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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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GAO CALLS FOR DECREMENTING BIS-ISSUED EXPORT LICENSES

A new report from the Government Accountability Office (GAO) criticizes the lack of cooperation and coordination among agencies responsible for enforcing export controls. It also calls for the Bureau of Industry and Security (BIS) and Customs and Border Protection (CBP) to consider establishing a requirement to decrement licensed dual-use exports to ensure that shipments don't exceed permitted quantities and values. BIS has rejected the proposal for decrementing exports, claiming GAO found no evidence to show such a system is needed.

> The GAO report (GAO-07-265) claims the lack of cooperation among BIS, CBP, Immigration and Customs Enforcement (ICE) and the FBI can "potentially reduce the effectiveness of enforcement activities." In particular, it cites the difficulties and delays agencies encounter in getting license determinations from BIS about the whether licenses are needed or not for exports being investigated.

CBP decrements export licenses that State's Directorate of Defense Trade Controls issues for Munitions List items. Because Customs inspectors don't have a system for decrementing exports on the Commerce Control List (CCL), "they cannot ensure accountability on the part of exporters or that Commerce regulations have been properly followed," the GAO states. BIS responded by saying it has "seen no data to indicate that the underlying issue – verification that the quantities of items otherwise authorized for export do not exceed tolerable limits – is of sufficient concern to justify the burden that would be placed on U.S. exporters, CBP and BIS."

One embarrassing example of interagency disagreement in the report involved an FBI decision to arrest an exporter and seize $500,000 in goods before they were exported. "Commerce determined that the item did not require a license," the GAO notes. Nonetheless, the FBI went to the White House National Security Council to get its opinion. The NSC determined the export was a high risk item. Ultimately, however, the case was dropped, the report says.

CIT JUDGE THREATENS USDA WITH SANCTION IN TAA CASE

Court of International Trade (CIT) Judge Donald Pogue Dec. 20 ordered the U.S. Agriculture Department (USDA) to show cause why it should not be subject to sanctions for refusing to comply with an earlier remand order that he issued. In a rare citation of CIT Rule 11(b), Pogue (Slip Op. 06-186) said USDA's refusal to comply with his remand order in a Trade Adjustment Assistance (TAA) case "reflects disregard of the court's authority." Pogue re-remanded the case of *Robert L. Anderson v. United States Secretary of Agriculture* back to the department for action under his previous order from November 2006. At issue is the use of Internal Revenue

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Service rules in calculating the income of fishermen seeking aid under TAA. USDA claimed an unrelated ruling by the Court of Appeals for the Federal Circuit (CAFC) in *Steen v. United States* had upheld its interpretation of TAA provisions for calculating fishing income. "The agency's reliance on *Steen* in the remand determination here is inappropriate," Pogue wrote. He said the CAFC specifically declared that its ruling didn't apply to other TAA cases involving tax rules. "Where a plain reading of *Steen* would have demonstrated its inapplicability, the agency's action is contrary to the requirements of USCIT R.11(b)," Pogue ruled.

> Rule 11 requires parties to base claims and arguments on existing law, including court precedents. Subsection (c) provides for sanctions for violation of these requirements, including actions "sufficient to deter repetition of such conduct." This could include a fine or the payment of attorneys fees for the opposing side.

U.S., PANAMA REACH TENTATIVE FTA DEAL

The Bush administration is learning quickly that the political climate in Washington has changed, and it isn't waiting for Democrats to criticize the labor provisions in a free trade agreement (FTA) it reached with Panama Dec. 19. In announcing the deal, the U.S. Trade Representative's (USTR) office prominently stated that the labor provisions of the accord will be the subject of further negotiations. USTR sources say they don't know when those additional negotiations will be completed or when the FTA will be submitted to Congress for approval.

> With the Panama pact and FTAs with Colombia and Peru completed and waiting in the wings to be sent to Congress, the administration has three major trade deals with Western Hemisphere nations for which it will seek approval before congressional fast-track procedures expire July 1. The "tres amigos" could form the foundation for an a new omnibus trade bill that is garnering increasing interest among lawmakers and trade lobbyists (see **WTTL,** Nov. 13, page 1).

