

# Washington Tariff & Trade Letter<sup>®</sup>

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

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Vol. 24, No. 47

November 29, 2004

## FIGHT OVER INTELLIGENCE BILL BODES ILL FOR EAA

The failure, so far, of the White House to win enactment of legislation to overhaul the U.S. intelligence operations is a bad sign for the prospects of the incoming Congress approving a new Export Administration Act (EAA). The connecting nemesis to both the intelligence bill and EAA is House Armed Services Committee Chairman Duncan Hunter (R-Calif.). Hunter's ability to stymie the administration and leaders of both parties in the House and Senate over the intelligence bill indicates how much power he wields and his close ties to the Pentagon.

Although the Armed Services Committee doesn't have direct jurisdiction for EAA, which comes within the orbit of the House International Relations Committee, it has had a virtual choke hold on export control legislation for almost two decades. Weak interest in EAA in the International Relations Committee has ceded de facto control of the legislation to Armed Services.

Hunter's rebuff of the Bush administration on the intelligence bill isn't the first time he has chosen to split with the White House on national security issues. According to industry sources Vice President Cheney and National Security Advisor Condoleezza Rice approached Hunter early in the administration to get his support for a Senate passed version of a new EAA bill, but Hunter rejected their appeal. Hunter's response reportedly cooled White House interest in pushing for a new EAA.

On the intelligence bill, the California lawmaker has sided with some Pentagon officials and generals who want to keep military intelligence out of the scope of the new intelligence super-structure. Although Congress hoped to limit the lame-duck session to one week, lawmakers have entered a limbo period and may come back in early December to finish some unresolved legislative issues. That might include another stab at a compromise on the intelligence bill.

## ITC AGAIN FINDS THREAT OF INJURY FROM CANADIAN LUMBER

On a split 5-1 vote, with Commissioner Daniel Pearson dissenting, the International Trade Commission (ITC) Nov. 24 reconfirmed its finding that imports of softwood lumber from Canada threaten to injure U.S. industry. This time its determination responded to a request from U.S. Trade Representative (USTR) Robert Zoellick for a Section 129 ruling that would bring its original threat finding into conformity with World Trade Organization (WTO) rules. Canada is likely to challenge this ruling as well at the WTO, setting off a new round of dispute settlement. A WTO dispute-settlement panel and its Appellate Body claimed the original ITC ruling failed to explain adequately how the record in the case supported its threat finding. In the

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Published weekly 50 times a year except last week in August and December. Subscription in printed or electronic form is \$597 a year in U.S., Canada & Mexico; \$627 Overseas. Additional copies with full price subscription are \$75 each.  
Circulation Manager: Elayne F. Gilston

Section 129 process, the ITC reopened the record, received additional comments and data, and held a hearing (see **WTTL**, Oct. 18, page 3). Based on this expanded record, the commission again found threat of injury but attempted to do a better job of explaining its ruling.

“The U.S. export-orientation of the Canadian producers clearly ties the excess capacity and projected increases in capacity and production to a likely substantial increase in subject imports in the imminent future,” five ITC members wrote.

“Moreover, the evidence in this Section 129 proceeding provides further support that an increasing share of Canadian production would enter the U.S. market.”

The commission was more ambivalent on the issue of price suppression. It recognized that domestic production and market conditions had an effect on prices. “While the evidence supports a finding that subject imports had *some* adverse price effect, we do not conclude that during the period of investigation they had yet had a *significant* price effect so as to be a substantial cause of material injury,” the ITC stated (ITC emphasis). Nonetheless, looking ahead to the increased imports it projected, the commission found the imports “are likely to have a significant depressing or suppressing effect on domestic prices in the imminent future.”

Just as the ITC was issuing its newest ruling, Canada published a notice Nov. 23 in the Canadian Gazette, its Federal Register, seeking comments on a proposed list of U.S. exports that could face retaliatory tariffs if the U.S. does not repeal the Byrd Amendment. Canada has joined a half dozen other countries plus the EU in notifying the WTO of their intent to impose sanctions next year. WTO Nov. 26 approved the retaliation if the U.S. fails to repeal the law.

While the level of Canadian retaliation would be relatively small initially, limited to 72% of duties on Canadian goods distributed under Byrd, it could hit hundreds of millions of dollars in U.S. exports, if the U.S. were to begin distributing the \$1 billion-plus it has collected in anti-dumping and countervailing duties on softwood lumber to the U.S. domestic industry. Among the scores of potential targets listed by Canada in its notice are: live swine, frozen fish, maple sugar, cigarettes, beer, whiskies, plywood, carpets, golf clubs and newsprint.

