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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Vol. 24, No. 4 January 26, 2004

SELF-DISCLOSURE DIDN'T HELP EMCORE AVOID $400,000 FINE FOR EXPORTS

The Bureau of Industry and Security (BIS) appears bent on a policy of imposing civil fines on exporters in settlement agreements even when a firm voluntarily self-discloses the alleged violation of export controls. This policy contrasts with the agency's past practice of issuing warning letters in most cases when a company has self-disclosed a violation. The latest firm to get hit with hefty penatly despite a voluntary report to BIS is Emcore of Somerset, N.J.

> As part of a settlement agreement with BIS in December, Emcore agreed to pay a $400,000 civil fine for its unlicensed exports of metal organic chemical vapor disposition (MOCVD) tools to Taiwan and China. BIS, however, agreed to allow the company to pay half the fine now and the rest in a year.

Emcore, which produces compounded semiconductor materials used in high bandwith communications equipment, fiber optics and solar products, reported the BIS deal in a Section 10k filing with the Securities and Exchange Commission in December. "In February 2003, we discovered that we had failed to obtain export licenses for a total of 14 MOCVD reactor shipments to Taiwan and one such shipment to Singapore between 1997 and 1999," it reported. "In May 2003, pursuant to Section 764.5 of the Export Administration Regulations, we filed a Voluntary Disclosure with the DOC disclosing these violations and related matters. We negotiated a monetary settlement with the DOC of $400,000 and accrued the settlement amount in the first quarter of Fiscal 2004," it continued.

The BIS charging letter didn't mention the Singapore exports. It did, however contain 71 charges related to exports to Taiwan and China, including 27 shipments to Taiwan and seven to China. In addition to 12 charges for exports to Taiwan without approved licenses, BIS added 13 more charges for Emcore's provision of service and parts "on hundreds of separate occasions" to tools in Taiwan without licenses. Other charges were tied to the failure to file Shipper's Export Declarations (SEDs), filing incomplete SEDs, making false statements on SEDs by claiming the items were classified as No License Required (NLR) or violating the conditions of a license by failing to submit copies of SEDs and waybills to BIS.

CHINESE FURNITURE FIRMS WILL SEEK MARKET-ORIENTED STATUS

Chinese producers of wooden bedroom furniture will ask the International Trade Administration (ITA) to treat them as a "market-oriented industry" in the current antidumping investigation. Lawyers at Wilmer, Cutler & Pickering, which represents two of the likely Chinese respondents in the case, contend the investigation should not be handled as a nonmarket economy (NME)

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

case, as all previous dumping cases on Chinese goods have been, because the Chinese furniture industry isn't controlled by the government and its costs and prices are market driven.

> The attorneys claim the industry meets ITA's three-prong test for market-oriented status. Beijing doesn't control prices or production decisions and production levels are determined by negotiations with customs, they argue. "Prices and quantities are negotiated (either directly or through a trading company) between the Chinese producer and the customer without any intervention from the government," they wrote in a Jan. 15 brief to ITA (see **WTTL,** Jan. 12, page 2).

The industry is also characterized by private ownership. "The wooden bedroom furniture industry in China is a relatively new and modern industry that is free from ownership or control by the state," they asserted. "Indeed, a large portion of respondent producers are 100 percent foreign owned and those producers that are owned by Chinese nationals are privately owned."

Finally, the prices for inputs, including supplies, labor and energy, are market driven, they wrote. "We believe that virtually all of these inputs either are acquired from market economy countries, purchased in China at market-determined prices from multinational corporations and/or purchased in China in arms-length transactions from privately owned sources," they continued. The letter claimed that labor wages in the industry are not controlled by the state nor does the government control the cost of utilities or fuel for the industry. Moreover, "energy costs are not a significant component of total furniture productions costs," they added.

CONFLICTING PANEL RULINGS COMPLICATE SOFTWOOD LUMBER CASE

The conflicting rulings coming from the World Trade Organization (WTO) Appellate Body Jan. 19 and a NAFTA binational panel last summer on the countervailing duty (CVD) ruling on softwood lumber from Canada have highlighted the problem with parallel litigation in separate international dispute-settlement systems weighing different legal requirements. The WTO judges examined the U.S. action under the the WTO Agreement on Subsidies and Countervailing Measures (SCM), while the NAFTA panel looked at the application of U.S. trade laws.

