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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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ONLY 5% OF VOLUNTARY DISCLOSURES LEAD TO ENFORCEMENT CASES

The Bureau of Industry and Security (BIS) continues to defend the benefit exporters will gain from making voluntary self-disclosures (VSDs) on potential violations of export control rules. An agency review of VSDs filed in fiscal years 2004 to 2006 found 95% of VSDs produced no enforcement action. About half those getting off the hook got a warning letter, while the other half were told that BIS didn't consider their actions to be violations of the regulations.

“When you look at that end of the perspective, the vast majority of voluntary self-disclosures now coming to us are being resolved through non-penalty means,” Michael Turner, director of the BIS Office of Export Enforcement told a Nov. 29 audio-briefing conference, Export Enforcement Trends, sponsored by WTTL. Of the administrative settlements BIS has reached in the last three years, only 30% involved VSDs “and that number is declining,” Turner said.

When BIS receives a VSD, it first determines whether there has been a violation of the Export Administration Regulations (EAR). If there has been a violation, BIS weighs whether it “presents significant issues of enforcement concerns to us that we believe are most appropriately addressed through the issuance of a monetary penalty or are we looking at a violation...of a nature that are best dealt with through the issuance of a warning letter,” Turner said. After firms make an initial VSD, BIS will invite them in to discuss what further information might need to be disclosed and a schedule for when the additional information should be submitted.

JURISDICTION QUESTIONS RAISED BETWEEN WTO AND ITU

A future debate over jurisdiction for dispute settlement could arise between the World Trade Organization (WTO) and the International Telecommunication Union (ITU) following the ITU's decision to undertake a comprehensive review of its current International Telecommunication Regulations (ITR). At its plenipotentiary meeting in Turkey Nov. 6-24, the ITU agreed to a review the ITR with the aim of holding a World Conference on International Telecommunication (WCIT) in 2012. The ITU's decision begins a six-year review process that will cover numerous provisions of the ITR, including dispute resolution.

Billions of dollars in payments for international telecommunication traffic are settled under the ITR, an international treaty that regulates how traffic, including the Internet, is accounted for, as well certain general interconnection obligations. The Geneva-based ITU produces international standards and regulations on telecommunications equipment and networks as well as cross-border payments among international carriers. Most of its work is conducted by technical

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experts from participating countries and isn't followed closely by WTO diplomats. The WTO has a role in telecommunications through commitments members have made under the General Agreement on Trade in Services (GATS) and the Basic Telecommunications Agreement. Possible inconsistencies between WTO and future changes in the ITR were identified in a 2005 ITU committee report. It is not yet clear how member states of the two multinational organizations would resolve those differences, particularly in terms of dispute resolution.

Proponents of a mandatory dispute resolution say the mechanism should take place within the ITU. "Countries have accepted non-consensus decision-making through ITU's voting provisions. They have also accepted binding dispute resolution within the WTO," noted the report of the chairman of the 2005 committee. Other ITU reports pointed out that opponents say dispute resolution is "premature to consider, given possible inconsistencies between ITRs and WTO/GATS."

ITU has not handled bilateral disputes in the past and it could conflict with ITU's basic instruments, which are worded mostly with soft language, one official said. Developing countries are saying some carriers are doing "funny stuff," an official said, and they can't do anything about it because there's no international dispute settlement regime for that kind of thing. These countries are among those seeking a tougher dispute resolution mechanism. The U.S. is not ready to discuss dispute resolution but was ready to discuss the impact of technology convergence on international traffic, an official said.

WILL FOREIGN AVAILABILITY MATTER IN FINAL CHINA CATCH-ALL RULES?

Industry is responding to the challenge from BIS officials to provide evidence of foreign availability and indigenous Chinese production of the 47 Export Control Classification Numbers (ECCNs) that would face new licensing requirements under the agency's proposed China catch-all rule. Whether that evidence, which is being provided in comments coming into BIS on the proposal, will sway agency officials to amend their proposal remains uncertain.

