

# Washington Tariff & Trade Letter<sup>®</sup>

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

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## **BIS READY TO IMPLEMENT WASSENAAR CHANGES QUICKLY**

The Bureau of Industry and Security (BIS) is moving quickly to issue new regulations to implement the changes in international export controls that the Wassenaar Arrangement adopted at its December plenary meeting. A draft 100-page implementing rule is expected to be circulated for interagency comment the week of Jan. 10, agency sources told WTTL. Although these regulations often get trapped in the interagency review process, the early start to the process could see the U.S. applying the new rules in the first quarter of 2005 (see **WTTL**, Jan. 3, page 1).

Among the changes that will be made is a decontrol of thermal imaging cameras used in passenger cars under three tons. This equipment, which reveals images on the road ahead at night or in fog, has become popular in high-priced cars.

Another change will delete controls on certain semiconductor testing equipment. BIS handles few licenses for this equipment, and the regime decided the controls didn't serve a strategic purpose. A broader review, which began in 2004, of controls on semiconductor manufacturing equipment will continue into 2005, with the aim of having recommendations for revising the rules ready for the regime's next plenary meeting in December 2005.

## **SPECULATION BEGINS ON ZOELICK'S SUCCESSOR AT USTR**

There may be as much speculation about what kind of person should become the next U.S. Trade Representative (USTR) as about who that person actually will be. The Washington name game started in earnest almost before the Wall Street Journal Jan. 6 reported that President Bush intended to nominate current USTR Robert Zoellick to be the deputy secretary of State under Condoleezza Rice. Bush formally announced Zoellick's nomination Jan. 7.

"I want to assure the American people this administration is committed to free trade," the president said as he announced Zoellick's nomination. "I look forward to finding a replacement for Bob Zoellick that will be able to carry on our desire to spread free trade around the world," the president said. He also praised Zoellick's work in the USTR position. "He did a fantastic job," Bush said.

Deputy USTR Josette Shiner is expected to serve as acting USTR once the Senate confirms Zoellick. She is also mentioned as his possible successor. As though by magic, almost the identical list of potential candidates for the USTR job appeared in news reports as soon as word leaked of Zoellick impending move to State. Along with the names came speculation about the type of person who should be USTR and whether he or she should have a strong trade

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and negotiating background or be someone with the political acumen to help get trade deals approved by Congress. Finding someone with a combination of those skills has raised speculation that President Bush might choose a former Democratic lawmaker such as ex-Rep. Cal Dooley (D-Calif.). One of the few Democrats who supported fast-track trade legislation, Dooley is slated to become president of the National Food Processors Association and would have to give up that job to take the USTR post.

Also mentioned is Rep. Jim Kolbe (R-Ariz.), one of the staunchest free trade advocates in Congress. Both Cooley and Kolbe “would bring tremendous credibility on Capitol Hill,” one industry representative told WTTL. Another potential successor is Commerce Under Secretary for Trade Grant Aldonas, who is popular with the business community and on Capitol Hill where he served as an aide on the Senate Finance Committee.

Also named is Gary Edson, who served as deputy assistant to the president for international economic affairs before moving to the Bush-Chaney 2004 campaign. Edson served as USTR chief of staff and general counsel when Carla Hills held the post in the Bush I administration.

While most of these names were mentioned before the election when chattering began over whether Zoellick would stay for a second Bush administration, the only new name to surface is Robert Kimmett, who heads Time Warner’s Washington office. “That suggests the White House may not have been satisfied with the other names,” one industry source said. Kimmett was deputy under secretary of State in the Reagan administration. Washington watchers caution against expecting any of these candidates getting the USTR job, with one saying the position could go to “someone who did something to help the president get elected.” Recalling previous USTRs, another industry representative said “some of the best ones were unexpected ones.”

## **GUTIERREZ MAY BE FORCED TO SHIFT VIEWS ON TRADE**

The expression, “Where you stand depends on where you sit,” appears to apply to Commerce Secretary Designate-Carlos Gutierrez, who had to swallow his former opposition to sugar trade restrictions during his confirmation hearing before the Senate Commerce Committee Jan. 5. As the outgoing CEO of Kellogg, the giant cereal maker and sugar consumer, Gutierrez opposed sugar quotas and tariffs, but in response to questions from Sen. Byron Dorgan (D-N.D.), he backed away quickly from that position.