> The split is expected to allow Commerce's International Trade Administration (ITA) to pick and choose the parts of each ruling it likes. How ITA will interpret these decisions could be revealed in its preliminary administrative reviews of the CVD and antidumping cases, which are due in June. Regardless of how it handles these disparate decisions, any ITA rulings are certain to face additional legal challenge, further putting off final resolution of the dispute.

The different rulings have upset the strategies for settling the dispute for both the domestic Coalition for Fair Lumber Imports and Canadian interests. Neither side has yet won a clear victory that would give it leverage in talks aimed at an interim agreement to replace the dumping and CVD duties with a tariff-rate quota. As long as the cases remain in litigation, the Coalition won't be able to get any of the $1.8 billion that could be distributed under the Byrd Amendment and Canadian exporters must keep paying hefty cash deposits. Canadian parties, mean-while, are schedule to hold a teleconference Jan. 26 with officials in Canada's Department of Foreign Affairs and Trade to decide on how to react to the latest WTO decision.

Further confusing the legal picture is a preliminary WTO panel ruling, which was leaked Jan. 16, that reportedly upholds most of the ITA's stand on the antidumping leg of the dispute. Added to that is a Jan. 16 decision from U.S. Court of Appeals for the Federal Circuit, in *Timken v. U.S.*, which upholds ITA's method for adjusting negative constructed dumping margins -- called "zeroing" -- in antidumping cases. Attorneys for Canadian parties, however, claim this issue could still be raised again, if the WTO rules against this zeroing practice. For now, the Appellate Body's Jan. 19 ruling supported the U.S. position that sales of timber stumpage rights by Canadian provinces could be considered a subsidized government provision of a good or service and could be determined to make a financial contribution to Canadian

lumber producers. It reversed a dispute-settlement panel's findings that U.S. acted inconsistent with the SCM when it ruled that Canadian market prices couldn't be used to determine the value of lumber subsidies and instead used a cross-border comparison to prices in the U.S.

> "Investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods," it said. The panel's rejection of cross-border comparisons was "overly restrictive and based on an isolated reading of the text," it said.

There are conditions on this use of cross-border comparisons, however, the AB noted.. After raising this caveat, it said there was insufficient information in the record to determine whether Washington met them. This ruling has left everyone scratching their heads about what the U.S. has to do, if anything, to reply to this criticism. It "must be demonstrated that, based on the facts of the case, the benchmark chosen relates or refers to, or is connected with, the conditions prevailing in the market of the country of provision," the AB stated. But "there are insufficient Panel findings or undisputed facts in the record to enable us to determine whether USDOC was justified, under Article14(d), in using a benchmark other than private prices in Canada....and therefore [the Appellate Body] makes no finding," it declared.

U.S.-AUSTRALIA FTA TALKS DEADLOCKED ON KEY ISSUES

Australian Trade Minister Mark Vaile will meet with U.S. Trade Representative (USTR) Robert Zoellick Jan. 26 to begin the last push toward completing a U.S.-Australian Free Trade Agreement (FTA) by the end of the week. Intense talks in Washington the week before his arrival continued to find wide differences over such key issues as agriculture and Australia's prescription drug benefits program. At press time, U.S. resistance to liberalization of its sugar market remains a major impediment to a deal.

> The super-sensitive sugar issue threatened to blow up the talks mid-week when reports surfaced claiming the U.S. refused to offer any increased opening of the American sugar market to Australia. These reports drew a protest letter to President Bush Jan. 22 from Reps. Cal Dooley (D-Calif.) and John Boehner (R-Ohio), who claimed Bush had backed off from his policy of not exempting any issue from the talks. "We are dismayed that you have now reversed your position and fear that the United States will pay a heavy cost for this decision," they wrote.

Before departing for the U.S., Vaile told reporters the rumors about the U.S. sugar position "haven't been verified yet." He also emphasized that "central to this agreement is agriculture and agriculture includes the key elements, as far as we're concerned, of beef, dairy and sugar." Also blocking the talks is Washington's effort to get Australia to revise its Prescription Benefit Scheme (PBS) which fixes drug reimbursement prices. U.S. drug firms have protested these price restrictions. "We are not prepared to enter into any agreement that will cause medicines in Australia to rise in cost to Australian consumers," Vaile declared.

