

# 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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## SENTENCING COMMISSION SEEKS COMMENTS ON “PRIVILEGE WAIVER”

As part of a broad set of amendments proposed in the Jan. 27 Federal Register, the U.S. Sentencing Commission has asked for comments on current sentencing guidelines which have encouraged the government to seek a waiver of attorney-client privilege in federal criminal cases, including those involving export controls and trade sanctions. Lawyers representing clients in these cases have raised alarms about the growing use of this practice, and the issue drew concerns from legal and business groups at a Commission meeting last November.

An amendment to the guidelines in 2004 offered a reduction in the “culpability score” that is used to determine a defendant’s potential penalty for a criminal conviction, if the defendant self-reported the offense, cooperated with authorities, and accepted responsibilities for his or her crime. This advice has been used in the penalty guidance issued by federal agencies, including the Bureau of Industry and Security (BIS) and Office of Foreign Assets Control (OFAC).

Commentary included with this advice said the waiver of attorney-client privilege was not a prerequisite for a reduction and requests for waivers should be limited. Nonetheless, lawyers have complained about the increasing number of requests for waivers. Organizations testifying at the Commission’s meeting in November raised concerns “about what they perceived as the unintended but potentially deleterious effects on the criminal justice process of this commentary language,” the Commission reported.

Other amendments proposed to the sentencing guidelines would implement 2004 legislation increasing penalties for participation in illegal activities related to weapons of mass destruction, including nuclear and viral products, as well as anti-aircraft missiles. Another proposal addresses sentencing under the Clean Diamond Trade Act of 2003. The Commission also is seeking comments on the definition of “ongoing commercial organization.” Participation in an ongoing commercial organization involved in a violation of WMD restrictions warrants an upward departure in penalty levels under current guidelines.

## WTO AGRICULTURE TALKS RESUME WITH FOCUS ON APRIL DEADLINE

Participants in informal meetings of the Doha Round agriculture negotiating committee the week of Jan. 23 agreed that they should develop a text to use as the basis for continuing talks, but they also recognized that the numbers that will have to be plugged in on “modalities” for opening markets and cutting domestic support won’t be added to the text until near the April 30

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deadline set by trade ministers in Hong Kong. But the Geneva meetings found negotiators still locked in the same rhetoric that stalled talks for the last three years. The chairman of the agriculture talks, New Zealand's ambassador to the World Trade Organization (WTO), Crawford Falconer, told participants that he will circulate a set of questions to members and will use their responses as the basis for the working text. He said his aim is to resolve as many technical issues as possible, leaving the difficult issue of specific cuts toward the April deadline.

Falconer urged delegates to work on a "bottom up" approach to the text to reflect the positions developed in the committee and in bilateral negotiations. If they fail to develop such a text, then they will face a "true top down" text dictated by ministers, he said. It is generally expected that a large number of trade ministers will reconvene at the end of April in Geneva as part of a WTO General Council meeting to complete work they put off at the Hong Kong Ministerial.

Falconer plans to hold two more week-long sets of formal agriculture negotiations Feb. 13-17 and March 20-24. He cautioned, however, that these meetings won't be able to finish work on the text by the end of April unless members hold informal bilateral and pluralateral talks to narrow their differences. Falconer noted that one month of the four-month extension has passed. He told delegates that they can't wait until the last minute to reveal their cards.

The farm talks got a little boost from a new proposal offered by developed countries belonging to the G-10 group of nations, including Japan, Korea and Switzerland. The group called for a 75% reduction in trade-distorting domestic support for the top band of countries and added Japan to that tier along with the European Union. It proposed a 65% reduction for the middle band, which includes the U.S. and Switzerland, and a 45% cut for all other nations. The U.S. proposal offered a 53% cut in trade-distorting U.S. farm subsidies.

## **U.S. INDUSTRY SAYS ENERGY CRISIS IN UKRAINE RISKS REFORMS**

Domestic U.S. industries argue that Ukraine isn't ready to shed its nonmarket economy (NME) status because political volatility in the country, along with its energy dispute with Russia, raise uncertainty about whether already made economic reforms will remain in place. "With parliamentary elections looming on March 26, 2006, whether Ukraine will continue its ongoing efforts to transform itself into a market economy country remains uncertain," attorneys at Collier Shannon Scott told the International Trade Administration (ITA) in comments filed on behalf of U.S. petitioners in the antidumping case against alloy steel wire rod from Ukraine.

