Washington Tariff & Trade Letter®

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

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CUSTOMS OPPOSES CONTINUED USE OF OPTION 4 FOR EXPORTS

Last-minute objections from Customs and Border Protection (CBP) have delayed Census Bureau plans for publishing a final regulation mandating use of the Automated Export System (AES) for submitting documentation on all exports, Census staffers told the Bureau of Industry and Security (BIS) Regulation and Procedures Technical Advisory Committee March 7 (see **WTTL**, Dec. 12, page 3). Customs wants Census to change the final rule to eliminate the availability of post-departure filing of AES information, also known as Option 4, and also to allow Customs to share AES information with foreign governments.

> Census had hoped to publish the final Mandatory AES rule in the first quarter of 2006 with a delayed 90-day implementation period. Because of the dispute with Census, publication may not come until this summer. In addition, Census staffers say they intend to delay the effective date of the rules for 30 days after their publication in the Federal Register while keeping the 90-day implementation schedule, giving exporters a total of 120 days to switch to AES.

Customs wants all import and export data to be filed in advance of shipment. "Basically, when you look at it in comparison to the import side in regard to the Trade Act regulations, we give no one the authority to file their data some time after you import from a foreign country. Even if you're a C-TPAT member you can't do that," Customs representative Tom Fitzpatrick told RAPTAC. "If the Trade Act regulations say we need to get the information in advance, why do we have a group that's allowed to file late," Fitzpatrick said. "That's our position."

U.S. DEFENDS CONSTITUTIONALITY OF NAFTA REVIEW PANELS

The U.S. has used non-government commissions to settle binational disputes for over two centuries and such arrangements have been deemed constitutional by the Supreme Court, the Justice Department argues in a brief filed March 6 defending the constitutionality of the binational dispute-settlement provisions of NAFTA. Moreover, the use of such com-missions comes under the powers of Congress and the president to regulate international trade and conduct foreign policy, the department claims.

"This type of binding international arbitration has a sterling history," the government claims in the brief, which replies to a suit by the Coalition for Fair Lumber Imports challenging the dispute-settlement provisions of NAFTA Chapter 19 (see **WTTL**, Jan. 23, page 3). Among similar arrangements, it cites the Jay Treaty of 1794, which settled claims of U.S. and British citizens, and Pinckney's Treaty of 1795, which settled claims with Spain. Justice also

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disagrees with the Coalition's claim that use of binational panels violates the industry's due process right to have the dispute resolved by a court established under Article III of the Constitution. "This contention is wrong; not every matter susceptible to determination by the federal judiciary must be adjudicated in an Article III court," the government argues. The brief notes that a 1929 Supreme Court ruling in *ex parte Bakerlite Corp*. upheld the jurisdiction of the old Court of Customs Appeal, which was an Article I tribunal. "Indeed, it was not until the enactment of the Trade Agreements Act of 1979 that judicial review of antidumping and countervailing duty matters became widely available," the brief contends.

JAPAN TIGHTENS EXPORT CONTROL ENFORCEMENT

Japanese export control authorities plan to conduct over 100 unannounced surprise inspections of Japanese exporters in the coming year as part of a broad initiative to increase compliance with the country's rules and awareness of its requirements. Japan's Ministry of Economy, Trade and Industry (METI) March 3 announced its new program, which also will aim at getting universities and research laboratories to be aware of Japan's technology transfer require-ments. The inspections will examine company compliance programs to determine if they are working well. Where programs are found to be inadequate, METI will ask firms to respond in writing to explain what steps they are taking to improve them.

> "METI has decided to take measures to strengthen Japan's export controls in order to ensure thorough compliance with the law in such a way as to enhance the awareness of companies' top management concerning export controls," METI said. The initiative will include outreach to some 250 trade associations, asking them to help spread the word about the need for export compliance.

METI also plans to hold 70 seminars for industry executives, including export control managers and company management and sales executives, one Japanese official told WTTL. For firms that hold comprehensive licenses that allow bulk exports, attendance at a seminar will be mandatory. METI also will hold seminars for universities and research labs. In addition, it will strengthen its outreach to companies in other Asian countries, including subsidiaries of Japanese firms, to increase their awareness of Japanese export controls.

SAUDIS GIVE GUTIERREZ ASSURANCES ON WTO COMPLIANCE

Commerce Secretary Carlos Gutierrez raised the issue of Saudi Arabia's enforcement of the boycott of Israel during his visit to the country in February, but he wouldn't say directly whether the Saudi's will give up the boycott. "We did talks about their WTO commitments," Gutierrez told WTTL (see **WTTL**, March 6, page 2). "They are very pleased to be part of the WTO. They are very grateful for our support and they are fully committed to abiding by all the terms of the WTO accession," he added. When pressed on whether that included ending the boycott of Israel, he said, "All of the terms of the WTO agreement."

