

# 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. 6

February 6, 2006

## DELAY IN CATCH-ALL PROPOSAL MAY BE TIMED TO U.S.-CHINA TALKS

The Bureau of Industry and Security's (BIS) decision to slowdown the drive to propose a "catch-all" regulation to impose new licensing requirements on countries subject to arms embargoes may be tied the coming annual meeting of the U.S.-China Joint Commission on Commerce and Trade (JCCT). Export control issues have been on the agenda of past JCCT meetings, which are usually held in the spring each year, and the issue may be on the agenda again, government sources reportedly are saying.

BIS is also looking at ways to divide the catch-all proposal to deal separately with China than with other embargoed countries, industry sources say. The potential imposition of tighter controls on China has been the main concern of the exporting community about BIS plans for implementing a Wassenaar Arrangement agreement to restrict exports to military end uses in embargoed countries.

In previous years, JCCT meetings have produced wide-ranging agreements on the opening of U.S.-China trade and Chinese compliance with trade agreements and its World Trade Organization (WTO) obligations. The main subject in recent years has been Beijing's enforcement of intellectual property rights (IPR). The U.S. has been moving toward a decision to file a WTO complaint against China's inadequate IPR enforcement (see **WTTL**, Jan. 30, page 3).

## TRADE COMPLAINTS REACHED RECORD LOWS IN 2005

Every month when new trade figures are announced and the U.S. trade deficit reaches a new high, politicians are quick to issue statements lambasting unfair trade practices and calling for tougher enforcement of U.S. trade laws. Whether or not the trade numbers reflect unfair trade, U.S. business isn't rushing to bring complaints against foreign imports. In fact, in 2005, the number of new antidumping cases initiated reached a record 25-year low, while countervailing duty (CVD) cases tied a 1996 record low which also was the lowest in 25 years.

Last year, 13 antidumping cases were initiated on just eight products. This includes a case against orange juice from Brazil that was filed in 2004 but not initiated until February. The previous low year was 1997 when 14 cases were launched. Only two CVD cases were initiated. This follows three CVDs in 2004.

There has always been a cyclical pattern to the level of antidumping complaints filed with Commerce's International Trade Administration (ITA) and the International Trade Commission

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

(ITC). One explanation for the current down trend is the political slogan, "It's the Economy, Stupid." Dumping cases tend to increase just after the bottom of economic downturns and decline when things get better. That pattern, however, has shifted, with each down cycle in the last 25 years, producing lower peaks with each new period and lower lows during growth phases. This may reflect the shallowness of recent recessions.

For example, antidumping cases peaked in 1992 at 84, but reached only 77 at the next peak in 2001. Following the 1992 peak, the case load slid to 14 the next year. After reaching 83 cases in 1986, the level dropped to 16 in 1987. CVD cases, on the other hand, have been on a downward slope since 1982 when they peaked at 60. They reached 37 in 1984 and 1985, rose to 22 in 1992 and were at 18 in 2001. There were only five in 2003 and four in 2002.

Trade lawyers offer many explanations for the decline in trade complaints. They say a primary reason is the concern that petitioners won't be able to show injury during the ITC phase of an investigation. Of the 13 dumping cases in 2005, the ITC made negative injury determinations at the preliminary stage in four cases involving sulfur dioxide from Canada and steel wire rod from three countries. Of the 26 cases launched in 2004, the ITC went negative or the cases were withdrawn in 13 instances. One petitioner lawyer complained that the ITC fails to recognize that increased profits during the current expansion are still below margins in past expansions and leave companies vulnerable to the next downturn.

Another discouraging factor, according to the trade bar, might be the low dumping margins ITA has issued in such costly high-profile, multi-respondent cases as bedroom furniture from China and frozen shrimp from several countries. The all-other rate for shrimp from Thailand, the largest foreign supplier, was just 5.95%. Furniture margins ranged from de minimis to 6.65% for parties entitled to separate rates. To overcome low prices from low-cost producers, margins have to be significantly higher, trade lawyers say.

One ITC commissioner, speaking on background, suggested the decline might be due to the decision of some U.S. companies to shift production overseas rather than fight import competition in the U.S. "Some firms have decided their competitive advantage is in marketing and not in manufacturing, so they have moved manufacturing offshore," the commissioner said.