The wire rod industry comments responded to ITA's changed circumstances review of the case and a request from Kiev for the revocation of Ukraine's NME status (see WTTL, Jan. 23, page 4). Support for declaring Ukraine to be a market economy came from several U.S. companies doing business in the country.

"The record evidence and analysis amply demonstrate that while Ukraine has begun the process of converting its economy into one that operates on market principles, it has not yet achieved that goal," the wire rod petitioners contend. The coming elections could weaken presidential power in Ukraine and increase parliament's powers, the comments note. The transformation also could lead to the return to power of former pro-Russia president Viktor Yanukovich, they warn. Kiev's dispute with Moscow over natural gas prices also "raises the prospect that the Ukrainian government will pull away from the difficult work required to allow market economy forces to determine prices and costs in the country," the industry warns.

U.S. firms doing business in Ukraine offer a more positive picture of the country's future and evidence that it meets the criteria for market economy status. "Based on our experience to date, we have found that the currency in Ukraine is convertible and that wages are determined by free bargaining between labor and management," says comments from Archer Daniels Midland Vice President Shannon Herzfeld. United Technologies is "enjoying increasing success in selling air conditioning, refrigeration and fire protection equipment in Ukraine,"

writes its Chief International Counsel Jeremy Preiss. "UTC's positive experience underscores that Ukraine welcomes foreign investment without significant restrictions," he contends.

## **FOREIGN OFFSET DEMANDS GROWING FOR DEFENSE EXPORTS, REPORT FINDS**

Foreign governments that buy U.S. defense products and systems are demanding an increasing level of "offsets" from American suppliers, including local co-production, technology transfer and purchases from their domestic industries, BIS reports in its latest study of offsets in defense trade. In 2004, the latest period covered in the report, foreign defense sales agreements valued at \$4.9 billion included offset requirements worth \$4.3 billion or 87.9% of the value of the exports. While defense sales and offsets vary year-to-year, BIS found the 2004 percentage was above the previous 12-year average of 71.4%.

"The data show not only that offsets are increasing over time, but also that more countries outside Europe are demanding these higher offset percentages," BIS noted. European governments, however, remain the main demanders of offsets, with Austria's offset demands accounting for 174.2% of the value of its purchases from 1993 to 2004; Poland, 172.2%; and the Netherlands, 119.3%.

Offsets are also having a greater negative impact on jobs, BIS reported. Offset deals in 2003 supported an estimated 41,776 jobs in defense industries, but offset requirements cost a loss of 37,450 jobs. While there is still a net positive in the job equation, the number of lost jobs was up from 2002 when BIS calculated that 25,450 were lost and 41,122 gained due of offset trade.

The Bush administration has begun to implement an amendment to the 2003 Defense Production Act, which required the president to create an interagency team to consult with foreign governments on limiting the adverse impact of offset trade. U.S. officials in November held their first meetings with counterparts from France, Germany, Italy and the United Kingdom. "At this time, the Interagency Team has not determined any findings nor drawn any conclusions nor decided upon any recommendations as a result of this first round of consultations," BIS said.

## **U.S. MOVES CLOSER TO WTO COMPLAINT AGAINST CHINA'S IPR FAILURES**

Chinese stonewalling on a U.S. request for information on its enforcement of intellectual property rights (IPRs) is pushing Washington closer to a decision on filing a complaint at the WTO. Citing China's lack of IPR enforcement and other unfair trade practices in a Jan. 25 speech, Deputy U.S. Trade Representative Karan Bhatia warned Beijing that "the United States will not hesitate, when appropriate, to use all tools at its disposal to ensure that China lives up to its commitments, including dispute settlement at the WTO or the use of trade remedies within our own legal system."

Bhatia's speech came after Deputy USTR Peter Allgeier wrote Jan. 20 to China's WTO ambassador to complain that Beijing hasn't responded fully to the request from the U.S. and other countries for details on its IPR enforcement. In October the U.S. invoked the Agreement on Trade-Related Intellectual Property Rights (TRIPs) to ask Beijing to supply information on specific enforcement actions.

"We have noted with concern your statement that 'Article 63.3 of the TRIPS Agreement only refers to a Member's request for information but there is no mentioning of a corresponding obligation of the requested Member to actually follow the request,'" Allgeier wrote. "As you state, Members should interpret and apply Article 63.3 in good faith. We assure you that our request was made in good faith and spirit of cooperation, and we look forward to China's full response in the same spirit," he asserted.

