

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

Vol. 26, No. 17

April 24, 2006

BOEING FINE WAS MATTER OF “RESPECT,” STATE’S TRIMBLE SAYS

State imposed a \$15 million fine on Boeing for its unlicensed export of planes containing the QRS-11 navigation chip not because the sale harmed national security but because the department wanted to maintain industry respect for the export regulatory system, according to David Trimble, chief of compliance in State’s Directorate of Defense Trade Controls (DDTC). Trimble admits that DDTC has been criticized for being both too lenient and too harsh in imposing the fine, with critics on both sides asking, “What are you doing?”

“This wasn’t the Hughes-Loral situation,” Trimble told an American Conference Institute program April 19. “This wasn’t where you had harm to national security. This was about respect. This was about following the law and doing what you are told,” he declared (see **WTTL**, April 10, page 2).

Trimble said there are two instances where State is likely to take action against a firm for an illegal export of items or services subject to the International Traffic in Arms Regulations (ITAR). “If you do something that harms national security or foreign policy interests, there is no way that we are not going to do something,” he said. “If you do something that subverts or undermines the regulatory integrity of the ITAR, we have to respond, because, as with Commerce, the systems are predicated on a cooperative industry,” Trimble explained.

“The systems are designed to rely on industry’s cooperation and adherence to the rules,” he said. “If they step out of that part of the deal, the whole system will collapse and we will have a cop on every beat; we’ll have somebody in every board room and we’ll have somebody on every shop floor because no one will be trustworthy,” he stated.

BIS WILL SHIFT ENFORCEMENT BACK TOWARD COMMERCIAL EXPORTERS

As the Bureau of Industry and Security (BIS) continues to put its export enforcement focus on the potential proliferation of weapons of mass destruction and terrorism, it is also turning back toward its traditional interest in export compliance by legitimate exporters. “Within Commerce we are talking seriously about what our message on compliance needs to be, because there is another priority here,” said Michael Turner, director of the BIS Office of Export Enforcement (OEE). “We are also very, very focused on increasing compliance by the legitimate export trade,” he told the American Conference Institute April 19. While some of this new emphasis will be aimed at basic compliance issues, such as dealing with denied parties or including correct information on export documentation, another target will be compliance with deemed export requirements. The renewed interest in enforcement aimed at legitimate exporters

Copyright © 2006 Gilston-Kalin Communications, LLC. All rights reserved. Reproduction, copying, electronic retransmission or entry to database without written permission of the publisher is prohibited by law.

Published weekly 50 times a year except last week in August and December. Subscription in printed or electronic form is \$597 a year in U.S., Canada & Mexico; \$627 Overseas. Additional copies with full price subscription are \$75 each. Circulation Manager: Elayne F. Gilston

responds to comments from some industry regulatory affairs professionals who have complained to BIS that its focus on proliferation has made it difficult to get corporate managers to give export managers the funds and resources for compliance because of the feeling that the agency won't take tough action against non-WMD violations.

BIS intends to step up its auditing of firms that have deemed export licenses to make sure they are complying with all conditions placed on the subject foreign nationals and the requirements for technology control plans. Industry sources say BIS is also using State Department work visa information to find Chinese nationals in the U.S. and to match them with U.S. high tech companies where they are employed to determine whether they have access to controlled technology.

Turner confirmed that BIS is reviewing how it charges violations, because of the recent increase in the fines available under the International Emergency Economic Powers Act (see **WTTL**, March 27, page 1). "I can assure you that we recognize this has an impact on the way we administer penalties at the Commerce Department," Turner said. "It's one thing to say we are going to charge every offense when it's \$11,000 per offense. It's something quite different to talk about that when it's suddenly \$50,000 per offense," he said. "One of the things that we drive for in our penalty processing is some equity and making sure that the penalties we are assessing are commensurate with the offenses that underlie them," he said.

Turner also emphasized BIS's use of warning letters to resolve export compliance cases. In fiscal year 2005, which ended Sept. 30, 2005, the agency completed action on 187 cases where violations of the Export Administration Regulations (EAR) were found. It imposed civil administrative penalties in 69 of those cases (37%). It sent warning letters to the exporters in 118 cases (63%), he noted. The decision to issue a warning letter rather than an administrative penalty is based on the agency's determination that even when there has been a violation of the EAR, the best way to resolve the issue is through counseling of the exporter and seeking remedial actions to improve compliance in the future, he explained.

