

# Washington Tariff & Trade Letter®

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

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## BIS PLANNING NEW GUIDANCE ON FOREIGN AVAILABILITY REQUESTS

The Bureau of Industry and Security (BIS) has begun work on new industry guidance to help exporters know what type of information they need to include in petitions seeking the decontrol or easing of controls of items that have “foreign availability” and cannot be effectively controlled unilaterally, BIS Under Secretary Ken Juster told the President’s Export Council (PEC) March 17. After the meeting, Juster told WTTL that the drafting effort is still in its earliest stage and has not yet gotten interagency review.

The foreign availability provisions of U.S. export control regulations have been a dead letter for more than a decade, with industry having given up hope that the government would ease controls based on items being available to controlled destinations from uncontrolled sources. Industry has been more successful in seeking control changes through concerted public relations and lobbying efforts as was seen for high performance computers and mass-market encryption products.

“It is important to improve the way we consider the existence of foreign availability of high technology goods in our export control licensing decisions,” Juster told the PEC. “The increase in the foreign availability of items that need control leads this issue to become important in determining the utility and effectiveness of our export controls,” he added. Juster claimed Commerce “is developing and publishing soon guidance for U.S. exporters for providing information to us supporting claims of foreign availability.”

After the PEC meeting, Juster told WTTL that BIS has never discouraged the use of foreign availability requests from industry. The guidance BIS is likely to issue, however, will not be aimed at increasing the use of this provision of the Export Administration Regulations. Rather it will clarify the type of information and evidence that is needed to support a request.

## TRADE ACTIONS SIGNAL TOUGHER APPROACH TO CHINA

Sino-American trade relations are heading downhill as the Bush administration responds to growing economic and political complaints to crackdown on Beijing’s trade and human rights record. Separate action aimed at China’s lack of intellectual property rights is also expected (see story page 2). The long anticipated U.S. move toward a tougher stand against China accelerated March 18 with the opening of a World Trade Organization (WTO) complaint against Beijing’s value added tax (VAT) on semiconductors. Additional pressure came from an AFL-CIO filing of a Section 301 petition March 16, asking U.S. Trade Representative (USTR) Robert Zoellick to investigate China’s labor rights violations and impose sanctions on Chinese

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goods to offset this “burden” on U.S. commerce. The U.S. has been threatening a WTO case against China’s VAT tax for months (see **WTTL**, March 15, page 2). China imposes a 17% VAT tax on integrated circuits, but rebates 14% to Chinese manufacturers. The U.S. claims this violates Beijing’s obligation to provide national treatment to U.S. exporters. U.S. officials have been trying to get Beijing to change the VAT law before the next meeting of the bi-national Joint Committee on Commerce and Trade (JCCT) in mid-April.

Although the complaint was not unexpected, the Chinese claim they were surprised by it. “At a time when bilateral negotiations are still underway, the United States suddenly requested at the WTO to consult with China. This is totally beyond understanding,” a Chinese Commerce Ministry spokesman said. In the initial stage of the dispute-settlement process at the WTO, the U.S. and China will hold 60 days of consultations to try to resolve the dispute.

The AFL-CIO petition, while primarily aimed at embarrassing the Bush administration ahead of the elections, actually has a solid legal grounding and may be hard for Zoellick to reject. At best, the USTR’s office may try to delay a decision on whether to initiate an investigation or in dealing with the results of the investigation.

The 103-page petition lays out the case for why China has followed “a persistent pattern of conduct” to deny workers the right to organize, bargain collectively, while also using forced labor. The union group contends these practices have imposed a burden on U.S. commerce because they have resulted in low wages in China and produced a cost advantage for Chinese goods. These arguments track the precise language in Section 301 of the U.S. Trade Act, which spells out what constitutes an “unreasonable” trade practice that could be subject to retaliation. The AFL-CIO wants the USTR’s office to impose trade sanctions on Chinese imports “commensurate with the cost advantage caused by China’s denial of worker rights.”

