

Washington Tariff & Trade Letter[®]

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

Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301-570-4544 Fax 301-570-4545

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BIS DRAFTING “CATCH-ALL” RULES FOR EXPORTS TO CHINA

The Bureau of Industry and Security (BIS) is drafting a regulation that would impose a “catch-all” requirement on all exports to China that might materially help the capability of the Chinese military. The draft, which may be sent out for interagency review within the next month, could require exporters of goods that would normally not require a license, such as items considered EAR99 or controlled only for anti-terrorism (AT) reasons, to apply for a license, if they know the end-use or end-user of the goods or technology would be the Chinese armed forces.

For items already requiring export licenses for China, BIS has a policy of denying those that are intended for military end-use or end-users in China, as well as those that will make a direct or significant contribution to Chinese military development of electronic and anti-submarine warfare, intelligence gathering, power projection, or air superiority.

Speaking April 28 to a conference in Washington, Acting BIS Under Secretary Peter Lichtenbaum said the U.S. was supporting China’s membership in the Nuclear Suppliers Group (NSG) and also approving exports to China. Nonetheless, he said BIS “will not knowingly approve any export that will help China modernize its military.” Under the expected proposal to change current regulations, the agency will “require licenses for all exports that an exporter knows can materially assist the Chinese military,” he said. “We will review applications that support the advancement of Chinese military capabilities under a policy of denial,” Lichtenbaum declared.

PORTMAN CONFIRMED AFTER PLEDGING TO WEIGH CVD TREATMENT OF CHINA

The Senate by unanimous consent April 28 confirmed Rob Portman to be the new U.S. Trade Representative (USTR) after he sent a letter to Sen. Evan Bayh (D-Ind.) promising to consider legislation that would extend U.S. countervailing duty (CVD) law to imports from China. Bayh had put a “hold” on Portman’s confirmation because he claimed a bill he has co-sponsored (S. 593) to apply the CVD law to China was not getting action in the Senate. “You have my commitment to give full consideration to S. 593,” Portman wrote (see **WTTL**, April 18, page 3).

In the letter, Portman repeated the statement he had made to the Senate Finance Committee during his confirmation hearing, promising a “top-to-bottom” review of current China trade issues. “As part of the review of China trade issues, and recognizing the special concern that you and others have with subsidies, unfair trade practices in China, including subsidies, will be included,” Portman pledged. Portman’s confirmation came the day before the USTR’s office announced that it has elevated China to a “priority watch list” country as a result of its out-of-

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cycle Section 301 review of China's enforcement of intellectual property rights (IPR). "This year we are elevating China to the Priority Watch List for failure to effectively protect intellectual property rights and to meet its commitment to significantly reduce infringement levels, despite efforts by China's senior leadership to do so," said Acting USTR Peter Allgeier. "Piracy and counterfeiting rates remain at extremely high levels due to China's inadequate and non-deterrent enforcement system," the USTR's office noted.

COURT LIMITS CUSTOMS' ABILITY TO INTERPRET WTO COMMITMENTS

The plain text of U.S. commitments in World Trade Organization (WTO) agreements may have the same status as the plain text of U.S. statutes when courts decided whether federal agencies have discretion to interpret those commitments, a new court ruling suggests. In *Pillsbury v. U.S.*, (slip op. 05-51), Court of International Trade (CIT) Judge Donald Pogue ruled that Customs "is not entitled to Chevron deference" in its application of a tariff-rate quota (TRQ) on ice cream imports that the U.S. agreed to adopt as part of Schedule XX in the Uruguay Round Agriculture Agreement. "Customs may not ride the coattails of USTR and ITC in claiming deference because of other agencies' authority," he wrote.

"Upon application of the canon of constitutional avoidance and the *Charming Betsy* canon, the court incorporates the unambiguous interpretation of Schedule XX into the meaning of Note 5" to the Harmonized Tariff Schedule of the U.S., Pogue ruled. Pillsbury sued Customs to get a lower, in-quota tariff on Haagen-Dazs ice cream it imported from France after its Le Mars, Iowa, plant was damaged by an explosion in 1999.

"In this case, the United States has accepted obligations to permit specific levels of ice cream into the United States at certain duty levels under Schedule XX," Pogue noted. "To suggest that there is a conflict between Schedule XX and Note 5 would offend the well settled principle that the abrogation of international agreements by implications is strongly disfavored," he said.