LABOR EXTENDS TAA TO SOFTWARE INDUSTRY WORKERS

After two remands and three Labor Department rulings, Court of International Trade (CIT) Judge Judith Barzilay April 17 accepted (slip op. 06-53) a revised Labor ruling which determined that software developers make an "article" and are not service providers. In a key decision that might affect other workers who've seen their service jobs go offshore, Labor said former employees of Electronic Data Systems are eligible for trade adjustment assistance (TAA) benefits. The department said its new policy will need to be elaborated through rulemaking.

Barzilay's order quoted the last Labor determination, which said: "software and similar intangible goods that would have been considered articles for the purpose of the Trade Act if embodied in a physical medium will now be considered to be articles regardless of their method of transfer."

NO MESSAGE IN PORTMAN-SCHWAB JOB SWITCH

President Bush's decision April 18 to move U.S. Trade Representative (USTR) Rob Portman to head the Office of Management and Budget (OMB) and promote Deputy USTR Susan Schwab to be USTR reflects the kind of action an ailing company would take on the advice of a management consultant: Do first things first. Rather than showing a reduced commitment to trade or the World Trade Organization's (WTO) Doha Round, the shift means the White House thinks it's more important to have Portman help get immediate control of the federal budget process in Congress and save the president's tax agenda. The Doha talks have another eight months in which to get fixed. Also, in naming Schwab, who has proved her negotiating skills in talks with Peru and Colombia, the U.S. won't have to wait for a Senate confirmation process for her to take over from Portman. Nonetheless, Portman's move is definitely not perceived as a

positive development, one ambassador to the WTO told WTTL. "But I don't think it necessarily sends a negative signal from Washington to the Doha process, partly because something domestically is taking place in Washington. I think their priority might have been placed on how to deal with budget deficits and how to deal with the Congress," he said.

Others see the change as another speed bump that makes reaching modalities in agriculture and non-agriculture market access (NAMA) negotiations incrementally more unlikely (see story below). Portman himself didn't expect the end of April deadlines to be met.

"The prospects for the next couple of weeks were already pretty dim," one diplomat said. Countries belonging to the G20 group of developing countries "feel it's a step backward because it will make it very difficult for the U.S. to have any position on any issue, to make any offer, because of the confirmation hearings. So that means nothing can move," one G20 participant said. "The U.S. could have waited a little bit, a couple of weeks, then made the change," he added, noting the timing of Bush's announcement just ahead of the April 30 deadlines in the Doha negotiations.

WTO CONFIRMS APRIL 30 DEADLINES WILL BE MISSED

WTO negotiators April 21 admitted they won't meet the April 30 deadline they set at the Hong Kong Ministerial in December to agree on key modalities and formulas for liberalizing trade in agriculture and non-agriculture market access (NAMA) – a fact many were predicting weeks ago (see WTTL, April 10, page 4). A Heads of Delegation meeting is scheduled for April 24, after which WTO Director General Pascal Lamy is expected to announce the fall-back plans for the talks. A Trade Negotiations Committee (TNC) meeting has been scheduled for May 1, but some sources are predicting the new real deadline for significant agreements is the end of July.

"But without making any tangible or substantive progress in April," the July deadline may also be missed, if political commitment from the membership does not coalesce, one diplomat in Geneva told WTTL. The missed April deadline puts pressure on July as a drop dead date for completing modalities, he said.

"I think the real deadline is July of this year, because after you conclude modalities, most of the negotiations are done, but you have a large amount of work and lower profile negotiations which are still very complicated," he explained. "In the case of NAMA and ag, you are going to have a lot of verification to do in the preparation of schedules. This is something we learned from the Uruguay Round. You have to be very careful. You cannot just trust what other people put in their tariff schedules," he continued.

"The same thing will happen with things like the rules negotiations. People will be very careful at how the texts are drafted, because of all the experience accumulated with regard to dispute settlement. So there's plenty, plenty of work to be done after the modalities are concluded," the diplomat noted.