## **TRADE OFFICIALS WILL PRESS CHINA ON IPR PIRACY**

U.S. trade officials who will be in China the week of March 22 will urge the Chinese to use their large cache of U.S. dollars to pay for software Chinese industry has been pirating. Under Secretary of Commerce Grant Aldonas and Deputy USTR Josette Shiner will be in Beijing to prepare the way for a Cabinet-level meeting of the Joint Committee on Commerce and Trade (JCCT). The two trade officials will focus their talks on China’s failure to enforce intellectual property rights (IPR) not just against street vendors who sell pirated CDs and video, but also Chinese companies that use pirated business software. IPR protection has become a major target for U.S. negotiators. To underscore its importance, trade officials are even threatening to call off the JCCT meeting, if progress on the issue can’t be reached before hand.

## **NUMBER OF EXPORT LICENSES RISES AS VALUE DECLINES**

The U.S. export control system appears to be catching more, lower-valued exports than in the past. In the fiscal year that ended Sept. 30, 2003, BIS reviewed 12,443 individual license requests, a 15.5% increase over 2002, but the total value of these applications dropped 11% from the year before to \$15 billion, the agency’s 2003 annual report reveals. BIS approved 10,416 licenses (84%), returned without action 1,784 (14%), and denied 243 (2%).

The largest number of approved licenses (950) was for exports to Japan. Of these, 79% were for cameras controlled under Export Commodity Classification Number (ECCN) 6A003. Licenses for China came in second with 847, of which 37% were for “deemed export” cases, BIS reported. The number of licenses approved for China increased 9% from 2002, but the value of case dropped 32% to \$1.4 billion. The number of licenses approved for trade with Cuba, including temporary aviation visits, was 528, about the same as last year, but with almost 19% more value at \$2.8 billion. The average time for completing a license review – not counting time the cases were held without action awaiting more information from applicants – was

44 days. This compares to 39 days in fiscal 2002. But for some products the review times were much longer. It took an average of 52 days for BIS to act on thermal imaging and light intensifying cameras. But exports of these items to Taiwan waited an average of 68 day for an answer and those headed to China sat for an average of 95 days.

The changing nature of export licensing policies was sharply illustrated in the latest report. During fiscal 2003, BIS received only 14 applications for products falling under ECCN 4A003, which includes digital computers and related equipment. This compares to fiscal 1993 when it received 11,164 applications for products in this category. That represented nearly 43% of its workload that year. In contrast, BIS received 2,818 license applications last year for thermal imaging products in ECCN 6A003 compared to 40 in 1993.

## **BIS REPORT SHOWS NEW TRADE PARTNERS STILL MAKE BOYCOTT DEMANDS**

The United Arab Emirates, Qatar, Kuwait, and Bahrain – countries with which the U.S. is seeking trade agreements – remain among the most active participants in the Arab League boycott of Israel, according to the BIS annual report for 2003. While the overall number of requests for restrictive actions from Islamic countries declined almost 3% in the fiscal year that ended Sept. 30, 2003, from the year before, requests from Qatar jumped 30% to 115.

There was a 27% increase in requests from Kuwait to 104 and a 2% increase to 612 from the UAE. The number of boycott-related conditions reported by U.S. firms dealing with Bahrain, however, declined 42% to 38, BIS reported. Overall, U.S. firms reported 1,437 boycott-related requests to BIS.

The most common boycott request (36%) involved restrictions on the country of origin for the goods being shipped. The second most common (22%) involved prohibitions on the carrier hauling the goods, followed by the general request (15%) to observe the boycott laws. The BIS report was released the same week USTR Robert Zoellick signed new Trade and Investment Framework Agreements (TIFA) with the UAE on March 15 and Qatar on March 19.

## **U.S. COMPLETES TALKS ON FTA WITH DOMINICAN REPUBLIC**

The conclusion of talks March 15 on a U.S.-Dominican Republic (DR) free trade agreement (FTA) and its expected docking into the Central American Free Trade Agreement (CAFTA) may drive a wedge into the almost solid Democratic opposition to approval of CAFTA this year. With one of the largest Dominican constituencies in the U.S., Rep. Charles Rangel (D-N.Y.) praised the U.S.-DR accord after its announcement, but stopped short of a full endorsement of its congressional enactment. "I look forward to working with the Washington Heights community [in New York City] in reviewing the details of this agreement and working to ensure that it's an agreement that brings benefits to us all," Rangel said in statement.

