

# 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. 14

April 2, 2007

## BIS WILL NARROW SCOPE OF CHARGES UNDER NEW PENALTY POLICY

With potential penalties for violations of the Export Administration Regulations (EAR) raised to \$50,000 from \$11,000, the Bureau of Industry and Security (BIS) will no longer charge every single potential violation in its administrative settlements with exporters. “For violations subject to the PATRIOT Act renewal provisions (i.e., those that occurred on or after March 9, 2006), BIS will only charge the most serious violation per transaction for cases that are timely settled,” said Darryl Jackson, BIS assistant secretary of Commerce for export enforcement.

“For example, if BIS believes that an exporter made an unlicensed export knowing that a violation of the EAR would occur, BIS would only charge the more serious knowledge-based violation, and not the underlying strict liability violations for the unlicensed export or any related charges for false statements on shipping documents,” Jackson said in an article to be published in the April issue of WTTL affiliate *The Export Practitioner*. “The penalty imposed would typically be higher than that imposed for a mere strict liability infraction,” he wrote.

“BIS will continue to charge each violation not directly connected to a specific export, namely conspiracy, evasion, and false statements to a Special Agent,” he continued. “If BIS must file a charging letter because settlement cannot be reached, then BIS will proceed with all viable charges. Finally, for violations occurring before March 9, 2006, BIS will continue to charge all applicable violations,” he said. [**Editor’s Note:** Copy of April issue of *The Export Practitioner* with Jackson’s article will be sent to WTTL subscribers on request.]

## ACCEPTANCE OF CVD CASE FOR CHINA MAY SPARK MORE PETITIONS

Washington trade lawyers have mixed views on whether Commerce’s decision March 30 to reverse a 23-year-old policy and apply the countervailing duty (CVD) law to imports of coated free sheet paper from China will open a flood of new petitions against Chinese goods. One attorney suggested industries that has been unhappy with the dumping margins they won against Chinese imports in the past could be among those weighing whether to file a CVD case now. The steel and chemical industries are prime candidates for new CVD petitions, he said. “If there is a downturn in the economy, this is a significant tool to have in your quiver,” he added.

Another lawyer argued that the conditions that have produced a drought in new antidumping and CVD cases in the last two years haven’t changed with the coated-paper decision. New petitions have reached record lows because the strong U.S. economy has made it more difficult to win an injury determination, this attorney noted. Globalization also has meant that many

Copyright © 2007 Gilston-Kalin Communications, LLC. All rights reserved. Reproduction, copying, electronic retransmission or entry to database without written permission of the publisher is prohibited by law.

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

foreign producers who normally would be targets for trade remedy cases are now affiliated with U.S. firms. Moreover, the International Trade Administration (ITA) in January lowered its index of expected wages for nonmarket economies (NME), including China, thus lowering the cost of Chinese goods and making it more difficult to show that Chinese goods are dumped.

The case against coated paper was helped by Beijing's own notification to the World Trade Organization (WTO) last year of its subsidies. Also, the subsidies that the U.S. Trade Representative (USTR) identified in the U.S. complaint at the WTO against Chinese subsidies provided a shopping list for the petitioner.

Commerce officials say the preliminary CVD order on coated paper has not changed the policy of treating China as an NME. Just last August, ITA reaffirmed its position that China remains an NME. "We have no plans to recognize China at this point as a market economy," one Commerce official said, speaking on background. "Although we found that China has made great strides in terms of its economic development, we also found that China has a long way to go before it meets market economy status," he noted. He said the shift in CVD policy will have an effect on the methodology ITA uses in dumping cases. Those revisions should be seen in the preliminary decision on the antidumping leg of the paper case, which is due in May.

An ITA staff memo justifying the change in CVD policy for China from the 1984 *Georgetown Steel* ruling said conditions in China are not like those in NMEs of the 1980s and before. "The Soviet-style economies at that time made it impossible to apply these criteria because they were so integrated as to constitute, in essence, one large entity," the ITA staff wrote. "The current nature of China's economy does not create these obstacles to applying the statute," it noted.

Commerce's authority to apply the CVD law to China was also upheld in a March 29 Court of International Trade (CIT) ruling that rejected a Chinese government request for an injunction to block Commerce from going forward with the coated-paper case. "Nothing in the language of the countervailing duty statute excludes NMEs," wrote CIT Judge Gregory Carmen (Slip Op. 07-50). In fact, there were no NMEs when Congress enacted the law, he pointed out.