“As a manufacturer and business, which relies on sugar, I had to see the world in a certain way,” Gutierrez told Dorgan. “I was paid to do that. It was in the best interest of the owners of the company. But I fully understand that the scope of my responsibilities will be a lot greater than having one set of shareowners who are interested in the price of sugar,” he added. Gutierrez offered to recuse himself on sugar issues if the committee deemed it necessary “for the purpose of ethics or even optics.” The committee approved his nomination unanimously Jan. 6.

As most Cabinet nominees, Gutierrez successfully avoided making any commitments to the committee or saying anything substantive. He assured the members that their concerns would be his concerns. On most issues, he admitted he did not yet have enough information to take a position. Although the committee’s main jurisdiction is over Commerce’s weather, oceanic and technology functions, members’ questions showed increased interest in trade disputes.

Among the trade topics they raised were steel, softwood lumber, crawfish, shrimp, furniture, copyright protection, exchange rates, China, and Cuba. Gutierrez noted his special interest in nontariff trade barriers. “The whole subject of nontariff barriers is something that I have personally lived through over 29 years,” he said. “That is something that I think is perhaps a little bit under the radar,” he added; saying “this is something I would like to work with the U.S. Trade Representative to try put the issue on the table and begin to address it, because it is as impactful as a tariff. It impedes us from actually competing in those markets.” For Kellogg,

he explained, the problem was seen in different rules imposed in the U.S., Canada and the European Union on the vitamin fortification of cereals.

### **ITC WEIGHS ‘CHANGED CIRCUMSTANCES’ REVIEW OF SHRIMP**

At the same time it determined that imports of dumped non-canned or frozen shrimp are injuring U.S. industry, the International Trade Commission (ITC) Jan. 6 said it would collect comments and information to help it decide whether to self-initiate a “changed circumstances” review of the imports from India and Thailand (see **WTTL**, Jan. 3, page 3). The commission said it would undertake the review because of its “concerns about the possible impact of the recent tsunami on the shrimping industries of Thailand and India.” Those industries operated in the areas where the tsunami hit. A new review could lead to revocation of the injury determination for these two countries.

The announcement of its planned examination of the cases for Thailand and India came the same day the commission made its final injury determination in the dumping cases against frozen and canned shrimp from Brazil, China, Ecuador, India, Thailand and Vietnam. The six commissioners offered divided opinions on whether the case involved one product or two.

Four commissioners decided there were two products at issue: canned warmwater shrimp and prawns and non-canned warmwater shrimp and prawns, which includes frozen products. They found injury caused by imports of non-canned shrimp from all six countries. For canned shrimp, however, they found no injury caused by imports from China, Thailand and Vietnam and negligible imports from Brazil, Ecuador and India. Thus, they ended the cases against canned shrimp from all six countries. Two commissioners, Stephen Koplan and Charlotte Lane, found one product and voted affirmative for all six countries.

### **OPPOSITION VOICED OVER BIS SAFE HARBOR, KNOWLEDGE PROPOSALS**

BIS failed to examine adequately how its proposed changes to the knowledge standard and “safe harbor” rules in the Export Administration Regulations (EAR) would affect small business and should conduct a full review before issuing a final rule, the Small Business Administration (SBA) told the agency. In its proposal, BIS certified that the changes would not have a significant impact on small exporters, but SBA’s Office of Advocacy said the certification doesn’t meet the requirements of the Regulatory Flexibility Act (RFA) (see **WTTL**, Nov. 15, page 3).

“We disagree with BIS’ contention that moving to a ‘more likely than not’ formulation does not increase a company’s responsibility with respect to knowledge,” SBA argued. The proposed shift to this standard from the “high probability” standard is more than a mere clarification of current rules, it added.

