commodity classifications (CCATS) from BIS. "Engaging in exports to China without a current, ECCN subparagraph level written CCATS classification which covers with specificity one's entire product line (by model number) destined for China would appear to be an unacceptable risk under the current circumstances," they warned.

In a separate article in ***The Export Practitioner***, Mike Turner, the former OEE director and now senior advisor to MK Technology, also emphasized the importance of proper classification. "In my experience, misclassification of products and technologies is one of the leading causes of export infractions," he wrote. Turner offered practical advice on how companies can amend their current export compliance programs to adapt to the new China rule.

"Nothing in the rule changes the basic questions laid out in Part 732 of the Export Administration Regulations (EAR) that you must answer regarding the facts of your transaction to determine if an export license is required: What is the item being exported? Where is it going? Who will receive it? What will they do with it? What else do they do? These basic questions provide the framework for China rule compliance," he explained. [**Editor's Note**: Free copy of July issue of ***The Export Practitioner*** will be sent to WTTL subscribers on request.].

SEPTEMBER IS NEW TARGET DATE FOR SAVING DOHA ROUND

As deadlines slip and key talks collapse, Doha Round negotiators have now reset their calendars to target September rather than the end of July as the new goal for finding a compromise to save the round. The two chairs of the crucial Agriculture Negotiations Committee and Non-Agriculture Market Access (NAMA) Negotiations Committee have told negotiators in Geneva that they plan to have their next draft texts with proposed "modalities" ready for distribution in mid-July. Agriculture Chairman Crawford Falconer and NAMA Chairman Don Stephenson also

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say they they are consulting each on their their drafts, suggesting that they will try to reach the "balance" of ambitions that trade ministers had said they wanted when they last met in Hong Kong. Falconer, New Zealand's ambassador to the World Trade Organization (WTO) and Stephenson, Canada's ambassador, have said they plan to hold meetings of their committees the week of July 23 to get the initial reaction from members. The talks will be suspended at the end of July and resume in September. The "intensive negotiations" in September are expected to lead to "further revisions" of the texts to reflect member reactions, they have said.

> Doha negotiators have increased their attention to the drafts being written by Falconer and Stephenson since the efforts of the U.S., European Union, Brazil and India, the so-called G-4, collapsed in Potsdam in June (see **WTTL**, Jun 25, page 3). The G-4 talks failed because their trade ministers were unable to bridge the gaps between their diverging demands and offers in agriculture and NAMA.

WTO Director General Pascal Lamy in a July 2 speech said he hoped the G-4 would continue to play a role in the multilateral process that is expanding in Geneva. "What remains to be done is small compared to all the proposals already on the table, which represents two to three times what was achieved in the last Round of negotiations," he said, referring to the Uruguay Round.

"Indeed, today reaching agreement on subsidies depends on additional concessions from the U.S. equivalent to less than a week's worth of transatlantic trade," Lamy said in his prepared remarks. "It depends on an additional handful of percentage reduction in the highest agriculture tariffs by the EU and Japan. It depends on an additional handful of percentage reduction in the highest industrial tariffs by emerging economies such as Brasil or India. All this to be done, not by tomorrow, but over a transition period of several years to leave space for a smooth adjustment," he said.

Meanwhile, U.S. Trade Representative (USTR) Susan Schwab warned that the failure of Falconer and Stephenson to reach for a high level of ambition in their drafts could lead to a long-term suspension of the Doha Round. "I suspect that WTO members will be gathering late July and in September to talk about those texts and to see whether there's enough there to negotiate that center of gravity – to find that center of gravity," she told reporters July 4 in Cairns, Australia, while attending a meeting of trade ministers of the Asia-Pacific Economic Cooperation Forum (APEC). "I believe that if those texts are low ambition texts, we're in deep trouble in terms of the Doha Round, and maybe, I would strongly suspect, at that point you would see countries go off and say: 'Okay, well, if Doha is going to be a low ambition round it will never be finalized or it will go into hibernation for an extended period of time. Let's go off and negotiate more bilateral and regional deals'," she said.