Another factor has been the consolidation of some of the major industrial sectors that in the past were heavy users of U.S. trade laws, such as steel, bearings and some commodities. In particular, there has been a decline in the number of new steel cases, which traditionally came in large batches against several product lines from numerous countries. In addition, because of increased globalization, many domestic U.S. firms have relationships with foreign competitors and don't want to harm that relationship with a trade complaint, one lawyer suggested.

## **FTA SWEEPSTAKES: SOUTH KOREA YES; SWITZERLAND NO**

The U.S. and South Korea Feb. 2 said they would begin talks in about 90 days aimed at reaching a Free Trade Agreement (FTA) before President Bush's fast-track negotiating authority expires in July 2007. The announcement came just days after the U.S. awarded Switzerland two weeks in Philadelphia as consolation prize for not winning a seat on the FTA bandwagon.

The subject of long preliminary talks and speculation about when they would begin, the U.S.-Korean talks drew bipartisan raves from Congress and the business community. The U.S. Trade Representative's office was praised for finally launching FTA negotiations with a partner that accounted for a large volume of trade. Korea is the U.S.'s seventh largest trading partner. Through November 2005, U.S. exports were \$25.1 billion and imports, \$40.1 billion.

Although Switzerland had proposed discussion about an FTA with the U.S., staff-level preparatory talks reached a deadlock over Swiss resistance to opening its agriculture market. In

Davos, Switzerland, Jan. 28, USTR Rob Portman and Swiss Federal Councilor Joseph Deiss announced that the two countries have forgone the FTA plan and instead will establish a Swiss-U.S. Trade and Investment Forum “to strengthen our already close bilateral relationship.” They said an FTA remains possible, and the two nations “may resume discussions at a later stage.”

Meanwhile, Colombian officials were back in Washington the week of Jan. 30 for another round of talks on an FTA, but sources said a deal still isn't close. The U.S. will continue to move the U.S.-Peru FTA through the process for congressional approval without waiting for Colombia and Ecuador, one U.S. official said.

This official also said U.S. diplomats in Bolivia are trying to determine the meaning of statements by Bolivia's new president, Evo Morales, who indicated that he may be interested in an FTA with the U.S. Bolivia could lose some of its preferential treatment in Peru due to the U.S.-Peru FTA and also with Colombia, if it reaches an agreement. Pressure also is mounting on Colombia, Ecuador and Bolivia to reach a trade deal with Washington this year, because Bush administration officials are saying they won't support renewal of the current Andean Trade Preferences Act, which expires at the end of 2006. The U.S. took a similar position on the Caribbean Basin Trade Act during talks with Central America and the Dominican Republic.

## **DEPARTING LICHTENBAUM EXPECTS BIS PROPOSALS TO MOVE FORWARD**

In an exclusive interview with WTTL just before his Feb. 3 departure from BIS to return to private practice, Assistant Secretary for Export Administration Peter Lichtenbaum said he expects the agency to propose new rules soon on a conventional arms catch-all and the application of the deemed export rules. Further down on the priority list, however, is a proposal to revise the definition of “knowledge” in export licensing and enforcement cases.

These potential changes to the Export Administration Regulations (EAR) have drawn strong criticism from exporters and the academic community. Lichtenbaum, who is returning to the D.C. law firm of Steptoe & Johnson, said BIS is listening to these concerns and the proposals that are likely to emerge for the catch-all and deemed export rules will address the issues that have been raised.

In dealing with the catch-all rule, which would implement a Wassenaar Arrangement Statement of Understanding, BIS recognizes that China presents different issues than most countries that are subject to arms embargoes. “It's important to differentiate between implementation of the catch-all and arms embargo where there is no controversy and China,” he told WTTL. Tighter controls on countries such as Iran and Cuba would make no difference, while most countries subject to arms embargoes are not large markets, he noted. “The concerns related to China are understandable and will be taken fully into account,” Lichtenbaum added.

On the deemed export rule, Lichtenbaum noted that BIS has already rejected the proposal of the Commerce Office of Inspector General (OIG) to expand controls to require licenses for foreign nationals based on their country of birth. BIS Under Secretary David McCormick revealed that decision in an article in the Financial Times in December. Lichtenbaum said other aspects of the OIG proposal “are getting senior attention” in the Commerce Department. “We will certainly take some action in response to the OIG proposal,” he said.