“Courts have stated that, from an evidentiary standpoint, a preponderance of evidence means ‘more likely than not’,” SBA noted. “Clear and convincing evidence is a higher standard and requires a ‘high probability’ of success,” it said. SBA also questioned BIS’ safe harbor proposal. “The failure to provide a time frame could lead to a business waiting an inordinate amount of time for the opinion which could cause a business to lose current or future exporting opportunities,” it asserted. SBA advised BIS to conduct an initial regulatory flexibility analysis (IRFA) to determine the full impact of the proposal and to consider alternative approaches.

SBA’s comments on the proposal echoed those filed by industry export managers and lawyers who also complained about revisions to the red flags advice in the EAR Know Your Customer guidance. The international law section of the American Bar Association (ABA), which filed a detailed and lengthy critique of the proposed changes in the knowledge standard, said BIS failed to justify the change or explain how it matches other laws or court rulings. “Unfortunately, while there are some useful parts of the proposal, most of it will make export compliance more

expensive and risky without improving national security,” the law group stated. The proposed safe harbor process is “unmanageable,” argued Catherine Thornberry, a trade consultant with Export Procedures Co. Exporters already have the ability under the Enhanced Proliferation Control Initiative (EPCI) to request BIS advice on suspicious customers but don’t use this opportunity because it is ineffective, she noted. “It is unlikely that implementing the same system under a different name will work any differently than the current system,” she said.

## **COURT REJECTS EXTRATERRITORIAL REACH OF ITAR BROKERING RULES**

A federal circuit court has struck down the government’s attempt to apply the Brokering Amendment to the Arms Export Control Act (AECA) and the aiding and abetting law extra-territorially to a non-U.S. citizen who once held a “green card.” In a Jan. 4, 2005, ruling (No. 04-3037) the D.C. U.S. Court of Appeals upheld a district court decision which dismissed the indictment of an Iraqi citizen, Sabri Yakou, who had been charged with helping his son acquire six armored patrol boats for the Baghdad government from 2000 to 2003.

The appellate court ruled that the AECA applies only to U.S. citizens or persons in the U.S. Although Yakou had been a lawful permanent resident (LPR), he had voluntarily given up that status and moved back to Iraq. The court rejected the government’s argument that the LPR status remains effective unless formally revoked by the Board of Immigration Appeals. It also said the aiding and abetting law couldn’t be applied if the underlying statute didn’t apply

## **TEMPORARY INJUNCTION BLOCKS CHINA TEXTILE SAFEGUARD PROCESS**

Almost lost in the opinion issue by Court of International Trade (CIT) Judge Richard Goldberg Dec 30 imposing a temporary injunction blocking any government safeguard action against textile and apparel imports from China was his note that the government had conceded the court’s jurisdiction over the Committee for the Implementation of Textile Agreements (CITA). While CITA has been the target of previous court rulings, the concession appears to give the court the ability to review future application of the safeguard process (Slip Op. 04-162).

Goldberg noted that previous cases involving CITA did not address whether the Administrative Procedure Act (APA) applied to its rules and procedures. “The plaintiff has raised sufficiently serious and difficult questions regarding the propriety of CITA’s action to warrant issuance of the preliminary injunction,” he ruled. He agreed that the plaintiff, the U.S. Association of Importers of Textiles and Apparel, would suffer “irreparable injury” if CITA continued its pending safeguard cases based on the “threat” of market disruption.

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

BIS: Agency reportedly has gone outside of Commerce career staff to select Mike Turner to become new director of Office of Export Enforcement. Turner comes from Customs where he served in office of strategic investigations. Before that he was on internal affairs staff in Customs’ Los Angeles office.

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EXPORT ENFORCEMENT: After self-disclosing alleged violation, Lam Research Singapore, Pte., agreed to pay \$40,000 civil fine to settle BIS charges related to four reexports of pressure transducers to Malaysia from Singapore without BIS licenses.

SENATE: Brian Pomper, formerly with Skadden, Arps law firm in D.C., has been named chief Democratic trade counsel on Senate Finance Committee. He succeeds Tim Punke, who has left Hill to join law firm of Preston Gates Ellis in Washington and Seattle.

WTO: Four candidates have been formally designated to vie for post of director general. They are: former EU Trade Commissioner Pascal Lamy and Carlos Pérez del Castillo of Uruguay, Jaya Krishna Cuttaree of Mauritius, and Luiz Felipe de Seixas Correa of Brazil.