It is hard to find anyone who is optimistic about the chances of a CAFTA-DR deal getting approved by Congress this year. The outlook is even uncertain for the U.S.-Australian-FTA. At the press conference announcing the U.S.-DR deal, USTR Robert Zoellick said he has spoken to Senate Majority Leader Bill Frist (R-Tenn.) and other members of the Republican leadership on moving the FTAs through Congress this year. The chance for action "really depends on the calendar and the support we can build for these agreements," Zoellick reported.

Eager to get on the CAFTA bandwagon, regardless of its speed, the DR accepted a deal that gave it very little extra quota for sugar exports to the U.S. and a slow 15-year pace of growth. It also accepted the same yarn-forward rule of origin for textiles and apparel as other CAFTA participants, along with the same cumulation provisions on woven apparel using Mexican and Canadian fabric. The phase-in of total tariff-free treatment between the two nations also will

be slow. While 80% of U.S. exports of consumer and industrial goods to the DR will become duty-free immediately, other goods won't see such treatment for 10 to 15 years. DR tariffs on some U.S. farm exports will phase-out over 15 years, but all will be tariff free in 20 years

### **CUSTOMS DISBURSED \$190 MILLION IN BYRD FUNDS LAST YEAR**

Some U.S. industries might complain that the Bureau of Customs and Border Protection (CBP) was stingy with its disbursement of funds under the Byrd Amendment in fiscal year 2003. The agency gave more than \$190 million to domestic firms that were parties to antidumping and countervailing duty cases, but these firms claim they're entitled to almost \$1.2 trillion. In the March 19 announcement of Byrd disbursements, CBP said an additional \$50 million is being held awaiting the outcome of court cases.

With no repeal of the Byrd Amendment in sight, nations that won a WTO ruling against the law are seeing the level of potential retaliation against the U.S. rising. The U.S. has asked a WTO arbitration panel to rule on the exact level of retaliation available to these countries.

As in previous years, the main beneficiaries of Byrd disbursements were companies that are heavy users of U.S. trade laws. That includes those in the steel, bearings and pasta industries. Members of the U.S. softwood lumber industry claim they are entitled to more than \$11.3 billion in funds collected from dumping and countervailing duties on Canadian lumber. Since these cases are subject to litigation, CBP disbursed only \$73,422 in 2003.

### **STEEL IMPORTERS, USERS HOPE FOR CHANGED CIRCUMSTANCES CASES**

Foreign steel producers and U.S. steel consumers are hoping some party to existing steel antidumping and countervailing duty cases will file a "changed circumstances" petition at the International Trade Commission (ITC) to get a ruling that the domestic steel industry is no longer being injured by imports for key steel product. Importers and consumers contend the sharp increase in steel prices, shortages of some product lines and lack of capacity in the U.S. to expand current production levels significantly mean existing trade orders should be revoked.

This segment of the industry wants Commerce to self-initiate these change circumstances reviews to help ease the pressure on U.S. steel buyers. It's unlikely the department would take such advice, but the issue may have to be addressed in the next 12 months as Sunset Reviews for several steel cases are scheduled.

As steel prices have jumped, steel producers and foundries also have complained about rising prices for steel scrap due to growing exports to China. A new group, the Emergency Steel Scrap Coalition, has been formed, and its lawyers have drafted a petition under Section 7 (c) of the Export Administration Act, which remain in effect as Section 754.7 of the Export Administration Regulations, seeking export controls or monitoring of scrap exports. The petition may be filed in the next two to three weeks, one source reported.

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

EXPORT ENFORCEMENT: Atlas Copco of Voorheesville, N.Y., has agreed to pay \$13,000 civil fine as part of settlement agreement with BIS to settle complaint that it exported oil and air seal components to listed entity in India without a license.

FSC: Senate Majority Leader Bill Frist (R-Tenn.) may seek to file cloture petition week of March 22 to cut off debate on FSC/ETI bill. If vote fails he may pull measure from floor.

EAR: BIS issued final order in March 18 Federal Register adding controls on 12 viruses and two bacteria to implement changes adopted by Australia Group last June. It also modified list of countries that are party to Chemical Weapons Convention, adding nine.