RULING EASES PATH FOR SAFEGUARD ACTION AGAINST CHINESE TEXTILES

U.S. importers and retailers have enjoyed a four month reprieve from potential restrictions on some textile imports from China, but a Court of Appeals for the Federal Circuit ruling April 27 ended that respite and indicated that the government will get authority to launch safeguard actions against Chinese goods based on the "threat" of market disruption and not just on actual disruption. The full implication of the appellate court's ruling may come a year or so from now if, as expected, the U.S. textile industry seeks renewal of any future safeguard restrictions based on the "threat" of disruption that might occur, if the safeguard measures are lifted.

The circuit court stayed a Court of International Trade (CIT) preliminary injunction which blocked Commerce from going forward with a safeguard action based on threat. The court will still hear arguments May 5 on the merits of the government's request to have the CIT order vacated.

The appellate court's ruling may give the U.S. Association of Importers of Textiles and Apparel (USA-ITA) little hope of preventing the Committee for Implementation of Textile Agreements (CITA) from going forward with safeguard actions based on threat. The court said the government made "a strong showing that it is likely to succeed on this appeal." It also said the CIT injunction doesn't meet the four criteria that justify the granting of preliminary relief. The short, four-page order agreed with the government that plaintiffs were unlikely to prevail; that the case was not ripe for judicial review; that the CITA regulations permit consideration of threat; and that CITA has jurisdiction to implement the China safeguard mechanism.

For importers, the short reprieve was important, nonetheless, because it means that any future safeguard restrictions in these cases based on threat will have to include at least two-months of

post-quota trade data from January and February 2005 in the calculation of the level of imports that would be permitted. Under the original petitions, that base period would have covered a lower level of imports when quotas still applied. For now, the ruling may present a quandary for CITA on how to go forward. The comments and data in the original petitions are outdated, and since it now has real post-quota data on imports, the question of threat may be moot.

Meanwhile, CITA April 27 launched safeguard investigations on seven Chinese apparel and textile products that were the subject of domestic industry petitions. The European Union (EU) is also invoking its WTO safeguard rights against Chinese imports. On April 24, it opened investigations into nine categories of textile imports based on a sharp rise in imports during the first quarter.

CANADIANS SUE TO BLOCK APPLICATION OF BYRD AMENDMENT

The Canadian government and three groups representing the Canadian lumber industry filed suits in the U.S. Court of International Trade (CIT) April 29 seeking to block the application of the Byrd Amendment to imports from Canada. The suits contend that the Byrd Amendment, which requires the distribution of antidumping and countervailing duties to the companies that supported the trade actions, violates NAFTA because it does not specify whether the law applies to duties collected on imports from Canada and Mexico.

The suit contends NAFTA requires trade laws to specify whether they apply to the two trade partners. "We believe that the application of the Byrd Amendment to Canada is inconsistent with the specific provisions of U.S. law implementing NAFTA," said Canadian Trade Minister Jim Peterson. "I cannot recall any previous occasion when the government of Canada sued the government of the United States in U.S. court," said Carl Grenier, executive vice president of the Free Trade Lumber Council, one of the groups joining in the suit.

Canada has already announced plans to begin imposing a 15% retaliatory tariff May 1 on some U.S. exports to Canada because of Byrd funds that have already been distributed from duties on Canadian goods (see **WTTL**, April 1, page 1). "Retaliation is not our preferred option, but it is a necessary action given the United States' failure to comply with the World Trade Organization ruling on the Byrd Amendment," Peterson said.

LICHTENBAUM DENIES OUTSIDE PRESSURE ON DEEMED EXPORTS

BIS Acting Under Secretary Peter Lichtenbaum rejects as untrue a rumor circulating in the business community that the agency's March 28 call for comments on proposals to tighten its deemed export rules is being driven and controlled by the White House and other federal agencies. "It is entirely without foundation as far as I am concerned," Lichtenbaum told **WTTL**.

"My signature is required, the last I saw, on any BIS rule," he said. "We are looking at the IG's recommendations; we published a notice; and we will act after we receive public comments to decide whether a proposed rule is warranted," he added (see **WTTL**, April 4, page 2).