WTO GAMBLING DISPUTE TAKING TWO COSTLY TRACKS FOR U.S.

Antigua and Barbuda's win in the WTO gaming dispute with the U.S. has divided into two separate but related issues and tracks for compensation. The Caribbean country has asked the WTO for authorization to impose $3.4 billion annually in retaliation for Washington's non-compliance with dispute- settlement panel and Appellate Body rulings that said U.S. restrictions on Internet gambling violate U.S. commitments under the General Agreement on Trade in Services (GATS) (see **WTTL**, May 7, page 1).

> On a second track, eight WTO members signaled their intention by a June 22 deadline that they will seek compensation from the U.S. in the process the U.S. has launched under Article XXI of the GATS to remove gambling from its list of services commitments. Antigua and Barbuda, Australia, Canada, Costa Rica, the EU, India, Japan and Macao, China, have indicated they want to negotiate for compensation as the U.S. seeks to revise its services commitments.

In seeking compensation from the U.S. for its non-compliance with the WTO rulings, Antigua and Barbuda is not seeking compensation in the form of higher tariffs or restrictions on

imports of U.S. goods and services. "Antigua really doesn't have anything that they can withhold from the U.S. to reach that level of damages," said an official familiar with the case. Instead, it is asking for authority to grant compulsory licensing for U.S. products protected under the agreement on Trade-Related Aspects of Intellectual Property (TRIPS). "At this point, what they've asked for is to lift IP [intellectual property] protection in the areas of software, movies and music," the official said.

> There is no formal response yet from the U.S., which is expected to oppose the request for authorization. The USTR will continue working with Antigua and Barbuda to try to find a mutually satisfactory resolution to the gaming dispute, said USTR spokesperson Gretchen Hamel.

Countries that are asking for compensation under the Article XXI process contend the change the U.S. is seeking will affect a wider range of commitments than gaming, including foreign investment in U.S. businesses and foreign companies that set up shop offshore to offer gambling services. The U.S. will have to negotiate for damages with countries that have industries adversely affected by the changes. Compensation would likely take the form of increased market opportunities in other services areas, such as finance and telecommunications.

COMMENTS SPLIT ON DESIGNATING CHINESE MARKET-ORIENTED ENTERPRISES

As would be expected, comments submitted to the International Trade Administration (ITA) on whether it should change its policies and begin designating certain Chinese companies as "market-oriented enterprises" (MOE) were divided between industries that import from China and those that have filed complaints against Chinese imports (see **WTTL**, May 28, page 4). While some comments argued that such a change would be the fair thing to do given China's economic reforms in the last 20 years, others said ITA lacks the authority to designate MOEs in non-market economies (NME).

> "There is no legal basis to support the department's proposal to designate individual entities as market-oriented enterprises," wrote attorneys at King & Spalding on behalf of several clients that have filed antidumping complaints against Chinese imports. The statute says valuations in NMEs "shall" be based on best information available or surrogate countries, they noted.

The Bureau of Fair Trade in China's Mnistry of Commerce filed comments renewing Beijing's request to be designated as a market economy. "While the current U.S. request for public comments on the MOE issue looks like progress towards U.S. recognition of China as a market economy, in reality it is little more than a formality to justify application of countervailing duties," the bureau wrote. "The United States should recognize China as a market economy rather than merely consider the situation of market-oriented operations of individual respondent enterprises in antidumping cases," it added.

The fight between the apparel and textile industries was also apparent in the comments. The U.S. Association of Importers of Textiles and Apparel (USA-ITA) supported the MOE idea for both China and Vietnam. "The prices negotiated by USA-ITA member companies (as buyers) are set by the market, no matter the location," it said in its comments. If the MOE concept is adopted it said it opposes the use of the existing criteria used to designated market-oriented industries (MOI). "No industry has met the MOI standard in the fifteen years since this was was introduced by the department," USA-ITA complained.