## **BRIEF CONTENDS COURT MISINTERPRETED “SPECIALLY DESIGNED”**

An appellate court ruling on the meaning of the phrase “specially designed” in the Export Administration Regulations (EAR) “will have a significant adverse effect upon hundreds of United States exporters,” argues the Industry Coalition on Technology Transfer (ICOTT) in an amicus curiae brief filed in support of an en banc appeal requested by the defendants in *U.S. v. Lachman* (see **WTTL**, Nov. 1, page 2). Walter Lachman and his associates at Fiber Materials, Inc. (FMI), have asked the full First Circuit Court to review and reverse the ruling of a three-judge panel which had sided with the government’s broad interpretation of specially designed.

In its ruling, the appellate panel said “specially designed” could be interpreted by the Bureau of Industry and Security (BIS) to mean “capable of” rather than the more limiting “exclusively for.” It claimed the broader meaning was in keeping with the national security goals of the Export Administration Act (EAA).

The panel’s interpretation of specially designed will lead to an increase in the number of export licenses U.S. firms will have to obtain, ICOTT argues. “This is because a control on items that are exclusively useful for a given purpose takes in far fewer items than a control on items that are capable of use for that purpose,” the group contends. The broader interpretation also could expose exporters to increased regulatory penalties and put U.S. companies at a disadvantage to foreign competitors whose exports aren’t subject to the same interpretation, it adds.

In addition, the ruling differs sharply from the interpretation long used by the Coordinating Committee on Multilateral Export Controls (COCOM), the predecessor to the Wassenaar Arrangement, ICOTT claims. The ruling “improperly obliterates years of COCOM deliberations and consequent Commerce Department practice that carefully calibrated the scope of export

controls for 'dual-use' commodities," states ICOTT in a brief written by Eric Hirshhorn of Winston and Strawn. This calibration is seen within the COCOM control list and in many Export Control Classification Numbers (ECCN), ICOTT notes. In ECCNs, "the use of 'designed for' and 'specially designed for,' and of 'for' and 'specially designed for' within the same entry prove that 'specially designed' has a narrower import than the other phrase," it contends.

## **DOHA IS TOP PRIORITY, SAYS NEW EU TRADE CHIEF MANDELSON**

Peter Mandelson, who succeeded Pascal Lamy as European Union (EU) trade commissioner Nov. 22, made a symbolic trip to Geneva on his first day in office to show his support for the WTO and the Doha Round negotiations. Developing the multilateral system "is my top priority and its biggest prize is success in the Doha Round," he told reporters Nov. 23 after he met with WTO Director General Supachai Panitchpakdi and other trade representatives in Geneva.

Mandelson said he recognizes the hard work that lies ahead to fill in the details of the agriculture framework reached in July and to make progress in non-agriculture market access and services before the next WTO Ministerial in Hong Kong in December 2005. "I believe this is attainable but challenging," he said.

Although EU is committed to the round and will "continue to play its full part in bringing the round to success, we cannot be its only banker," Mandelson said. He said he welcomes the emergence of different negotiating groups of developing countries in the Doha talks. "But it also highlights the fact that not all developing countries share identical interests," he said.

Speaking to EU parliamentarians Nov. 25, Mandelson gave his support for a WTO Parliamentary Assembly to bring representatives of WTO member legislatures into the dialogue on trade. He also called for creation of a "consultative group" in the WTO to move negotiations forward. "This might provide a practical middle way between formal but unwieldy meetings of all 148 delegations and the over-restrictive Green Room process of GATT," he said.

## **BIS REACHES SETTLEMENTS WITH THREE FIRMS FOR INDIAN EXPORTS**

BIS is continuing to clean up a backlog of enforcement cases involving unlicensed exports to organizations in India that were placed on the agency's Entity List in 1998. In three recent settlement agreements, Bristol-Myers Squibb, Halear and PartMiner agree to pay civil fines to resolve BIS charges that they shipped items to Indian customers without licenses.

Bristol-Myers Squibb Medical Imaging of North Bellerica, Mass., was charged with export violations as the successor to DuPont Merck Pharmaceutical, which it acquired. The firm will pay a \$16,200 civil fine for DuPont Merck's alleged unlicensed export of Cobalt-57 to the Indian Department of Atomic Energy, Directorate of Purchase and Stores on two occasions in 1999.

