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BIS SLOWING DOWN MARCH TOWARD CATCH-ALL RULE

The Bureau of Industry and Security (BIS) won't reach its goal of proposing a new "catch-all" regulation for exports of unlisted goods and technology to embargoed countries by the end of 2005, and it may be reconsidering the proposal to reduce its potential negative impact on U.S. companies. The slowdown in the rulemaking process apparently responds to questions raised by Commerce Secretary Carlos Gutierrez and new officials at BIS and State who want to take a closer look at the issue before any new rules are proposed (see **WTTL**, Oct. 31, page 2).

"The secretary is strongly committed to achieving a level playing field specifically in this area," BIS Assistant Secretary Peter Lichtenbaum told a Practising Law Institute conference Dec. 5. "I think, if we believe that we are taking an action that would not result in a level playing field, we would think long and hard about going through with it," he said.

Part of the credit for the new look at the catch-all proposal goes to an industry working group in Washington that has been lobbying to prevent the potential rules from becoming a new unilateral export control aimed primarily at China. The group, made up of industry representatives and trade association executives, has met with administration officials and congressional staffs to raise concerns about the impact of a unilateral sanction.

Lichtenbaum's comments also reflect the emphasis that new BIS Under Secretary David McCormick has placed on maintaining U.S. technology competitiveness. One new BIS priority is "better economic analysis of the impact of export controls on key industries," Lichtenbaum said. "We need to insure that U.S. licensing requirements are not so onerous that we virtually compel U.S. industries to move off shore," he said.

"If export controls push those industries off shore we will lose jobs and we will lose influence in strategic exports," he noted. Lichtenbaum pointed to the night vision industry as a current example. "We need to streamline our policies, particularly in regard to Western Europe and Japan, where their domestic suppliers have the same items, because if we don't take that into account, I think we will end up controlling exports that no longer exist," he declared.

TEST TIME FOR PORTMAN, LAMY, MANDELSON IN HONG KONG

The week before the World Trade Organization (WTO) Ministerial Dec. 13-18, delegations and WTO staff in Geneva shipped out for Hong Kong, leaving a conflicting diagnosis of the situation in their wake. "We are on a big ship with loads of sails, destination end of 2006,

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stopover Hong Kong, and we just need the necessary wind to move this boat closer to the port of call,” said WTO Director General Pascal Lamy at a press conference Dec 6. “I think we succeeded last week in capturing the progress which was made since July 2004, and we also succeeded in giving ministers clear focus in terms of topics to be taken up next week and a text which provides them with a tool for gaining great convergence during this meeting,” he said.

“The tool box is now ready for ministers to negotiate in Hong Kong, not to discuss, not to address, not to talk -- of course, they’ve got to do all that -- but also to negotiate,” Lamy said displaying his fondness for metaphors. “The work captured in this [draft ministerial declaration] text probably moves us somewhere around 55% of the way there, and our mission, their mission in Hong Kong, is now to build on this and move as close as we can to the two-thirds target, which we know we will not reach,” he said.

“We do seem to be heading towards at least some conceptual convergence,” said Indian Commerce Minister Kamal Nath on Dec 3, “There are no numbers on it, but once we are at conceptual convergence, I think numerical convergence will follow,” he added.

Going into Hong Kong, everyone has someone else to blame for the limited progress made so far in the round. The European Union’s (EU) stand on agriculture remains the primary target of complaints from the U.S. and advanced developing countries belonging to the G-20. The EU agriculture proposal “is the one thing that is holding back everything else,” said an official close to the negotiations. But he also saw some bright spots. “The annex on services in the declaration, I think it’s surprisingly good,” he said (see story below).

WTO AIMS TO DELIVER PACKAGE FOR LEAST DEVELOPED NATIONS

A new strategy aimed at circumnavigating the roadblocks in Doha Round negotiations emerged in the days just ahead of the WTO Ministerial in Hong Kong. During talks in Geneva Dec. 1-3, a group of ministers, including U.S. Trade Representative (USTR) Rob Portman, agreed to propose a package of trade and aid benefits for least developed countries (LDCs) at the meeting. The apparent goal of the plan is to show some meaningful results at the ministerial and reduce the chance these small economies will derail the talks as they did the ministerials in Seattle and Cancun over the lack of attention to their developmental needs (see **WTTL**, Nov. 28, page 4).