The CVD decision "is a positive development," said Rep. Artur Davis (D-Ala.), cosponsor of a bill (H.R. 1229) to amend the Trade Act (see *WTTL*, March 19, page 3). "However, it is still imperative that Congress pass countervailing duty legislation that Congressman English and I have introduced in order that our policy regarding subsidies is made crystal clear," he said.

## **ITT AGREES TO DO RESEARCH FOR DoD IN PLEA DEAL ON EXPORT VIOLATIONS**

Exporters are being warned that the government's decision to seek criminal prosecution of ITT Corp. and \$100 million in penalties for the unlicensed export of night vision technology to China, Singapore and the United Kingdom marks a significant shift in policy on the enforcement of the International Traffic in Arms Regulations (ITAR). Although the prosecution has been attributed to some extent to the over enthusiasm of the U.S. Attorney in Roanoke, Va., where the case was handled, it was approved by Justice officials, including Assistant Attorney General Kenneth Wainstein, who reportedly wants more criminal cases for ITAR violations.

The tough new line on ITAR enforcement may explain why ITT wasn't able, like other big defense contractors, to settle the government's charges through a consent decree with State's Directorate of Defense Trade Controls (DDTC). ITT is still negotiating a separate agreement with DDTC, but it may be several weeks before it is complete, a State official told *WTTL*. The DDTC agreement will include additional remedial actions the company must undertake in addition to those it promised in its plea agreement with Justice, the official said.

A unique and apparently unprecedented condition in the plea agreement ITT reached with Justice will require the company to spend \$50 million in research to develop new night vision products for the Army. "Payment of the \$50 million deferred prosecution penalty will be suspended for five years, subject to certain conditions," Justice said. "ITT Corporation can

reduce this penalty on a dollar-for-dollar basis by investing \$50 million toward the acceleration, development and fielding of the most advanced night vision technology so that the members of the U.S. Armed Forces can maintain their battlefield advantage of having the most capable night vision equipment in the world," Justice said. ITT also will pay a \$2 million criminal fine, \$28 million to Immigration and Customs Enforcement, and \$20 million to State.

State has issued a partial debarment of ITT from export licensing privileges. The debarment is limited to ITT's night vision division and won't affect the rest of the firm. A State official told WTTL that the department will continue to review pending and future export licenses for the night vision division on a case-by-case basis and will approve those that it finds to be in the national security and foreign policy interest of the U.S. Although BIS usually issues denial orders on parties that are convicted of violating arms export controls, agency officials wouldn't comment on what they would do regarding ITT.

"We have been cooperating with the government in this investigation and we have voluntarily disclosed all discrepancies that our internal reviews revealed," said ITT CEO and Chairman Steven R. Loranger. "While this settlement relates to the actions of a few individuals in one of our 15 business units, we regret very much that these serious violations occurred. I want to reinforce, however, that the heart of our night vision goggles – the tube - is secure. No technical information regarding the tube was ever compromised," he added.

### **ITA WANTS TO SHIFT STAFF TO DEVELOPING COUNTRIES**

Good-bye truffles in Lyon, France, glasses of port in Oporto, Portugal, and fondu in Zurich for members of Commerce's Foreign Commercial Service (FCS). Hello kabobs in Kabul, Afghanistan, couscous in Tripoli, Libya, and ceviche in Tegucigalpa, Honduras. If the International Trade Administration (ITA) gets the approval of key congressional committees, the agency plans to close 26 foreign trade posts mainly in Europe, Japan, the Caribbean, Latin America and Canada, while opening five new ones and expanding nine existing posts in developing countries, including China, India, Pakistan, Qatar and Tunisia. At the end of the process, which could take about a year, the FCS will reduce its overseas posts to 125 from 146.

The shift is part of what ITA calls its Transformational Commercial Diplomacy Initiative. "Our strategy recognizes that U.S. businesses need more Department of Commerce support in rapidly-growing, emerging markets where trade relationships and rules are not as well established," said ITA Under Secretary for International Trade Frank Lavin. The House Appropriations Committee has urged ITA to make the changes for two years. House and Senate committees must review and clear the moves before they are implemented.