Halear of Placentia, Calif., will pay a \$60,000 civil fine for unlicensed exports of amplifiers, connector sockets and spare parts to India in 1998 and 1999. Its president, Bernard Spear, reached a separate settlement imposing a three-year denial of export privileges for his part in the alleged violations. Spear was charged with making false statements to special agents from BIS' Office of Export Enforcement who were investigating the exports. "Specifically, Spear stated to OEE investigators that the export of the amplifier had been made prior to the license requirements in this case," the BIS Charging Letter stated. "This statement was false," it charged. The agency also claimed he made false statements about the export of the connectors.

PartMiner of Melville, N.Y., agreed to pay a \$50,000 civil fine to settle BIS charges that it exported electronic components that were classified as EAR99 to organizations in India which were on the Entity List. On one occasion it failed to file a Shipper's Export Declaration (SED) for the goods and on another it filed a false SED, claiming the items qualified for

License Exception NLR (no license required) and stating the goods were destined for consignees in Denmark and Singapore.

## CHINA WARNS U.S. ON IMPOSITION OF APPAREL SAFEGUARDS

China is complaining that U.S. officials are encouraging the American textile industry to file safeguard petitions against Chinese apparel imports by the acceptance of the cases. "If the U.S. government allows such momentum despite the facts and WTO rules, it will cause serious impact on bilateral trade and investment ties," warned a spokesman for the Chinese Ministry of Commerce Nov. 23. The U.S. Committee on the Implementation of Textile Agreements (CITA) has opened investigations on seven safeguard requests. It received a new request on Nov. 24 for action against dressing gowns and robes, and is considering three other recent requests for safeguards on synthetic fiber, wool trousers and knit fabric.

CITA Chairman Jim Leonard defended the committee's actions at a meeting with apparel importers Nov. 16, but claimed no decision has been made on safeguards for the pending cases. "It is very important to understand that our acceptance of a case does not mean we will take the safeguard action," he asserted.

Meanwhile, at the WTO Council on Trade in Goods Nov. 25, China, India and Pakistan urged the council to shift the discussion on the impact of the end of the Agreement on Textiles and Clothing (ATC) to the WTO subcommittee on least developed countries. The U.S. objected to that proposal, as did several advanced-developed countries such as Turkey and Sri Lanka, who see the post-ATC problems affecting more than just least developed countries.

## WTO LAUNCHES TALKS ON TRADE FACILITATION

Following up on a new mandate approved at the end of July, WTO members have begun the first series of talks on trade facilitation. While participants in meetings Nov. 22-23 voiced support for improving transparency, strengthening disciplines and simplifying entry processes, several countries also stressed the need for technical assistance. A presentation by the World Customs Organization also noted importance of customs process on the collection of tariffs, which are a prime source of revenue for many countries. A representative of UNCTAD addressed the impact of sanitary and phytosanitary border measures and quarantines.

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

DEEMED EXPORT: Fujitsu Network Communications in Richardson, Texas, has agreed to pay \$125,000 civil fine to settle BIS charges that it violated deemed export licensing requirements by releasing technology related to fiber-optic transmission and broadband switching equipment to 20 Chinese nationals and one Ukrainian without obtaining required license.

APEC: Asia-Pacific leaders meeting in Santiago, Chile, Nov. 21 issued declaration calling for "substantial results" in Doha Round talks by next WTO ministerial in Hong Kong in December 2005. Also, they said they supported "efforts to conclude promptly" accession of Russia and Vietnam into WTO. Leader endorsed "best practices" for future FTAs.

CHINA SOFTWARE: At Nov. 25 WTO Council on Trade in Goods, U.S. raised concerns about Chinese proposal to favor domestic software in government purchasing over foreign software.

BIS: Agency amended EAR in Nov. 23 Federal Register to require, effective Dec. 23, 2004, communication of license conditions to consignees in writing. "Such communication must be in writing (which includes recorded and retrievable media, such as e-mail)," it explained

DYNAMIC ADAPTIVE ROUTING: Representative for Cisco, Juniper and 3Com urged BIS Information Systems Technical Advisory Committee to support their request for decontrol of software and technology used in routers. Software for these systems is over 25 years old and used in every router on market, claimed Roz Thomson. Therealso is extensive foreign availability, including in China, he noted