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U.S., CHINA CREATE WORKING GROUP ON EXPORT CONTROLS

The Bureau of Industry and Security's (BIS) march toward a new "catch-all" regulation to expand controls on exports to China may be slowed by a U.S.-China agreement April 11 to establish a working group on high technology and strategic trade cooperation. Establishment of the working group was one of the results on the bilateral meeting of the Joint Commission on Commerce and Trade (JCCT), which produced a wide range of announcements aimed at easing Sino-American trade tensions (see story below).

> The expected catch-all regulation was not discussed in depth during the JCCT meeting, BIS Under Secretary David McCormick told WTTL. But it was "an area of concern" raised by the Chinese, he said (see **WTTL**, March 20, page 1). "There was a lot of discussion of the working group and that being a useful mechanism to discuss export controls," McCormick added.

"The group will meet about twice a year on a biennial basis and will have an ongoing agenda around end-use visits and the end-use visit understanding, as well as ways to facilitate high-tech trade, legitimate civil high-tech trade," he explained. Its first meeting will be sometime in the next six months, he said. A BIS statement said the BIS representative to the group will be Deputy Under Secretary Mark Foulon. The Chinese side will be led by the director general of the department of science and technology in China's Ministry of Commerce. One of its first goals is to present a seminar in China on U.S. export controls at a time to be agreed upon.

A BIS source says the 2004 End-Use Agreement has been working well in relieving the backlog of visit requests, although he refrained from saying how many requests are still pending. The improved process for conducting visits to Chinese facilities before and after export licenses have been approved has helped reduce the licensing time for China cases, he says.

CHINESE PROMISES AND PURCHASES SOOTHE WAY FOR HU

On the road to capitalism, China has learned at least one thing: money talks. It also has learned a lesson from the Japanese who helped ease trade tensions with the U.S. in the 1980s and 1990s by sending trade missions to the U.S. to make large, highly publicized purchases of American goods. A Chinese buying mission was a key element of Chinese Vice Premier Wu Yi's visit to the U.S. for the April 11 meeting of the Joint Commission on Commerce and Trade (JCCT). Wu brought along some 200 Chinese business executives who were supposed to sign 106 purchase contracts valued at $16.21 billion. Among the top beneficiaries of the visit were Boeing, which signed a deal with the Chinese to sell 80 next-generation 737 airplanes with an

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estimated value of $4.6 billion, and Motorola, which reached an agreement to sell some $1.5 billion in telecommunications equipment to China, including its new "Ming" cellphone. "Products to be purchased include not only computer software, communications equipment and power station equipment, but also electronic appliances, automobiles, auto parts, airport security equipment and optical devices," Wu told a press conference after the JCCT meeting. "The value of software alone is nearly 1.7 billion U.S. dollars," she added.

> Along with cash-on-the-barrel-head diplomacy, Wu announced or reconfirmed several trade liberalization measures. These include a new policy of requiring computers to be sold with pre-loaded software; the reopening of the Chinese market to U.S. beef following negotiations on a safety protocol; and elimination of duplicate factory quality inspection requirements for medical devices.

Other measures are a crackdown on optical disk factories making pirated music and movie CDs; easing of express delivery rules; reconfirmation of a policy of "technology neutrality" for Generation Three telecommunications equipment; an acton plan for improving protection of intellectual property rights; improvement of regulatory transparency by requiring all local and provincial regulations to be published in the official national Gazette; and a promise to join the World Trade Organization's (WTO) Government Procurement Agreement by the end of 2007.

Beijing's IPR Action Plan, which was outlined in a 27-page document, is likely to cool U.S. plans for bringing a WTO complaint against China's lack of enforcement. "If we can resolve this, then we need not bring an IPR complaint," one U.S. trade official said on background. "We need to monitor and see what the practical effect on the ground is," he added. "I'm not saying we are putting our case on the shelf or not," he said. Another U.S. official told WTTL that the U.S. will "keep close council on if and when we will file" a WTO complaint. He noted that the Chinese have begun to cooperate in providing more information on their IPR enforcement statistics in response to the U.S. Section 63.3 request under WTO procedures.