Although the details of the package haven’t been worked out yet, the heart of the plan is the extension of duty free and quota free treatment to goods from LDCs. There is also likely to be a proposal – under Mode 4 of the services negotiations – to expand access to developed country markets for service workers from these poor countries. Another element would be implementation of the Aid for Trade initiative that G-7 leaders announced at their last summit.

Some members of Congress quickly raised concerns about the further opening of the U.S. textile and apparel market and the impact Mode 4 changes might have on U.S. immigration and visa policies. Supporting U.S. textile industry complaints, 24 House members wrote to Portman Dec. 8 asking him to remove textiles from any general tariff cutting proposal and not to support duty-free, quota free access for LDC textile and apparel imports. House Judiciary Committee Chairman James Sensenbrenner (R-Wis.) and Sen. Diane Feinstein (D-Calif.) and six other senators renewed objections to using a trade deal to change U.S. immigration policy. Portman met with Sensenbrenner and Feinstein before leaving for Hong Kong to clarify U.S. goals.

WTO SERVICES PROPOSAL MAY BE BRIGHT SPOT IN HONG KONG

Doha Round negotiations on the liberalization of services industries, which had lagged for nearly four years, may turn out to be one of the few positive signs of progress at the Hong Kong Ministerial. U.S. industry executives say the main goal of the WTO meeting will be to

prevent the watering down of the draft services annex to the ministerial declaration. "Our main goal is to convince these guys to leave the annex the way it is," said Bob Vastine, president of the Coalition of Service Industries.

The draft endorses the continuation of a sectorial approach to services negotiations with the aim of achieving liberalization on a sector-by-sector basis rather than a broad formula to open all sectors across the board. The pace of services talks picked up in the last few months due to the efforts of 17 informal groups of countries called "friends of" that have focused on liberalization of access in specific services sectors.

These small informal groups of five to 12 countries represent nations that are seeking liberalization of these sectors. The process, however, has drawn complaints from some WTO critics and countries in Asia and Africa who object to the lack of transparency in the discussions and concerns that the goal of the talks is the privatization of nationalized industries or monopolies and the displacement of local workers.

The "friends of" such sectors as logistics, energy services, financial services, legal services and film services, are developing model agreements for opening each sector under discussion. Because participating nations are also among the largest suppliers of these services, opening their markets would represent the bulk of the global market. As a result, plans call for them to open their markets unilaterally on a most-favored-nation (MFN) basis to all WTO members.

JURY ISSUES SPLIT VERDICT ON EXPORT CONTROL VIOLATIONS

A federal jury in Washington, D.C., Dec. 7 reached different conclusions on export control violation charges against two former executives of forklift truck manufacturer Clark Material Handling Co., of Lexington, Ky. (see **WTTL**, Oct. 31, page 3). It convicted Robert Quinn, the firm's former VP for global parts marketing, but acquitted Michael Holland, an account representative, on one count of conspiracy and five counts of exporting forklift truck parts to Iran without a license from Treasury's Office of Foreign Assets Control (OFAC).

Government sources could not explain the different verdicts but speculated that the jury may have considered Quinn, who was the senior executive, more responsible for arranging the illegal exports than Holland. The indictment of the two had described a scheme with a fugitive co-conspirator in Iran to have the parts exported to Dubai, United Arab Emirates, and then reexported to Iran.

In his 58-page instruction to the jury, U.S. District Court Judge John Bates explained what constitutes a "willful" violation of U.S. export controls. "The essential elements of this offense, each of which the government must prove beyond a reasonable doubt, are: (1) that the defendant exported goods from the United States to Iran, through the United Arab Emirates; (2) that the defendant did so willfully, that is, voluntarily and intentionally in violation of a known legal duty; (3) that the defendant knew or had reason to know that those goods were intended for delivery to Iran; and (4) that the defendant did not obtain the necessary license from the Office of Foreign Assets Control before exporting the goods," Bates told the jury.

CENSUS WILL ISSUE PENALTY MITIGATION GUIDANCE FOR MANDATORY AES

The Census Bureau will issue penalty mitigation guidelines when it publishes its final regulations requiring mandatory use of its Automated Export System (AES) for the filing of export documentation for all exports. The draft guidance, which is being shared with industry advisors, may calm growing exporter concerns that they will face different interpretations of the new documentation rules from the different agencies that are being given authority to enforce them. The publication date for the final mandatory AES rules continue to slip and is now not expected until the first quarter of 2006. The requirements won't go into effect until 90 days

after the rules are published. Under a delegation of authority signed by Commerce Secretary Carlos Gutierrez, the power to enforce the AES rules will be shared by BIS, Customs and Immigration and Customs Enforcement (ICE). The delegation to Customs has sparked worries that the AES rules might get different interpretations at each of the 450 U.S. ports of entry.