BIS TAKING NEW LOOK AT DEEMED EXPORT RULES

Any change in deemed export licensing requirements may not be in the form of a regulation but instead may come as guidance, according the BIS sources. Despite some reports, the agency doesn't intend to abandon completely the deemed export issue. With Commerce Secretary Carlos Gutierrez and the department's "fifth floor" now deeply involved in reviewing possible policy changes, BIS is looking at several options to address the issue. BIS Under Secretary David McCormick has already stated in an article in the Financial Times that the agency won't expand the regulation to base licensing requirements on a foreign national's country of birth. Two issues still needing resolution are whether to change the definition of what constitutes "use" of a technology and the treatment of fundamental research. McCormick wants "to frame the issue in a balanced way" to address national security and business and academic concerns,

Todd Willis, senior analyst in the BIS Office of National Security and Technology Transfer, told the agency's Regulations and Procedures Technical Advisory Committee March 7. BIS is still considering how to address recommendations Commerce's Inspector General made to change the deemed export rules. "The purpose of the review is to make sure we analyze everything, all the concerns, and that could mean taking a different approach," Willis said. One result might be the issuance of new guidance. "That's what we mean by framing the issue," he said. "We want to make sure there is clear guidance because without guidance there is not compliance," he said. If the deemed export rules are changed, BIS will first issue a proposal with a public comment period to get industry and academic views, Willis assured RAPTAC.

NEW ORLEANS TO GET SMALL SHARE OF CEMENT ALLOCATION

One of the justifications that Commerce cited for suspending the 16-year old antidumping order on cement from Mexico was the need for cement in the reconstruction of New Orleans and the Gulf Coast in the aftermath of Hurricanes Katrina and Rita. But under the binational agreement signed March 6, New Orleans will receive only 9% of the 3 million metric tons of Mexican cement that will enter the U.S. under license from the Mexican government in the first year and 10% thereafter. Alabama and Mississippi will get 2% and Florida 7%. The bulk of Mexican cement, 42%, will go to Arizona, and another 24% will go to El Paso/New Mexico.

> Because the antidumping law doesn't include clear authority for the International Trade Administration (ITA) to reach the complex deal that settled the case, it was implemented through a binational executive agreement signed by U.S. Trade Representative (USTR) Rob Portman and Mexican Secretary of Economics Sergio Garcia de Alba. The agreement suspends the current antidumping order on Mexican cement, returns to cement importers over $250,000 in duties that have been the subject of suspended liquidation, and recognizes a side deal between U.S. and Mexican cement producers to split those duties 50-50. The money will go in an escrow account until it is divided (see **WTTL,** Jan. 23, Page 2).

The agreement bases the authority for liquidating duty deposits on Section 617 of the 1930 Tariff Act, which gives the Secretary of Commerce authority to reduce the government's claim for duties when questions are raised about the probabilities of collecting on the claim. ITA sources also say the settlement was based on the government's inherent right to settle litigation.

DEVELOPING COUNTRIES MAKE SERVICES REQUEST FOR MODE 4

Led by India, 11 developing countries March 8 submitted a collective request in the Doha Round negotiations to liberalize significantly the movement of contract workers between countries under what is known as Mode 4 in the services talks. "These proposals, or these kind of things, this group of developing countries, have been saying for quite some time," said an official in Geneva who is familiar with the proposal.

> The request makes it clear that the quid pro quo facing developed countries that want greater services access in developing nations will be allowing more foreign workers to enter their countries (see **WTTL,** March 6, page 4). For the U.S., the request is likely to run into opposition from members of Congress who oppose being forced to change U.S. immigration policies under a trade agreement.

The proposal, obtained by WTTL, seeks new or improved market access commitments delinked from a commercial presence. It would allow so-called Contractual Service Suppliers (CSS) to bring workers into another country under contract to perform a service even if the CSS doesn't have a commercial presence in the country. CSS employees would have to meet requisite qualifications, including, at a minimum, a diploma, university degree or demonstrated experience. Wage parity would not be a pre-condition of entry. The proposal would limit access to specific identified sectors or occupations and restrict work to activities covered in a

contract. It would eliminate or reduce an Economic Needs Tests but would limit the duration of entry to one year or for the length of a contract, if longer. Stays could be renewed. Independent professionals also would be allowed in, but their employment would be restricted to services "at a level of complexity and specialty that require at a minimum, a diploma or university degree or demonstrated experience." The request says "it may not be feasible to achieve full harmonization of domestic immigration regimes in respect of these categories, however, it is useful in arriving at a common understanding of these categories and their specific elements." It would also help create uniformity and clarity in the scheduling of commitments.

END OF DUBAI PORT DEAL WON'T STOP LEGISLATION

The decision of Dubai Port World to cancel its planned acquisition of operations at six U.S. ports won't stop congressional interest in enacting legislation to reform the foreign-investment review process at the Committee for Foreign Investment in the U.S. (CFIUS), congressional sources say. Senate Banking Committee Chairman Richard Shelby (R-Ala.) intends to go ahead with a markup of CFIUS legislation the last week in March, and other committees are expected to move other pieces of legislation. Most measure would come under Banking jurisdiction.

> The Shelby bill is expected to give CFIUS statutory status instead of being established by executive order as it now is. In addition, it would make the Director of National Intelligence a member; impose requirements for notifying Congress about CFIUS decisions; increase congressional oversight of the panel; and clarify current requirements for when a formal 45-day review is needed when a foreign-government-owned entity seeks to acquire a U.S. company.