Industry sources claim officials at other departments have told them the proposal, which is based on recommendations that the Commerce Inspector General made in a March 2004 report on BIS deemed export rules, would be adopted as proposed. The IG had recommended that deemed export rules should be applied to foreign nationals based on their place of birth and not their current country of citizenship. It also wanted stricter interpretation of the what constitutes "use" of controlled technology and equipment and application of the fundamental-research exception to controls. Industry representatives met April 27 to map out a strategy for fighting the proposal. In addition to filing comments, they intend to reach out to groups and associations outside the exporting community, including universities and civil liberties

organizations, to get their support in opposition to the proposal. While industry sources accept Lichtenbaum's willingness to consider opposition to the proposal, they say they are concerned that he might be asked to adopt the rules anyway by the White House and would have to agree to that order or resign. They also say they are worried that the administration sees the regulation as a way to forestall legislation that might impose tougher requirements.

TURNER PROMISES NEW APPROACH TO EXPORT COMPLIANCE

The BIS Office of Export Enforcement (OEE) plans to take a new approach to educating exporters about compliance with export rules, putting more emphasis on helping them know what types of U.S. goods and technologies are being sought by illicit foreign end users and to identify those end users, new OEE Chief Mike Turner says. OEE will use a risk-based process to focus on products and end users that should get more attention, he indicated.

"You'll see in industry across the board over the next year or so a shift in the approach we are taking in outreach from BIS to industry," Turner told the Sensors and Instrumentation Technical Advisory Committee April 26. "Increasingly, we will be doing behind the scenes assessments of what we think particular problem end users are really trying to acquire and then coming out to manufacturers, exporters and shippers with that approach...We're coming to you because we have information that shows this end user is trying to acquire a type of product you manufacturer," he added.

Turner also said BIS has begun working with Mexico to increase cooperation on export enforcement to prevent diversion of U.S. exports to third countries. The largest number of licenses for exports to Mexico involves thermal imaging products, he told the committee. "As we begin to look at the question of diversion with our Mexican counterparts, this is a particular area of concern for us to determine whether this is a legitimate market for those types of items or are there any vulnerabilities that we might try to address," he said.

* * * BRIEFS * * *

UKRAINE: ITC in April 26 Federal Register initiated changed circumstances review to determine whether Ukraine should continue to be treated as nonmarket economy (NME). On April 2, Kiev, citing changes that have occurred in country, asked for review of current antidumping order on alloy steel wire rod. U.S. concerns about corruption and government control of economy in Ukraine blocked previous efforts to get Ukraine treated as market economy.

SHRIMP: ITC won't make final determination of whether tsunami that hit Indian Ocean countries warrants changed circumstances ruling on warmwater shrimp from Thailand and India until Oct. 31, Commission announced. ITC April 25 voted 5-1 to launch review which could lead to decision that imports no longer are likely to injure U.S. industry.

ITC: President Bush April 21 sent Senate nomination of Shara Aranoff to be ITC commissioner to replace Marcia Miller, whose term has expired (see **WTTL**, Jan. 31, page 4). Under law, Miller can stay in post until Aranoff is confirmed. Aranoff is current Democratic trade counsel on Senate Finance Committee. Before joining committee, she was attorney at ITC for eight years and earlier was attorney with Steptoe & Johnson in Washington. She received her B.A. from Princeton and her J.D. from Harvard. If confirmed by Senate, her ITC term would run through Dec. 16, 2012.

COMMERCE: Deputy chief counsel for export administration Roman Sloniewsky retired April 29. He will be starting work shortly at Institute for Defense Analysis in Alexandria, Va.

WTO: Race for new director general has narrowed to two candidates: Ex-EU Trade Commissioner Pascal Lamy and Uruguay's former ambassador to WTO, Carlos Perez del Castillo.

SUGAR: WTO Appellate Body April 28 ruled that EU export subsidies for sugar violate its commitments under Agriculture Agreement and Subsidies and Countervailing Measures Agreement. Australia, Brazil and Thailand had complained that subsidies exceeded limits agreed upon in Uruguay Round.

NEWS FLASH: BIS in March 28 Federal Register Seeks Comments on Proposed Changes to Deemed Export Regulations and their Application to University-Industry Cooperative Research!