The October 2004 BIS proposal to revise the definition of “knowledge” in the EAR may be split off from the other parts of the proposal to create a “safe harbor” mechanism for getting BIS review of potential customers and to update the “red flags” in the current regulations. “There is significantly less concern in the exporting community” about the safe harbor and red flags proposal, Lichtenbaum said. The knowledge change “clearly was controversial,” and it is “a much closer question as to whether there will be a clarification” of the definition, he said.

Looking back over the time since he joined BIS in October 2003, Lichtenbaum noted several achievements that have counterbalanced the controversies over these proposals. The recent

introduction by House International Relations Committee Chairman Henry Hyde (R-Ill.) of a consensus bill to renew the Export Administration Act (EAA) was one of them. Lichtenbaum also was proud of BIS' speedier handling of export licenses despite an increase in the number of applications and little increase in staff, and the significantly quicker pace of implementing changes in controls that have been agreed on by the members of the multilateral export control regimes. Another positive was getting the computer industry and the national security community together to agree on a new metric for controlling high-performance computers and seeing the replacement for MTOPS adopted by the Wassenaar Arrangement in December.

## MINISTERS LOOK TO MID-MARCH FOR NEW DOHA ROUND OFFERS

As part of an agreement reached during talks in Davos, Switzerland, Jan. 26-28, trade ministers are pledging to propose market opening offers in agriculture and industrial tariffs "in concert" around March 10. The let's-all-step-together-plan is intended to overcome the four-year deadlock in Doha Round negotiations caused by everyone waiting for everyone else to make the first offer. The mid-March goal for new offers is part of a calendar of deadlines that WTO Director General Pascal Lamy circulated in Davos and which will be the subject of talks during a meeting of the Trade Negotiations Committee Feb. 8.

Lamy has identified 33 action items and deadlines that trade ministers set in their final Hong Kong Declaration. The key date is April 30 when final "modalities" or tariff-cutting formulas are supposed to be adopted in the agriculture and non-agriculture market access (NAMA) talks (see **WTTL**, Jan. 20, page 1).

A group of trade ministers is expected to gather in Geneva in March to present their offers in person. Sources in Geneva say the ministers will reconvene the "green room" talks that were held during the last days of the Hong Kong meeting. They will meet again at the end of April for the final push to fill-in the blanks in the negotiations. Deputy USTR Peter Allgeier held a Senior Officials Meeting in Geneva the week of Jan. 30 with representatives from at least nine countries to begin preparations for the coming offers and to consider Lamy's schedule.

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

**EXPORT ENFORCEMENT:** Nippon Express USA of New York agreed to pay \$17,000 civil fine to settle BIS charges that it "caused" export of controlled seismic equipment to Syria without license. Company also was charged with misstating item's classification on SED.

**STATE DEBARMENT:** State's DDTC published notice in Feb. 1 Federal Register, listing 21 individuals who are subject to statutory debarment from ITAR licensing because of convictions for violating AECA.

**AIRBUS:** USTR's office Feb. 2 said U.S. would ask EU for additional consultations about new subsidies allegedly being given to Wales to support training of Airbus workers. New subsidies could become part of ongoing U.S. WTO complaint against Airbus subsidies.

**BYRD/COTTON:** Repeal of Byrd Amendment and Step 2 Cotton program, both of which were deemed in violation of WTO rules, was included in Deficit Reduction bill passed by House Feb.1 and sent to President Bush for signature (see **WTTL**, Jan. 2, page 1).

**SENATE:** Finance Committee Chairman Charles Grassley (R-Iowa) has named two co-trade counsels to succeed Everett Eissenstatt, who was named assistant USTR for Latin America. Stephen Schaefer will handle issues related to WTO, financial services, IPR, investment, Europe, Asia and Pacific. David Johanson will be responsible for agriculture, textiles, other services, Americas, Africa and Middle East.

**USTR:** USTR Rob Portman has named Justin McCarthy assistant USTR for congressional affairs. He had served as assistant USTR for intergovernmental affairs and public liaison since September 2005. Previously, McCarthy was director of government relations for pharmaceutical maker Pfizer.

**OCTG:** Binational NAFTA panel Jan. 27 issued ruling upholding most of Commerce's determinations in antidumping case on oil country tubular goods from Mexico, but remanding case for recalculation of production and packaging costs and possible revocation of order, if final figures are zero or de minimis.