After an agreement is reached on modalities and formulas, which establish the framework into which tariff cuts and market access proposals are to be fitted, it will take members six or seven months to complete the full presentation of offers and to do line-by-line, country-by-country verifications of schedules, the official said. In addition, to modalities, however, there are numerous other disputes that need to be resolved including the treatment of Geographic Indicators, sensitive and special products, flexibilities for developing countries, and food aid, WTO sources point out. "We still have some political maneuvering to do," one official said.

In the key agriculture talks, Ambassador Crawford Falconer, the New Zealand representative who chairs the negotiations, has called for the start of an intense six-week cycle of meetings to agree on "full modalities." These sessions would be held starting May 1 in two-week blocks that would allow ambassadors to spend one week in consultations or back in their home capitals

reviewing proposals and one week in Geneva doing negotiations. During the April 21 meeting of the agriculture group, Falconer reportedly said participants have told him they oppose adopting “partial modalities” that leave key issues unresolved. He also said he expects to produce a series of “reference papers” that reflect areas where negotiators have narrowed their differences. Falconer said he opposed the idea of setting any new deadlines for reaching modalities. He particularly objected to setting July as the deadline, noting that agreements have to be reached before then.

A senior U.S. official told reporters on background in Geneva April 21 that the farm talks had “a mixed week.” They produced “a lot of good talking, a lot of useful meetings, some interesting ideas from some of our partners, and some greater sense of urgency than we’ve seen in the past,” he said. “But when it gets down to the real core issues of the negotiations, still quite significant problems remain in terms of meeting the ambitions of Doha,” he added.

WTO APPELLATE BODY REJECTS ‘ZEROING’ IN ADMINISTRATIVE REVIEWS

International Trade Administration (ITA) plans for abandoning the use of “zeroing” in determining dumping margins in initial antidumping investigations may have to be extended to administrative reviews as well. A WTO dispute-settlement panel in October had found the practice to be inconsistent with the Antidumping Agreement when used in initial investigations, and an Appellate Body ruling April 18 found it violated these rules when used in administrative reviews. ITA is already in the midst of receiving public comments on plans for changing its policies and is now likely to seek industry reaction to applying the change to both initial and administrative cases (see **WTTL**, March 13, page 4).

The Appellate Body overturned the panel’s determination that zeroing, which drops above normal export prices from the equation used to calculate a dumping margin, is permitted in administrative reviews. The European Union (EU) had brought the original complaint and the appeal, seeking to have the WTO reject the U.S. use of zeroing just as it rejected the EU’s zeroing methodology in an earlier ruling involving EU imports of bed linen.

Whether ITA can make the change in its regulations without legislation remains the subject of debate between attorneys for respondents and petitioners. “Our view is that Commerce does not have the authority to make the change required by the decision,” said Skip Hartquist of the newly merged law firm of Kelley Drye Collier Shannon. “They will have to go to Congress to make this change,” he told **WTTL**. However the change is made, it is likely to lead to lower dumping margins in many cases, said Charles Blum of International Advisory Services Group. With the chance of lower margins, respondents “will have more reason to participate fully in ITA proceedings” than before, he said.

* * BRIEFS * * *

HIGH-PERFORMANCE COMPUTERS: BIS will publish Federal Register notice and make effective April 24 new rules adopting “adjusted peak performance” – as measured in tereflops – as replacement for CTP and MTOPS for calculating computing powers for export controls (see **WTTL**, Jan. 2, page 2).

CHINA: WTO April 19 issued first trade review of China in four years. Commenting on findings, Deputy USTR Peter Allgeier said Beijing has made progress in implementing specific WTO commitments and obligation. “At the same time, however, it is apparent that China has not yet fully embraced the key WTO principles of non-discrimination and national treatment, nor has China fully institutionalized market mechanisms and made its trade regime predictable and transparent,” he said. “Despite many positive reforms, China continues to use an array of industrial policy tools to promote or protect favored industries, and these tools at times appear to collide with China’s ongoing WTO obligations,” he added. Separately, China has submitted 88-page notification to WTO on subsidies it provides its industries. [**Editor’s Note:** Electronic copy of Chinese subsidies notice will be sent to **WTTL** subscribers on request.]

ITAR: DDTC published 22 pages of “technical” changes in regulations in April 21 Federal Register.