The National Council of Textile Organizations (NCTO) opposed the MOE idea. "For every antidumping case brought against China, it could be expected that most Chinese producers would claim they were 'market-oriented' enterprises in an effort to obtain much lower antidumping margins than their non-market counterparts," NCTO wrote. "This would be extremely harmful to U.S. industries that use trade remedy laws, while also resulting in an overwhelming number of investigations to rule on each enterprise," it added.

CFIUS CASE LOAD INCREASING EVEN BEFORE NEW LEGISLATION

Even before the Senate passed legislation (S. 1610) June 29 to impose stricter rules on the Committee on Foreign Investment in the U.S. (CFIUS), the interagency panel was already experiencing a sharp increase in the number of cases it was reviewing. The increase in the number of foreign investments and acquisitions in the U.S. being reviewed for their potential national security impact appears to have been part of the fallout from the political clamor that followed the attempted purchase of several U.S. port operations by Dubai Ports World (DPW), a global port operating company headquartered in the United Arab Emirates.

> There were 113 transactions filed with CFIUS in 2006, up 74% from the previous year, Senate Banking Committee Chairman Christopher Dodd (D-Conn.) reported during Senate debate on the bill. "Because companies seek CFIUS consideration voluntarily, this increase reflected greater sensitivity among foreign investors, which in turn may reflect a more aggressive stance from CFIUS," he said.

CFIUS conducted seven second-stage investigations, the same number of investigations that it conducted over the previous five-year period. "There was also an increase in the number of companies withdrawing from CFIUS reviews and investigations, which suggests a higher degree of scrutiny: either companies withdrew for the purpose of terminating the underlying transaction or in order to restructure the transaction to address CFIUS concerns," Dodd said.

The number of cases in which CFIUS approved transactions with conditions attached through mitigation agreements also increased. CFIUS has also increased its congressional outreach, notifying congressional leaders and committees of jurisdiction upon completion of CFIUS action on each transaction. Treasury also finally produced the long-overdue quadrennial report on CFIUS-related issues as mandated by the Defense Production Act of 1950, Dodd noted.

The Senate bill will now have to be reconciled with CFIUS legislation (H.R. 556) the House passed in February. A compromise favoring the Senate version is expected (see **WTTL**, May 21 page 4). Because it is much less intrusive than other proposed changes to CFIUS, the Senate-passed bill has the support of the business community. S. 1610 would establish CFIUS as a formal organization and strengthens the role of the White House Director of National Intelligence (DNI). Among other changes, the bill would require assistant secretary-level officials to sign-off on any 30-day review finding that an investment poses no threat to national security. Transactions involving foreign-government owned companies acquiring U.S. firms would require a more extensive 45-day investigation.

* * * BRIEFS * *

SACKS: Laminated Woven Sacks Committee and its individual members, Bancroft Bag, Inc. Coating Excellence International, LLC, Hood Packaging Corporation, Mid-America Packaging, LLC, and Polytex Fibers Corporation filed antidumping and countervailing duty complaints at ITA and ITC June 28 against imports of laminated woven sacks from China.

PALESTINE: To implement new U.S. policy to support government of Palestinian Authority President Mahmoud Abbas, OFAC issued General Order No. 7 on June 28 to allow U.S. parties to provide assistance and to engage in business dealings with Palestinian Authority. "No application is necessary to engage in activities authorized by the General License, nor is any notification to OFAC required," agency said in guidelines it issued along with General License.

EXPORT ENFORCEMENT: David H. McCauley, former export administration manager for Henry Shein, Inc., maker of drugs and medical devices, has agreed to pay $6,380 civil fine to settle single BIS charge that he conspired to export dental equipment to Iran without approved export license. BIS Charging Letter claimed he conspired with others to have equipment shipped to UAE and then on to Iran.

MORE EXPORT ENFORCEMENT: Enternet, LLC, of Lisle, Ill., has reached settlement with BIS on single charge of releasing controlled technology to employee who was national of Iran at time without deemed export license. Company has agreed to pay $7,000 civil fine for releasing technology that BIS claimed could be used in development, production or use of field programmable logic device.