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

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STATE SEEKING COMPLIANCE REVIEWS FOR FIRMS BEING ACQUIRED

State's Directorate of Defense Trade Controls (DDTC) appears to be using the registration process under the International Traffic in Arms Regulations (ITAR) to force defense firms to conduct compliance reviews of companies they acquire and to make self-disclosures of any ITAR violations they find. "In the context of that acquisition notification, the State Department is now formally requesting the acquiring company to conduct a compliance assessment into the ITAR compliance posture of the acquired company and to report back to the State Department any violations within 90 days," reports attorney William McGlone.

Under ITAR, firms that are registered with DDTC as defense exporters must amend their registration to reflect the acquisition of another company. So far, the extent to which State is requesting these compliance assessments is anecdotal and DDTC hasn't issued any statement on the policy. The letters being issued are signed by Deborah Carroll, the new head of the registration and compliance office in DDTC, who is described as very tough and enforcement minded.

"This is a very significant development," McGlone, a partner in the D.C. law firm of Miller & Chevalier, told a conference on international technology transfer June 27. "It is effectively forcing companies to make voluntary disclosures," he added. Whether State will treat these reports as voluntary or directed disclosures is not yet clear. Sources familiar with the requests sent so far say there is no indication that State was basing its requests on any specific knowledge or suspicion of violations, which might support a directed disclosure requirement.

NAFTA COUNTRIES PROPOSE NEW TRILATERAL TRADE, SECURITY MEASURES

The commerce, security and foreign affairs ministers of the U.S., Canada and Mexico sent a comprehensive proposal to the leaders of their three countries June 27, recommending the implementation of measures to integrate further the security, trade and regulatory systems of North America. The proposal responds to a call that President Bush, Mexican President Fox and Canadian Prime Minister Martin issued during their March summit for the creation of a Security and Prosperity Partnership for North America.

The ministers ask the leaders to approve a plan to ease border crossing for people and goods, speed up trade liberalization through changes in NAFTA rules of origin, open more lanes and facilities at congested borders for low-risk traffic, and improve cooperation in health and safety regulation. The report says the three countries have already drafted a document clarifying entry procedures for temporary professional workers. It proposes a trilateral Regulatory

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Cooperation Framework by 2007 “to support and enhance existing, as well as encourage new cooperation among regulators, including at the outset of the regulatory process.” The officials want to create a North American Steel Strategy by 2006 to promote growth and competitiveness in this sector. The strategy will pursue “elimination of distortions adversely affecting North American steel markets, including through policy coordination and other actions.”

Another goal is establishment of an Automotive Partnership Council of North America to address regulation, innovation, transportation and border facilitation. In the security sector, the report proposes real-time sharing of terrorist screening information, creating export/import controls to minimize the risk of illicit movement of radioactive materials, and adopting “compatible border security measures so we can better screen out high risk individuals and cargo.”

PRESIDENT GOES OUT OF TOWN TO FIND NEW BIS UNDER SECRETARY

Unable to find anyone in Washington who wanted the thankless job of heading the Bureau of Industry and Security (BIS), President Bush June 28 reached outside the Beltway to nominate a Pittsburgh software executive, David H. McCormick, to be the next under secretary for export administration. A West Point graduate who earned a Bronze Star as an Army officer in the first Gulf War, McCormick currently is president of Ariba, Inc., which in 2004 acquired, FreeMarkets, Inc., a firm McCormick headed for two years before the acquisition. Ariba provides procurement software.



David H. McCormick

McCormick, who holds a PhD. in public and international affairs from Princeton, has little, if any, experience in export controls or government outside of the Army. Before joining FreeMarkets he worked for McKinsey & Company, a consulting firm. FreeMarkets was a business-to-business version of eBay, providing an online auction site for industrial goods.

LITIGATION VETERAN TAPPED TO HEAD BIS EXPORT ENFORCEMENT

President Bush June 28 nominated Darryl W. Jackson, a partner in the D.C. law firm of Arnold & Porter, to be BIS assistant secretary for export enforcement. Jackson works in the firm’s general litigation practice where he specializes in civil litigation and white-collar criminal defense. Before joining Arnold & Porter, the firm that ex-Under Secretary Kenneth Juster left to join BIS, Jackson was executive assistant U.S. attorney for operations with the U.S. Attorney for the District of Columbia.