Wu made no announcements on China's currency policies and none was expected. This is a major subject that apparently is being left for Chinese President Hu Jintao to address when he visits Washington April 20. Even Hu, however, is not expected to make any groundbreaking statement on the renmimbi, but rather only a confirmation of Beijing's previous commitments to allow the currency to increase in value over time.

Ahead of Hu's visit, President Bush cited currency as one of the areas in which he wants to see progress in U.S.-China relations. "China needs to take additional steps to address the bilateral trade imbalance between our two countries. And China needs to move to a flexible market-based currency," Bush said in a April 13 speech.

BOTH SIDES CLAIM VICTORY IN INCONCLUSIVE WTO RULING ON LUMBER

The WTO Appellate Body issued such a mixed decision April 13 on the International Trade Commission's (ITC) threat-of-injury determination in the softwood lumber case that both the U.S. and Canada claimed victory in the ruling. Because of the confusing decision, Canada is considering asking for a new panel to review the case. "Canada will carefully consider its options following this decision, including the possibility of bringing a new WTO proceeding against the U.S. measure in this case," a Canadian statement declared.

The Appellate Body had been asked to review a WTO Article 21.5 panel decision which had upheld the ITC's renewed finding of a threat-of-injury from Canadian imports after a Section 129 review that was intended to bring the U.S. into compliance with an earlier panel ruling that found the original injury determination to be inconsistent with WTO rules. The Appellate Body reversed the Article 21.5 panel's decision, but it refused to decide whether the ITC decision was correct, saying it didn't have sufficient factual data on which to conduct such a review. The Appellate Body neither exonerated nor condemned the ITC Section 129 decision. It merely said the WTO panel didn't apply the correct standard of review in its examination of the new

injury determination. "We find that...the panel failed to comply with its duties under Article 11 of the DSU [Dispute Settlement Understanding] in the standard of review that it articulated and applied to assess the consistency of the Section 129 determination" with provisions of the WTO antidumping agreement and the agreement on subsidies and countervailing measures, the Appellate Body declared (see story below).

> In finding that the panel acted incorrectly, the Appellate Body also reversed the panel's decision that the U.S. has implemented the earlier panel ruling and come into conformity with its obligations under the dumping and subsidy agreements. Thus, there is no WTO judgment on whether the ITC's 129 determination has brought the U.S. into compliance with the original panel ruling that the first threat-of-injury determination wasn't consistent with WTO rules.

WTO APPELLATE BODY CLARIFIES STANDARD OF REVIEW FOR PANELS

While the WTO Appellate Body ruling April 13 on the softwood lumber case left the U.S.-Canada dispute up in the air, it clarified the standard of review WTO dispute-settlement panels must use in assessing a trade action's compliance with WTO rules. When reviewing an administrative decision of any government's trade agency, "a WTO panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report," the body stated.

> The ruling of the panel reviewing the ITC's Section 129 determination had four "serious infirmities," the Appellate body explained. It put too much burden on Canada to prove the ITC's decision was wrong; its use of the "not unreasonable" standard didn't comply with previous appellate rulings; it didn't conduct a critical and searching review of the ITC decision; and it failed to conduct an analysis of "the totality of factors and evidence" considered by the ITC.

"It is well established that a panel must neither conduct a de novo review nor simply defer to the conclusions of the national authority," the Appellate Body stated. "The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it," the body added. "The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of record evidence," it said.

CIRCUIT COURT REMANDS ITC RULING ON "CAUSATION" OF INJURY

The ITC will have to do a better job explaining why imports subject to an antidumping or countervailing duty complaint are the cause of injury to a U.S. industry when there are other imports that are not the subject of the investigation. In a divided ruling April 10 in *Bratsk Aluminum v. U.S.*, (Case O5-1213), the Court of Appeals for the Federal Circuit (CAFC) vacated a Court of International Trade ruling upholding the ITC's injury finding on silicon metal from Russia and added more clarity to its landmark 1997 decision in *Gerald Metals.*