One BIS official told WTTL that the foreign availability information the agency is receiving is what it asked for. Depending on the amount of detail on foreign availability that is submitted, the agency will rely on the comments as evidence of foreign availability. Where there is not enough supporting information, it may ask the U.S. embassy in Beijing to follow up. "If there is clear and convincing evidence, then we will have to look at it," he said.

The official also said other agencies may be open to further revision of the catch list depending on the submissions. BIS will use the comments to prepare a new assessment to take to the interagency process where there will be a "collaborative discussion" of any potential changes. There also could be some changes in the way the new rules are implemented based on the comments, he indicated. But the general direction of the catch-all proposal will remain the same. "The overall policy is not going to change," the BIS official told WTTL.

Comments that came into BIS ahead of the Dec. 4 deadline repeated criticism that has been raised before about the China proposal, including the unilateral nature of the controls on the 47 ECCN items, the limited benefits of the Verified End User (VEU) process, and the expected delay in exports due to the need for an expanded number of end-user certificates from the Chinese Ministry of Commerce. The most important parts of the comments, however, were those that identified specific sources of foreign availability for many of the 47 items in countries that won't bar their export to China or from indigenous Chinese producers.

In a 42-page joint submission, a group of 24 trade associations, including the National Foreign Trade Council and the Coalition for Employment Through Exports, identified foreign availability for items in ECCNs 7A994, 6A998, 5A991-2, 5A002, 5D002, 5A992, and 5D992. BIS' own Materials Processing Equipment Technical Advisory Committee filed comments identifying Chinese manufacturers of 5-axis machine tools in ECCN 2B991. Cummins, Inc., filed 26 pages

of comments describing the Chinese diesel engine manufacturing industry, including three firms that make engines that meet EU environmental protection standards.

“It is important to understand that much of the diesel engine technology and software has already been supplied to Chinese domestic companies and joint ventures,” Cummins said. The company asked BIS to drop ECCNs 9D990, 9E990, 8D992 and 8E992 from its proposal because the additional restrictions “would not accomplish the goal of preventing the export of items that could make a material contribution to China’s military development, because China’s military development has access to the levels of technology and software it needs to meet its military demands from its own companies and foreign non-U.S. companies.”

SCHWAB URGES BIPARTISAN APPROACH TO TRADE

As Bob Dylan sang, “You don’t need a weather man to know which way the wind blows.” With Democrats poised to take control of Congress in January, Bush administration officials are bursting with the bipartisan spirit. U.S. Trade Representative (USTR) Susan Schwab offered her hand across the aisle in a Nov. 27 speech. “My hand is outstretched to any and all members of Congress on the trade agenda, the new Democratic leadership – many of whom I’ve worked with for decades – and, of course, our Republican colleagues,” Schwab said.

In an early gesture of bipartisanship, Schwab Dec. 2-3 was going to Big Sky, Montana, where forecasts predict temperatures ranging from -3 degrees to 17 degrees, to have dinner with incoming Senate Finance Committee Chairman Max Baucus (D-Mont.), Korean Ambassador Tae-Sik Lee, and the Montana Farm Bureau. She’ll have lunch the next day with the Big Sky Chamber of Commerce. U.S.-Korea Free Trade Agreement talks will be held in Big Sky on Dec. 4-8.

In her talk in Washington, Schwab said there is a 70-year history of bipartisan support for trade. “That doesn’t have to change,” she declared. She said the Bush administration trade agenda isn’t going to change because Democrats are in control in Congress. “The details of trade agreements and trade legislation are always the subject of negotiation between the executive and legislative branches regardless of who’s in control,” she said.

NO MENTION OF “LIKE PRODUCT” IN VIETNAM MONITORING NOTICE

In a Federal Register notice to be published Dec. 4, the International Trade Administration (ITA) is asking for public comment on which imports of textiles and apparel from Vietnam it should monitor as part of the program it promised members of Congress it would implement in the effort to get approval for granting Vietnam permanent-normal-trade-relations (PNTR) status. The notice, however, fails to meet apparel industry calls for limiting monitoring to imports for which “like products” are made in the U.S. (see **WTTL**, Nov. 20, page 3).