Congressional Democrats are already on the record opposed to the labor provisions of the Colombia and Peru FTAs, so the administration's demurring on the labor provisions in the Panama agreement was clearly a preemptive recognition of reality. "We have reached this agreement with the understanding that it is subject to additional discussions on labor," USTR Susan Schwab said in a statement. "Before submitting the agreement to Congress, we will work with both sides of the aisle to ensure strong bipartisan support for the agreement," she added.

According to a USTR description of the accord, Panama has agreed to recognize U.S. inspections of meat, poultry and processed foods. It also has agreed to grant U.S. firms "substantial" access to its financial services market, improved access to express delivery services, and new access to other professional services previously restricted to Panamanians. The deal includes a "yarn-forward" rule for textiles and apparel without providing for cumulation with materials from other Central American FTA partners. It also has a safeguard provision to protect against surges of apparel imports from Panama. Another provision will ensure that U.S. firms have a chance to compete for work on the planned $5.25 billion expansion of the Panama Canal.

PROPOSAL WOULD HARMONIZE EU DUAL-USE EXPORT CONTROLS

European exporters could face stricter penalties, including criminal prosecution, under broad revisions the European Commission (EC), the executive branch of the European Union (EU), proposed Dec. 19 to the EU's export controls for dual-use goods. The proposal, which must be approved by the EU Council of Ministers before implementation, calls on member states to revise their individual export control rules to harmonize procedures and policies among the 25 EU members and to make EU exports more competitive with those of other countries. The proposal is based on a study conducted under an EC contract. The study by Interexport Managements Systems, Ltd. (IMS), evaluated current export control practices in the EU and recommended a series of revisions to member policies. Some of the recommendations were

rejected, but those calling for greater harmonization, new rules on intangible transfers and brokering, stronger enforcement, and sharing of license denial information were included in the proposal. Some of the proposed changes are aimed at bringing the EU into compliance with United Nations Security Council (UNSC) Resolution 1540, which requires UN members to adopt export control rules to prevent the proliferation of weapons of mass destruction. Others stem from findings in the IMS report that showed divergent policies among EU members. (**Editor's Note**: Copy of the IMS report will be sent to WTTL subscribers on request.)

> A key proposal would amend rules on certain intra-EU transfers to change the current requirements for prior authorization to a requirement for just prior notification to the export authorizing agency in the country of origin. Along with this liberalization would come new registration and recordkeeping requirements for exporters that use what is known as a Community General Export Authorization. Another proposal would provide for EU members to share information on export license denials and for a system to resolve disagreements between states over whether or not to grant a license for an export that was denied by another member.

The proposal would give the EC the authority to negotiate mutual recognition agreements with third countries to eliminate reauthorization requirements for reexports approved by those third countries. The proposed provisions on criminal sanctions would require EU members to take appropriate measures to impose criminal penalties for "serious infringements of the provisions of this Regulation, such as intentional export intended for use in a programme for the development or manufacture of chemical, biological, nuclear weapons or of missiles capable of delivery without the authorization required under this Regulation, or the falsification or omission of information with a view to obtaining an authorization that would otherwise have been denied."

NEARLY 1000 PAGES OF COMMENTS OPPOSE CHINA CATCH-ALL PROPOSAL

By the time the Dec. 4 deadline passed for public comments on BIS' proposed China catch-all rule, the agency had received 55 individual comments totaling 967 pages in length. Almost all were critical of the proposal or called for changes in the list of 47 Export Control Classification Numbers (ECCNs) that would face new export licensing requirements, if the proposal were adopted without change. Many of the comments included detailed information, including ads and specifications in Chinese, on the foreign availability of these ECCNs either indigenously in China or from sources readily open to the Chinese.

> The comments claim this foreign availability will undermine the effectiveness of the proposed restrictions and only hurt U.S. exporters. But an unintended eye-opening consequence of this accumulated analysis of Chinese industrial capability is a demonstration of how far advanced China has become in key equipment and technology needed to modernize its armed forces.

The most extensive, detailed and first-hand comments came from the American Chamber of Commere in China. Comments submitted by its Export Compliance Working Group (ECWG) were accompanied by a 179-page report on foreign and Chinese availability of equipment in seven categories covered by the catch-all proposal, including composite materials; machine tools; servers, integrated circuits and encryption; telecommunications equipment, test equipment and software; navigation and avionics, diesel and marine engines, and helicopters.