Darryl W. Jackson

With the U.S. Attorney, he held such posts as head of the narcotics section, acting chief and deputy chief of the special prosecution section, and lead attorney on the Organized Crime Drug Enforcement Task Force. He has a B.A. from Lincoln University and a J.D. from Howard University. He has been a visiting professor at George Washington University School of Law and a Distinguished Lecturer in Law at Catholic University’s Columbus School of Law. Jackson also has served as vice chair of the American Bar Association’s Criminal Law Section Committee on White Collar Crime.

COURT REVERSES CIT ON CHINESE TEXTILES SAFEGUARD INJUNCTION

The Court of Appeals for the Federal Circuit (CAFC) June 28 gave the government formal approval to begin using the “threat” of market disruption to initiate safeguard actions against textile and apparel imports from China. The government has already launched these cases based the appellate court’s earlier stay of the preliminary injunction that Court of International Trade Judge Richard Goldberg had issued to block such threat-based safeguard actions (see

WTTL, May 9, page 1). While Goldberg's temporary injunction has been reversed, he could still rule on the underlying merits of the permanent injunction suit filed by the U.S. Association of Importers of Textiles and Apparel (USA-ITA) against the Committee on Implementation of Textile Agreement's (CITA) launching of the safeguard cases.

Even if Goldberg were to let the case go forward and side with USA-ITA, the CAFU opinion, written by Chief Judge Paul Michel, suggests he would be reversed on the merits on appeal. "Because the Association failed to show even a fair chance of success on the merits, we hold that the trial court abused its discretion in granting the preliminary injunction and so we reverse," Michel wrote.

BIS OFFICIALS SAY NO DECISION YET ON DEEMED EXPORT RULES

In a letter to the editor of *The Export Practitioner*, the sister publication of WTTL, two BIS officials said the agency has not endorsed the changes to current deemed export rules that appeared in the Advance Notice of Proposed Rulemaking (ANPR) published in the March 28 Federal Register. That notice was based on recommendations the Commerce Office of Inspector General (OIG) made in a March 2004 report on BIS enforcement of its deemed export rules.

The letter came in response to a column written by Mark Menefee, the former director of the BIS Office of Export Enforcement (OEE), who is now with the law firm of Baker & McKenzie in Washington. Menefee's column, titled "Driving Us Crazy," was a satirical attempt to show the potential implications of the ANPR, suggesting that Commerce Secretary Carlos Gutierrez and California Governor Arnold Schwarzenegger could be denied access to a factory where controlled technology was being used because they were foreign born.

"BIS has not endorsed the OIG recommendations that Mr. Menefee discussed in his article," wrote Michael Turner, the current OEE director, and Bernard Kritzer, director of the National Security and Technology Transfer Controls. "In particular, BIS has not taken a position on the OIG proposals to revise the definition of 'use' and to trigger deemed export licensing requirements on country of birth," they stated. "The ANPR simply allowed BIS to obtain public comment on the OIG recommendations."

They said Gutierrez and Schwarzenegger would not be denied access to controlled technology because of their place of birth, Cuba and Austria, respectively. Both of them are U.S. citizens. "Even if BIS implemented the OIG recommendations, deemed export licensing requirements would not apply to U.S. citizens and U.S. legal permanent residents," they explained.

BUSH ORDER THREATENS SANCTIONS FOR TRADE WITH PROLIFERATORS

Firms or financial institutions that are found to be supporting any activities aiding the proliferation of weapons of mass destruction (WMD) or missile delivery systems could have their assets in the U.S. frozen and be blocked from doing business with any U.S. person without any advance warning, according to a new executive order President Bush issued June 29. With the order, the president identified four Iranian, three North Korean and one Syrian entity to which the sanctions will apply immediately.