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FEATURED SPEAKERS:

Todd E. Willis

Senior Export Policy Analyst
BIS Office of National Security and
Technology Transfer Controls

Richard J. Pettler

Partner
Fragomen, Del Rey, Bernsen and Loewy

Terence Murphy

Managing Director and General Counsel
MK Technology

Rachel Claus

Senior University Counsel
Stanford University

TUESDAY, MAY 10, 2005

2:00 to 3:30 P.M. (Eastern)

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ABOUT OUR SPEAKERS

Todd E. Willis

Mr. Willis is the Senior Export Policy Advisor in the Bureau of Industry and Security's Office of National Security and Technology Transfer Controls. This office is the focal point within BIS for issues related to the transfer of technology to foreign nationals in the United States, as well as National Security and Short Supply controls. Joining BIS in 2003, Mr. Willis was recently named the Department of Commerce liaison to the academic and research community for export control issues. Before coming to BIS, he was the Economic Development and Public Policy Director for the Oakland Metropolitan Chamber of Commerce in Oakland, California. Mr. Willis was also an adjunct professor for California State University, Hayward School of Business and Economics and founded Global Trade Alliance Corporation, a trade consulting firm. This followed over ten years in the finance and technology fields. Prior to this, Mr. Willis spent six years in the U.S. Army as an Armor and Intelligence Officer. He graduated cum laude with an MBA from California State University, Hayward, and has a BA in Political Economics from the University of Pacific.

Richard J. Pettler

Mr. Pettler is a partner in the San Francisco law firm of Fragomen, Del Rey, Bernsen and Loewy LLP, where he manages the firm's Export Controls Practice Group. A member of the California Bar since 1977, he is recognized as one of the nation's premier experts on the issue of deemed exports and the deployment of foreign nationals. His practice includes the representation of a varied clientele, including Fortune 500 companies and universities, in major export investigations, settlement and enforcement actions, export control due diligence for mergers and acquisitions, compliance audits, corporate compliance programs, commodity jurisdiction disputes, and export licensing. Additionally, Mr. Pettler has advised the U.S. government on deemed export policy and has testified before the House Committee on Government Reform on deemed export issues and visa processing. He is a graduate of the University of California, Berkeley (B.A., 1970) and the University of West Los Angeles Law School (J.D., 1977).

Rachel Claus

Following 20 years in private practice in the area of federal contract disputes, Rachel Claus joined Stanford University's Office of General Counsel in 1992 as the University Counsel for the Stanford Linear Accelerator. On becoming Senior University Counsel in 1998, she was given responsibility for export control issues related to Stanford's public domain fundamental research, working closely with Stanford's Office of the Vice Provost & Dean of Research and Graduate Policy. Ms. Claus has spoken extensively on the subject of export controls and university research before such groups as the National Academy of Sciences, the Office of Science and Technology Policy, the U.S. State Department, the National Association of College and University Research Administrators, and the Center of International Security and Cooperation. A 1975 graduate of the University of San Francisco School of Law, she is admitted to practice before the U.S. Court of Appeals for the Federal Circuit, the U.S. Claims Court, the U.S. District Court of the Northern District of California, and the California Supreme Court.

Terence Murphy

Mr. Murphy is Managing Director and General Counsel of MK Technology, and a Senior Associate of the Center for Strategic and International Studies. From 1986 to 2003, when he joined MKT, he was founding partner of the law firm Murphy Ellis Weber in Washington. A member of the BIS Regulations and Procedures Technical Advisory Committee, he led the advisory process on new BIS Penalty Guidance. He participated in the 2003 Sino-U.S. Export Controls Seminar in Shanghai. Mr. Murphy advises leading research universities and has been consulted by BIS on "deemed exports" issues. He also has worked with CSIS on a National Academy of Sciences white paper on that subject. He chairs the Annual "Globalization of Strategic Trade Controls" conferences in London and Asia, called "the definitive export controls conference." A former member of the ABA Administrative Law Council, he received his J.D. from the University of Michigan and his A.B. from Harvard. He has litigated successfully in the U.S. Supreme Court and is a member of the Bar of the District of Columbia, the Supreme Court, and other Federal courts.

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Tuesday, May 10, 2005

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