The report, prepared with the assistance of John Larkin, the former BIS liaison officer in Beijing, includes published specifications from Chinese and foreign suppliers of 32 of the 47 ECCNs, along with photos of many items. "Non-U.S. foreign companies freely export products, software and technology not only at levels well above those in the proposed rule but above the current control levels under the Wassenaar Arrangement," the AmCham noted. "The ECWG learned that these exports are to civil end-uses, dual civil and military end-uses, and solely to military end-use," it added. "Chinese military demand is primarily met by domestic state-owned enterprises," the comments contended. This reflects Beijing's policy against a foreign role in

military procurement. "When the Chinese military does procure items from foreign sources, it finds them readily available from primarily Russia and Europe," the AmCham claimed. "European and Russian companies have provided direct military sales and joint development assistance to China's PLA, Navy and Air Force programs," the business group asserted.

TREASURY DOESN'T TAG CHINA AS CURRENCY MANIPULATOR

Treasury Secretary Henry Paulson has touted a new approach to China, but the results so far are the same as the department's old policy. On returning from China and the first meeting of his newly created Strategic Economic Dialogue, Paulson Dec. 19 released Treasury's semiannual report on foreign currency manipulation. Just as his predecessors did, Paulson refused to cite China as a manipulator. "No major trading partner of the United States met the technical requirements for designation," the report declared (see **WTTL**, Dec. 18, page 3).

> "China's cautious approach to exchange rate reform continues to exacerbate distortions in the domestic economy and impede adjustment of international imbalances," the report conceded. Beijing has allowed some increased flexibility in the renminbi, the department noted. "This increased flexibility, however, is considerably less than is needed," it declared.

The report will get early attention from the incoming Democratic Congress, warned Rep. Sander Levin (D-Mich.), who is expected to chair the House Ways and Means trade subcommittee. The report "underlines the need for congressional oversight hearings," he said in a statement. Citing statements that the Bush administration plans no change in policy on China, Levin said, the "administration needs to explain when they would be prepared to act."

* * * BRIEFS * * *

ANTIBOYCOTT: Enforcement actions for violations of embargo of Libya, including so-called "installed base" goods exported prior to lifting of embargo, could uncover additional charges for violation of antiboycott rules, recent BIS settlement shows. Price Brothers (UK) Ltd., of Surrey, United Kingdom, subsidiary of Price Brothers Company of Ohio, has agreed to pay $15,000 civil fine to settle five BIS charges claiming it furnished boycott-related information to Libyan customers in 2001. Price had paid $101,500 fine in 2005 settlement with BIS for unlicensed exports to Libya (see **WTTL**, Sept. 7, 2005, page 4).

MORE ANTIBOYCOTT: International Specialties, Inc., of Boston, has agreed to pay $3,600 fine in settlement of one BIS charge for supplying boycott-related information to customer in Oman.

SENATE: Incoming Senate Finance Committee Chairman Max Baucus (D-Mont.) has promoted Demetrios Marantis to chief trade counsel. Marantis has worked for Baucus since 2005. Previously, he worked in Vietnam for U.S.-Vietnam Trade Council, and from 1998 to 2002, he was USTR associate general counsel.

TEXTILES: Commerce has named Matt Priest to be deputy assistant secretary for textiles and apparel, filling vacancy created by retirement of James Leonard. Priest has been serving as senior advisor to assistant secretary for import administration and earlier was legislative director for Rep. Sue Myrick (R-N.C.).

TRADE LAWS: USTR's office Dec. 27 told Congress that current FTA negotiations with Malaysia and South Korea won't require any changes in U.S. antidumping or countervailing duty laws. Amendments might be needed for implementation of proposed safeguard measures similar to those in other FTAs, it said. In talks with Seoul, "We have made it clear that the Administration has very limited flexibility on trade remedies issues, and have not agreed to any proposals to date," it said.

ZEROING: In Dec. 27 Federal Register, ITA modified its zeroing methodology for calculating dumping. Effective Jan. 16 it will no longer make average-to-average price comparisons without offsets in dumping investigations. The rule, proposed in March to bring U.S. into compliance with WTO panel ruling, will apply to all seven pending dumping investigations, agency said (see **WTTL,** March 13, page 4).

COMMERCIAL SERVICE: Commerce Inspector General has released mostly favorable report on ITA offices in Argentina and Uruguay, noting customer satisfaction. Some financial management changes urged.