Australia's position got support from a group of House Democrats who wrote to President Bush Jan. 15 to raise concerns about the U.S. proposals on PBS. The lawmakers said they were concerned the American position could boomerang and hurt U.S. drug programs for veterans and for such health programs as Medicare, Medicaid and the Pentagon's Tricare program, if the U.S. had to accept the same policy changes it was seeking from Australia.

Moreover, they questioned whether seeking a curb on the drug program was a negotiating objective under the 2002 Trade Act. The fast-tract law called for eliminating programs that provide a competitive disadvantage to foreign producers or reduce market access for American firms. "It is far from clear that the Australian system as currently structured provides any net advantage to Australian producers in competition with U.S. pharmaceutical companies – and to date this reason has not been offered as the basis for the proposal," they wrote.

EXPORTERS RAISE CONCERNS ABOUT RELEASE OF SED DATA

U.S. exporters are beginning to comment on a proposal to release Shipper's Export Declaration (SED) information to foreign governments in exchange for their SED-like data (see **WTTL**, Jan. 12, page 1). "This proposal represents a substantial departure from the U.S. government's longstanding policies on the confidentiality of SED information," the Census Bureau was told in a letter from the Industry Coalition on Technology Transfer (ICOTT).

> "As you know, many foreign governments – including the governments of many U.S. allies – are known to employ intelligence information to further national commercial and business interests, including efforts to wrest business opportunities from U.S. exporters," ICOTT noted. "The highly competitive international commercial environment could provide foreign governments with additional incentives to make improper use of SED data," it warned.

If the U.S. does enter into any agreements with foreign governments on SED data, ICOTT said these governments must assure: (1) that they will provide the same high level of protection to SED data as the U.S.; (2) that access to SED information and the information derived from that information is limited to targeted transactions that raise national security concerns; (3) that foreign governments be required to make a showing, based on objective criteria, of their need for specific SED data; and (4) that procedures are in place to monitor the use of such data and to identify and address "with firmness" any unauthorized use or disclosure.

MANUFACTURING INCLUDES TOUGHER TRADE ENFORCEMENT AS REMEDY

Commerce Jan. 16 issued detailed and thoughtful report on "Manufacturing in America," revealing 30-year decline in manufacturing jobs in most industrialized nations, but offering political remedies that included reshuffling Commerce to create an assistant secretary for manufacturing and services and using "aggressive enforcement of current trade rules." The report asserts that "in today's global economy, a policy of protection simply does not work." Nevertheless, it propose creating an office of investigations and compliance to seek potential unfair trade cases that restrict market access and a task force in the Import Administration office to pursue unfair trade practices that distort markets through subsidies or dumping.

* * * BRIEFS: * * *

CUSTOMS: Deputy Commissioner Douglas Browning has announced plans to retire May 3.

FTAs: At press time, talks U.S. talks aimed at bringing Costa Rica into CAFTA were continuing, with final agreement reportedly close. Week-long FTA talks with Morocco also were moving forward.

EXPORT ENFORCEMENT: Massive International of San Diego paid $13,000 civil fine as part of settlement agreement with BIS to resolve charges that it attempted, with knowledge, to export hydraulic stud tensioners to Bharat Heavy Electrical Limited of Tiruchirapalli, India, without approved license from BIS.

CUBA: President Bush Jan. 16 continued Clinton-era policy of suspending Title III of Libertad Act, which would otherwise allow U.S. citizens to sue persons "trafficking" in confiscated Cuban property.

BULGARIA: President Bush Jan. 21 asked Senate to ratify protocol to amend Bilateral Investment Treaty (BIT) between U.S. and Bulgaria. Accord, reached in September, will maintain BIT and avoid any conflicts with European Union (EU) law after Bulgaria joins EU in 2007. White House previously sent Senate similar accord with Romania, which also will join EU in 2007. President said he expects shortly to seek Senate ratificaiton of additional agreements with Czech Republic, Estonia, Latvia, Lithuania, Poland and Slovak Republic, which will join EU May 1, 2004. "The understanding is designed to preserve U.S. bilateral investment treaties with each of these countries after their accession to the EU by establishing a framework acceptable to the European Union for avoiding or remedying present and possible future incompatibilities between their BIT obligations and their future obligations of EU membership," president said in message to Senate.