The CAFC remanded the case back to the ITC. "Under *Gerald Metals*, the Commission is required to make a specific causation determination and in that connection to directly address whether non-subject imports would have replaced the subject imports without any beneficial effect on domestic producers," ruled Judges Arthur Gajarsa and Timothy Dyk in a decision written by Dyk. Judge Glenn Archer Jr. dissented, saying the ITC sufficiently explained its causation finding. In this case, there were non-subject imports from Brazil, Canada, Saudi Arabia and South Africa in addition to those from Russia. "*Gerald Metals* requires the Commission to explain why, notwithstanding the presence and significance of the non-subject imports, it concluded that the subject imports caused material injury to the domestic industry,"

the court stated. "The failure of the agency to explain its causation analysis in accordance with *Gerald Metals* is particularly troubling in this case because of the agency's claim that it is not obliged to follow this court's precedent," it declared. "In ordering reconsideration by the Commission, we do not suggest that the mere existence of fairly traded commodity imports at competitive prices precludes the Commission from finding material injury," two judges ruled.

> "For example, it may well be that non-subject imports lack capacity to replace the subject imports or that the price of the non-subject imports is sufficiently above the subject imports that the elimination of the subject imports would have benefitted the domestic industry," it continued. "The point is that the Commission has to explain, in a meaningful way, why the non-subject imports would not replace the subject imports and continue to cause injury to the domestic industry," it said.

APPROVAL OF U.S-PERU FTA UNCERTAIN IN BOTH COUNTRIES

The U.S.-Peru free trade agreement (FTA) signed April 12 faces a precarious future in both the U.S. Congress and the Peruvian legislature, with Democrats in Washington still mostly opposed to it and Peru in the midst of a presidential election in which two main candidates oppose the deal. Both U.S. Trade Representative Rob Portman and Peruvian President Toledo say they hope it can get approved by both legislatures before Toledo leaves office July 28.

> "You can be absolutely sure that we're going to do everything that is within our possibility for this free trade agreement to be approved in the Peruvian Congress during my administration," Toledo told reporters after the FTA signing. Although there is some "legal paperwork" yet to be done in Peru, he said he is "realistically optimistic of the approval of this new free trade agreement."

A group of House and Senate Democrats wrote to Portman April 6 raising objections to the Peru FTA because it still doesn't require compliance with International Labor Organization (ILO) standards. Despite these objections, Portman contends he will get support for the deal from several "New Democrats" with whom he has met. "We have spent a lot of time working with them on this agreement," Portman said. "If you talk to them, you will see a number of them will be supportive of this agreement who could not be supportive of CAFTA," he said.

* * * BRIEFS * * *

BIS: Career Commerce attorney John Masterson has been named Chief Counsel for Industry and Security. He was deputy chief counsel for international commerce.

ANTIBOYCOTT: Hyundai Engineering and Construction of Englewood Cliffs, N.J. has agreed to pay $12,000 civil fine to settle BIS charges that it violate Antiboycott regulations by providing boycott-related information to customers in Kuwait and failing to report requests to BIS.

EXPORT ENFORCEMENT: BIS has reached settlement with Transtar Metals, Gardena, Calif., which will pay $65,000 civil fine to settle charges that it caused or attempted to export aluminum rods to various destinations, including Israel and Philippines, without approved licenses.

MORE EXPORT ENFORCEMENT: MTS Systems of Eden Praire, Minn., agreed to pay $36,000 civil fine in settlement with BIS for alleged export of thermal mechanical fatigue testing system to Indira Gandhi Center for Atomic Research, which was on BIS Entity List, in India without approved license.

ARMS EXPORT: Hadianto Djoko Djuliarso of Indonesia and Ibrahim bin Amram were arrested April 9 and Detroit U.S. District Court Grand Jury indictment unsealed April 12, charging them with conspiracy to export of Munitions List items, including aircraft radar and guidance systems and machine guns, to Indonesia.

PALESTINIAN AUTHORITY: OFAC April 12 posted notice declaring Hamas, which is designated terrorist entity, has "property interest in the transactions of the Palestinian Authority." It said U.S. persons are prohibited from engaging in transactions with Palestinian Authority without OFAC authorization.

TRADE FIGURES: U.S. goods exports in February were up 14% from year ago to $80.5 billion.