Administration officials reportedly have indicated that they would consider the issue of “like products” in the monitoring scheme and in the self-initiation of antidumping cases against Vietnamese products, but the notice gives no hint of that. The notice doesn’t say how the monitoring program will operate, but asks for answers to numerous questions on what products should be monitored, what data is available and how Vietnamese production costs should be calculated.

In the notice, ITA lumps the textile and apparel industries together. It asks: “In your opinion what information on the domestic industry should the department examine as part of this process?” In addition, it asks: “How can the department best ascertain the effects of shifts in the type of textiles and apparel imports from Vietnam on the domestic textile and apparel industry?” ITA also seeks recommendations on what market economies should be used as surrogates in any cases, as Vietnam continues to be treated as a nonmarket economy.

ITA OPENS DOOR FOR RENEWED EXAMINATION OF CHINA'S NME STATUS

The International Trade Administration (ITA) has agreed to take another look at China's status as a nonmarket economy (NME), but this time has actually opened a countervailing duty (CVD) case against Chinese imports for the first time since 1991 as the testing ground. In the Nov. 27 Federal Register, ITA initiated antidumping and CVD cases against imports of coated free sheet paper from the People's Republic of China, along with AD and CVD imports of the paper from Indonesia and Korea (see **WTTL**, Nov. 6, page 4). "Given the complex legal and policy issues involved, and on the basis of the Department's discretion as affirmed in *Georgetown Steel*, the Department intends during the course of this investigation to determine whether the countervailing duty law should now be applied to imports from the PRC," the ITA notice said.

The notice said ITA was rejecting a request by the petitioner to consider China's alleged manipulation of its currency as a subsidy. "Petitioner has not sufficiently alleged the elements necessary for the imposition of a countervailing duty and did not support the allegation with reasonably available information. Therefore, we do not plan to investigate the currency manipulation program," it said.

CONTROLS ON LUXURY EXPORTS TO N. KOREA COULD COME SOON

Although BIS officials are not saying when they will issue new regulations imposing a ban on exports of luxury goods to North Korea, quick action is likely following State's Nov. 13 notification to the United Nations of the candidates to be hit. Despite press reports which suggested that the ban will cover products by brand name, the list identifies items generically. UN Security Council Resolution 1718 requires members to bar exports of "luxury" goods to North Korea but doesn't define what that term means (see **WTTL**, Oct. 23, page 1).

"We will ban the export of these and other luxury goods that are purchased for no other reason than to benefit North Korea's governing elite," said a statement from Commerce Secretary Carlos Gutierrez. "We are not imposing a full trade embargo, or restricting essential items like food and medicine that benefit the people of North Korea," Gutierrez said.

Some items on the list, such as laptop computers and passenger vehicles, will be exempt from sanctions if they are going to "legitimate organizations involved in humanitarian relief efforts, other internationally sanctioned efforts, or items in the interest of the United States Government," State said. [**Editor's Note:** A copy of the U.S. report to the UN and the full list of item provisionally identified for the ban will be sent to subscribers on request.]

* * * BRIEFS * * *

SUNSET REVIEWS: WTO dispute-settlement panel report released Nov. 30 says U.S. still hasn't complied with earlier ruling that found ITA "sunset" review of oil country tubular goods from Argentina to be inconsistent with WTO requirements.

LEBANON: Even with turmoil swirling around, U.S. and Lebanon signed Trade and Investment Framework Agreement in Beirut Nov. 30. TIFAs are often precursors to FTA talks.

STATE: In short Nov. 30 Federal Register notice, State said it has dropped nonproliferation sanctions on Russia aircraft maker, Sukhoi, effective as of Nov. 17 (see **WTTL**, Aug. 14, page 1).

OFAC: Super Micro Computers, Inc. of San Jose, Calif., has completed its trifecta of enforcement settlements with government. It has agreed to pay \$179,327.16 civil fine in deal with OFAC to settle charges related to its unlicensed exports of computer motherboards to Iran. Earlier it paid \$124,500 civil fine in settlement with BIS and \$150,000 criminal fine (see **WTTL**, Sept. 18, page 4).

COUNTRY GROUPS: BIS in Nov. 27 Federal Register amended Country Group List to indicate Serbia and Montenegro are separate countries. Controls remain the same.