* * * BRIEFS * * *

CHINA CATCH-ALL: In addition to splitting its forthcoming "conventional arms catch-all" regulations into separate rules for China and all other embargoed countries, BIS also plans to expand China regulations to clarify general licensing policies for China, agency staffers report (see **WTTL**, Feb. 13, page 1).

SPECIALLY DESIGNED: RAPTAC wrote to Under Secretary David McCormick March 7, complaining that exporters are still confused about meaning of term "specially designed" in EAR in light of conviction of Fiber Materials, Inc., for exporting allegedly specially designed items to India (see **WTTL**, Nov. 28, page 1). It urged BIS to apply specially-designed definition in Missile Technology (MT) rules to all CCL items.

EXPORT ENFORCEMENT: In four-way settlement with BIS, Dolphin International of New Delhi, India, agreed to pay $22,000 civil fine and be denied export licensing privileges for four years and Orcas International of Flanders,N.J., agreed to pay $19,800 fine and be denied export privileges for four years to resolve BIS charges that they conspired and solicited to export controlled toxins to North Korea without approved license. Dolphin President Vishwanath Kakade Rao and Orcas President Graneshawar K. Rao agreed to be denied export privileges for four years for alleged violations in their "individual capacity."

FTAs: U.S. and Malaysia March 8 said they will launch FTA negotiations (see **WTTL**, Feb. 20, page 4). Separately, Jamaican Prime Minister P.J. Patterson told OAS March 9 that FTAA talks are "comatose."

CANADA: OMB now considers draft BIS rule to require export licenses for all MT items going to Canada to be "significant regulation" and is giving text closer scrutiny, BISers report (see **WTTL**, Feb. 13, p. 4).

LIBYA: President Bush Feb. 28 issued waiver allowing Ex-Im Bank to finance exports to Libya.

EX-IM BANK: Finance Committee Chairman Charles Grassley (R-Iowa) March 8 put "hold" on confirmation of James Lambright to head bank until he gets better explanation for its approval of financing for construction of wet-ethanol processing plant in Trinidad and Tobago, which Grassley opposes.

ZEROING: ITA in March 6 Federal Register said it was abandoning average-to-average comparisons in setting dumping margins in response to WTO ruling and asked for comments on alternative approaches.

UKRAINE: House March 8 voted 417-2 to grant Ukraine Permanent Normal-Trade-Relations Status.

NOTE TO LIBRARIANS: **WTTL** March 6, 2006, had wrong volume number. It was Volume 26, No. 10.

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ABOUT OUR SPEAKERS

Margaret M. Ayres

Ms Ayres is Counsel in the Washington, D.C. office of Davis Polk & Wardwell, an international law firm. She specializes in U.S. trade and investment laws applicable to cross border transactions, including the Foreign Corrupt Practices Act (FCPA), U.S. economic sanctions, and laws restricting foreign investment in the United States. Ms. Ayres has advised many companies around the world, including industrial, banking and investment banking clients, on the FCPA and other statutes. Her antibribery advice has focused on world wide transnational anti-corruption measures and conventions as well as FCPA enforcement actions and developments. She has drafted dozens of agent agreements, guidelines and compliance codes, tailored to take account of differences in corporate operations, structures and cultures. She has also conducted intensive training programs for U.S. companies and their overseas subsidiaries in many parts of the world, as well as for foreign issuers of U.S. securities. In addition, she has published a number of articles on the FCPA and appeared on numerous panels. Ms. Ayres is Vice Chair of the Anti-Corruption Initiatives & Compliance Issues Committee of the ABA Section of International Law and was also Vice Chair of its predecessor, the ABA's Task Force on Corruption. She has been a board member of the Washington International Trade Association since 1989. Ms. Ayres graduated from Yale Law School and is a member of the D.C. Bar.

Andrea Fekkes Dynes

Ms. Dynes is Senior Counsel and Director of International Law at the headquarters of General Dynamics Corporation in Falls Church, Virginia. She specializes in various aspects of international trade, including export controls, antibribery, sanctions, antiboycott, and import laws and regulations. She advises the company and its various businesses on various matters, including corporate policies and procedures, compliance issues, investigations, voluntary disclosures, audits, training, and merger and acquisition transactions. Prior to joining General Dynamics in 2004, Ms. Dynes was of Counsel with the law firm of Gibson, Dunn & Crutcher in Washington, DC for six years where she advised U.S. and foreign businesses on U.S. international trade laws and regulations and represented them before U.S. federal agencies. From 1991 to 1998, she was associated with Graham & James' international trade practice, where she focused on antidumping and countervailing duty proceedings, customs issues, export controls and sanctions matters. Between 1988 and 1991, Ms. Dynes served as an Attorney Advisor in the Office of Chief Counsel for Import Administration, U.S. Department of Commerce. Ms. Dynes is admitted to practice law in the District of Columbia and Virginia. She is a member of the American Bar Association and the District of Columbia Bar Association. Andrea is a 1988 cum laude graduate of The American University, Washington College of Law, and a 1981 graduate of Indiana University in Bloomington, Indiana.

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