Bhatia said the results of a "top-to-bottom" review of U.S.-China trade relations, which USTR Rob Portman promised to undertake during his confirmation hearing, will be released in the

coming weeks. He cautioned that the relationship has become enormously complex. "In short, the relationship lends itself neither to simplistic characterizations nor simple policy prescriptions," he said. Bhatia said the U.S. and China have entered the third phase of their economic relationship of the modern era. "As we enter the third phase of our bilateral relationship with China, China's apprentice period must now come to a close, and China must act as a fully accountable participant and beneficiary in the international trading system," he declared.

Whether the U.S. will file a WTO complaint against China may depend on a broader Bush administration assessment of America's geopolitical relations with Beijing, particularly in the face of growing concerns over Iran and North Korea. While Bhatia and Allgeier were warning Beijing about trade, Deputy Secretary of State Robert Zoellick was in China photographed incongruously cuddling a panda cub. The symbolism of Zoellick's gesture was not lost on the Chinese who reportedly circulated the picture to the news media throughout China.

\* \* \* BRIEFS \* \* \*

BIS: Assistant Secretary for Export Administration Peter Lichtenbaum in next few weeks will be leaving BIS and returning to Steptoe and Johnson, law firm he left to join government. Lichtenbaum came to BIS in October 2003. He was acting under secretary for nine months between departure of Under Secretary Ken Juster and arrival of David McCormick. He also was named temporary head of ITA before confirmation of Franklin Lavin. Although not necessarily his positions, Lichtenbaum took heat from exporting community for highly unpopular proposals to revise deemed export rules, to create arms catch-all regulation and to modify knowledge standard in export enforcement cases.

ELASHI BROTHERS: Federal judge in Dallas Jan. 25 sentenced Hazim Elashi to 66 months in prison and ordered him deported when his term is served. Judge also sentenced brother Ihsan (Sammy) Elashi to 72 months in prison, which will be served consecutively to 48-month term he is currently serving. Pair were convicted in 2004 and again in 2005, along with three other brothers and their company, Infocom, on various charges of violating EAR, Libyan Sanctions Regulation and money laundering in connection with exports of computers and other controlled items to Syria and Libya (see WTTL, April 25, page 1).

UKRAINE: Following completion in January of out-of-cycle review under Special 301, USTR Jan. 23 restored Ukraine's GSP eligibility based on country's improved protection of intellectual property rights and especially its crackdown on illegal pirating of CDs and DVDs. U.S. striped Kiev of GSP benefits in 2001. Ukraine also had its Special 301 status changed to Priority Watch List from Priority Foreign Country.

PAKISTAN: USTR's office Jan. 24 ended review of petition seeking to withdraw Pakistan's GSP eligibility due to lack of protection of intellectual property rights. "The U.S. determined that it was appropriate to end the petition review due to the significant progress Pakistan has recently made in the protection and enforcement of intellectual property rights, especially with regard to stopping production of pirated optical media products (i.e., CDs, DVDs)," USTR statement explained.

EXPORT ENFORCEMENT: Ning Wen, who was convicted in September on nine counts of exporting electronic products to China in violation of export control rules and money laundering, was sentenced Jan. 19 in Milwaukee Federal Court to 60 months in prison and fined \$50,000. He also was ordered to be under supervised release for two years following prison term (see WTTL, Sept. 26, page 4). Wen had agreed to forfeit his interest in his home and \$329,000 in cash. His wife and two Chinese co-conspirators pleaded guilty to related charges earlier in 2005.

ACTIVATED CARBON: Calgon Carbon Corp. and Norit Americas filed antidumping petitions at ITC and ITA Jan. 26 against imports of activated carbon from China.

CAFTA-DR: Senate Finance Committee Chairman Charles Grassley (R-Iowa) Jan. 25 wrote to USTR Rob Portman urging him to delay implementation of CAFTA-DR for those countries that have not recognized U.S. meat inspection program and still require plant-by-plant inspection. He noted that recognition of U.S. system was part of parallel agreement outside of FTA pact but Congress in part voted for agreement "upon expectation that the CAFTA-DR countries would recognize equivalency of the U.S. meat inspection system."

KOREA: U.S. has reached deal with Korea under which Seoul will revise domestic-film showing requirements, dropping number of days theaters must show Korean films to 73 days of each year from 146 days. "Today's announcement reflects a significant step forward in Korea, which is fast becoming one of the most dynamic markets in Asia," said Dan Glickman, president of Motion Picture Association of America.