Factors that might mitigate penalties for violating the new Foreign Trade Regulations (FTR), which carry a potential \$10,000 per violation fine compared to the previous \$1,000 per count penalty, will include an exporter's past experience with AES, the training given its employees, voluntary self-disclosure of violations and cooperation with investigations of violations, according to Jerry Greenwell, director of the regulations branch of Census' Foreign Trade Division. He also warned that Census is likely to seek an early enforcement case to demonstrate the consequences of violating the new rules. "Someone, somewhere is going to be an example," he told RAPTAC Dec. 6. "If you don't have an example, you don't have any teeth," he said.

*** BRIEFS ***

FACILITATION: Pressure from Congress is prompting OFAC to take closer look at how rules prohibiting "facilitation" of transactions involving countries and individuals subject to OFAC restrictions should apply to U.S. parent corporations of foreign subsidiaries that deal with those parties, OFAC officials say.

PERU: U.S. Dec. 7 decided to stop waiting for Colombia and Ecuador to compromise on key sticking points in negotiations on U.S.-Andean Pact Free Trade Agreement (FTA) and to go ahead with just bilateral deal with Peru. Senior U.S. trade official said there is no calendar for resuming talks with Colombia and Ecuador (see WTTL, Oct. 24, page 4).

DR-CAFTA: As U.S. moves ahead with FTA with Peru, implementation of DR-CAFTA may miss its Jan. 1 target date, if White House wants to certify compliance of all six trade partners with agreement at same time. Costa Rica isn't likely to enact implementing legislation until couple of months after March elections, sources report. Guatemalan officials say they are ready to implement Jan. 1.

JAPAN: During U.S.-Japan Trade Forum meeting Dec. 7 in Seattle, U.S. presented Tokyo with another set of recommendations for regulatory reforms. Latest batch puts focus on speeding approval of U.S. medical devices and drugs and on healthcare pricing policies. U.S. also urged Japan to ensure that privatization of Japan Post doesn't disadvantage private foreign delivery services.

SOFTWOOD LUMBER: WTO Appellate Body Dec. 5 upheld dispute-settlement panel ruling which said first U.S. administrative review of CVD order on softwood lumber from Canada didn't properly conduct pass-through analysis of log sales. Separately, ITA Dec. 6 issued final results of second administrative review of CVD and dumping orders on lumber, lowering CVD rate to 8.70% and reducing dumping margins for specific exporters to margins ranging from 0.51% to 4.43%.

EXPORT ENFORCEMENT: After making voluntary self-disclosure, Carrier Access Corp. of Boulder, Colo., reached agreement with BIS to pay \$61,600 civil fine for violations related to export of telecommunications equipment through UAE to Iran without OFAC license.

ITAR: Howard Hsy of Bellevue, Wash., pled guilty Dec. 6 in Seattle U.S. District Court to conspiracy to violate Arms Export Control Act. He was charged in March with exporting night vision goggles, helmet mounts and camera lense through "front company" in Auburn, Wash., to co-conspirator in Taiwan who reexported equipment to China without approved State license. Another co-conspirator, Donald Shull, pleaded guilty in October to conspiracy to violate Export Administration Act, Justice reported.

BAHRAIN: House passed U.S.-Bahrain FTA implementing legislation (H.R. 4340) Dec. 7 by bipartisan 327-95 vote. Senate action expected week of Dec. 12 when Senate reconvenes from Thanksgiving recess.

SULFUR DIOXIDE: ITC Dec. 7 made 5-1 preliminary determination that allegedly dumped imports of liquid sulfur dioxide from Canada are not injuring U.S. industry. Vote terminates case.

DEGASSED CHROMIUM: ITC Dec. 5 made final determination that dumped imports of superalloy degassed chromium from Japan are injuring U.S. industry.

EDITOR'S NOTE: Publication of Dec. 19 issue of WTTL will be delayed so we can include special report on outcome of Dec. 13-18 WTO Ministerial. We'll be in Hong Kong for first-hand coverage of meeting.