The order delegates to the secretary of State the authority to designate persons found to be "materially contributing" to proliferation and to the secretary of Treasury the power to freeze that persons assets and to block any U.S. person from dealing with the identified party. A material contribution could involve "any efforts to manufacture, acquire, possess, develop, transport, transfer or use" WMDs and missiles "by any person or foreign country of proliferation concern." Because assets could be transferred instantaneously, advance notice would "render these measures ineffectual," the order declares. To be effective, "there need be no prior notice of listing or determination made pursuant to section 1 of this order," it adds.

WTO APPELLATE BODY REVERSE RULING ON KOREAN SEMICONDUCTORS

In a ruling replete with observations that are likely to influence future dispute-settlement proceedings at the World Trade Organization (WTO), the WTO Appellate Body June 27 reversed the major findings of a dispute-settlement panel and said the U.S. countervailing duty order on DRAM semiconductors from Korea was consistent with WTO rules. The text of the Appellate Body decision includes extensive discussion of the standard of review that WTO panels should use in reviewing trade decisions issued by authorities in member countries. It agreed with the U.S. that dispute-settlement panels should not overturn trade rulings just because they might reach a different opinion than the reviewing agency (see **WTTL**, Feb. 28, page 4).

“A panel may not reject an agency’s conclusions simply because the panel would have arrived at a different outcome if it were making the determination itself,” the Appellate Body ruled. “A panel may not conduct a de novo review of the evidence or substitute its judgment for that of the investigating authority. A failure to apply the proper standard of review constitutes legal error under article 11 of the DSU [Dispute Settlement Understanding],” it added.

COMMERCE IG SAYS ITA MOVES CASES ON TIME, BUT IMPROVEMENT NEEDED

The International Trade Administration’s Import Administration (IA) office completes annual administrative reviews of antidumping cases by statutory deadlines “most of the time,” a just-released report from the Commerce Office of Inspector General (OIG) found. This is a significant improvement from IA’s record in 1993 when 32% of administrative reviews were late. Administrative reviews are conducted annually on all existing antidumping orders based on imports during the period of review to re-calculate deposits importers must post on future goods imports covered by the orders and the liquidation rates that actually will be paid.

While deadlines are being met, the OIG found problems with IA’s Case Management Database, which is supposed to track agency performance. In addition, it revealed flaws with the management of case files, including missing data sets and margin calculations in electronic records. The OIG criticized IA for not having adequate written internal guidance to give its analysts and the public systematic instructions on policies and procedures for conducting administrative reviews.

* * * BRIEFS * * *

DR-CAFTA: Proving again that all trade is local, about dozen senators crossed party lines either to vote for or against DR-CAFTA when Senate approved implementing legislation June 30 by 54-45. Bush administration promises to restrict sugar imports during life of current Farm Bill helped gain support from some sugar-state senators, such as Florida’s Martinez and Nelson and Minnesota’s Coleman but not from Wyoming’s Thomas and Enzi. Meanwhile, House Ways and Means Committee June 30 reported out DR-CAFTA bill by 25-16 vote (see **WTTL**, June 27, page 2). House floor vote by end of July is expected.

TRADE PEOPLE: President Bush June 30 nominated ex-BIS Assistant Secretary of Export Enforcement Julie Myers, who now is at White House personnel office, to be assistant secretary for Homeland Security and head of Bureau of Immigration and Customs Enforcement (ICE). He nominated current ICE Chief Michael Garcia to be U.S. Attorney in Manhattan. Bush on June 28 nominated Deputy USTR Josette Shiner to be under secretary of State for economic and business, post formerly held by now-retired Alan Larson. President nominated Robert Mosbacher Jr., son of former Commerce Secretary, to be president and chairman of Overseas Private Investment Corporation and John Hillen, a former think-tank guru on security who now is president of CGI-AMS Secure, to be assistant secretary of State for political-military affairs.

METAL CALCULATOR SLIDES: Stuebing Automatic Machine June 29 filed antidumping petitions at ITC and ITA against metal calendar slides from Japan. This is only third antidumping case filed in six months.

OFAC: Federal Financial Institutions Examination Council June 30 released manual that OFAC will use to conduct audits of financial institutions to determine compliance with U.S. sanctions. Separately, OFAC in July 1 Federal Register issued 245-page supplement which alphabetically lists entities subject to sanctions.