### **BUSH NOTIFIES HILL ON PANAMA AS TALKS CONTINUE ON FTA CONDITIONS**

President Bush March 30 notified Congress of his intention to sign a free trade agreement (FTA) with Panama even though talks between the administration and members of the House Ways and Means Committee failed to reach an agreement on how to handle the labor and environment provisions of the accord. April 1 was the deadline by which the president had to notify Congress that he intends to sign the Panama FTA to get congressional action under his fast-track negotiating authority (see **WTTL**, March 19, page 1).

Administration officials and their staffs were in talks – on the phone and in person – with Ways and Means Chairman Charlie Rangel (D-N.Y.), Ranking Member Jim McCrery (R-La), and Rep. Sander Levin (D-Mich.) during the week of March 26 but weren't able to bridge the gap between their views on trade and Democratic demands for additional conditions in the Panama, Colombia and Peru FTAs. Rangel and Levin March 27 unveiled what they called "A New Trade Policy For America." The statement included basic trade goals Democrats have been seeking for

nearly ten years. In addition to requiring compliance with international labor standards through enforcement mechanisms in the FTAs, the policy calls for provisions on international environmental agreements, investor rights, port security, drug patents and logging.

Rangel said his proposal had the backing of the Democratic leadership in the House, including Speaker Nancy Pelosi (D-Calif.), and the Democratic Caucus. Rep. Marcy Kaptur (D-Ohio), however, contested the assertion that the Caucus gave its support to the plan. "The Caucus not only did not vote on the approach, but there was virtually no discussion either," she asserted. Kaptur, who has been a staunch opponent of most trade legislation and agreements, said she stood up and protested the lack of discussion at the meeting and was told by Pelosi afterward that members would have a chance to comment on the proposal later.

Kaptur's comments reflect continuing opposition among some Democrats to any trade deals regardless of the conditions. One congressional source suggested a Rangel-McCrery-Administration deal would still only garner 100 to 125 Democratic votes, meaning it would need the support of a lot of Republicans. Congressional sources say the talks between the committee and the administration will continue when lawmakers return from their Easter/Passover recess.

## WTO LOOKING AT NEED TO UPDATE INFORMATION TECHNOLOGY AGREEMENT

Major technology changes and new products since the signing of the Information Technology Agreement (ITA) in 1996 have prompted calls at the World Trade Organization (WTO) for updating the accord. These advances also will require parallel changes in the next revision of the Harmonized Tariff Schedule (HS), speakers at a March 28 WTO symposium said. Products such TV set top boxes, LCD monitors and multifunction printers are among the products that are getting different tariff treatment because they aren't covered by the ITA, they noted.

Electronics manufacturers and trade groups are working to keep products within the scope of the ITA's zero-tariff treatment. They want a periodic review of the ITA and its extension to non-tariff barriers (NTBs) to trade, said Ulf Pehrsson, a vice president at Ericsson. Industry is also pushing to expand the ITA to more products, such as multi-chip integrated circuits, and to add more countries as signatories. A plurilateral deal on multi-chip processors was reached in 2005.

"Convergence in some computer peripherals, such as multifunction printers, have raised questions as to whether they are covered by the ITA," said Carlos Halasz of Hewlett-Packard. The European Union (EU) considers set top boxes with new functions to be dutiable. The same is true for LCD monitors with a digital video interface (DVI). The EU has suspended the duty for two years on monitors 19" or less. Speakers also said time is running short to get new proposals to the World Customs Organizations for its next revision of the HS in 2012. "Knowing how difficult things are to analyze in the technology area, knowing how contentious these issues can be ... time is rapidly running short for new proposals. So, if the trade is interested in new proposals, if government is interested in new proposals, they really need to present them very, very soon to the review subcommittee," an official involved in the work said.

### \* \* \* BRIEFS \* \* \*

KOREA: "Negotiations continue between the US and the Republic of Korea on a number of outstanding issues," said USTR spokesman Sean Spicer March 30. "The negotiations must conclude by 12:00 PM (E.D.T.) on Sunday April 1 so that the Administration can decide whether to notify Congress of its intent to sign by Sunday, April 1, the deadline for congressional notification under Trade Promotion Authority."

SOFTWOOD LUMBER: U.S. March 30 requested formal consultations with Canada under 2006 Softwood Lumber Agreement (SLA) to address U.S. lumber industry complaints that Canada isn't adjusting lumber export levels based on conditions in U.S., that exports from British Columbia in January and Ontario in February should have been lower, and that assistance programs maintained by Quebec, Ontario and Canadian federal government raise questions under SLA (see **WTTL**, Feb. 19, page 1).