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

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BIS OFFICIALS LAUNCH PUSH FOR EAA LEGISLATION

Bureau of Industry and Security (BIS) officials are putting their shoulders to the wheel to win congressional, industry and public support for legislation (H.R. 4572) to renew the Export Administration Act (EAA) (see **WTTL**, Jan. 9, page 1). BIS Under Secretary David McCormick met with industry representatives Jan. 10 to push the bill, and Assistant Secretary for Export Administration Peter Lichtenbaum met with reporters Jan. 11 to explain its need.

Lichtenbaum said House International Relations Committee Chairman Henry Hyde (R-Ill.), who introduced H.R. 4572, has told Commerce Secretary Carlos Gutierrez that he is committed to working toward passage of the measure. Hyde's staff reportedly had talked with other committee staffs in the House about the bill before it was introduced, but there apparently is no assurance that members of those other committee won't try to amend the legislation.

While Commerce officials have pushed for EAA renewal for the last 15 years, the need for a new law has become more acute lately, claims Lichtenbaum. One factor is the greater difficulty BIS has faced getting U.S. attorneys to bring criminal charges in export violation cases.

"We see a reluctance among some prosecutors to bring criminal indictments for export control violations given that there is a fairly complex web of authorities that need to be explained to judges and juries when you don't have a statute that you can say has been violated," Lichtenbaum said. Government lawyers need to explain how the International Emergency Economic Powers Act (IEEPA) has been invoked to enforce the Export Administration Regulations (EAR).

In their meeting with McCormick, industry representatives said they could support H.R. 4572 as it is written but would oppose it if amendments were added that would tighten controls. One participant admitted that industry support probably wouldn't help BIS sell the bill to lawmakers who want tougher export regulations, and such backing might actually hurt the measure's chances. "We have grave concerns that things would be added to it along the way," one industry source told **WTTL**. If that were to happen, industry would work to defeat the legislation and would hope the administration also "would pull the plug" on the bill, the source said.

COURT REJECTS ITA'S NARROW INTERPRETATION OF "CLERICAL ERROR"

Petitioners and respondents in antidumping and countervailing duty cases may have a greater opportunity than before to seek changes in International Trade Administration (ITA) rulings based on errors in the record, according to a Jan. 10 ruling by the Court of Appeals for the

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Federal Circuit (CAFC). The decision affirmed a Court of International Trade (CIT) opinion which upheld an ITA remand ruling that rejected a request from Timken to revise a dumping order on cylindrical roller bearings from Germany because of “clerical” errors the firm had made in its filings on behalf of its German subsidiary (Case 05-1158).

While the appellate court upheld ITA, it rejected the agency’s argument that the current policy on errors is based on statutory language. Commerce had ruled that the error Timken sought to correct was not a clerical error. The government cited previous CAFC rulings which Commerce has interpreted as meaning clerical errors only apply to errors made by the government.

“In making this argument, the government seems to advocate a bright line rule regarding what kind of errors may be corrected in the context of antidumping duty determinations,” wrote Chief Judge Paul Michel in *Timken v. U.S.* He said Commerce has misread the CAFC’s earlier ruling in *Alloy Products*. “Contrary to the government’s implications, however, we did not broadly bar Commerce from correcting ‘clerical’ errors or, for that matter, methodological errors, errors in judgment, or substantive errors made by an importer,” Michel declared.

In addition, Michel argued that a Commerce dumping determination in Certain Fresh Cut Flowers from Colombia “is not binding on this court.” He said the court disagreed with the restrictiveness of that ruling. “Upon careful review, we do not even find any dicta suggesting a distinction between ‘clerical’ and other types of errors, and Commerce cited none,” he stated. Noting Commerce’s reliance on a CAFC ruling in *NTN Bearing* as the basis for a distinction between clerical and other errors, Michel said, “we surmise that Commerce erroneously extrapolated one where none was stated or intended.”

CATCH-ALL PROPOSAL COULD END SOME LICENSE EXCEPTIONS FOR CHINA

As it struggles to come up with a proposal to implement a conventional arms “catch-all” regulation, BIS has conceded it won’t impose new licensing requirements on items considered EAR99, and is now looking at the potential lifting of some license exceptions for exports to China. In addition, some items now controlled only for antiterrorist (AT) reasons and not subject to licensing requirements for China, as well as items covered by nuclear proliferation (NP) rules, could become subject to tighter requirements under the coming catch-all proposal, BIS Assistant Secretary Peter Lichtenbaum told reporters Jan. 11.

“One decision that has been made -- and that’s to clarify some of the inaccuracies that appear in the media – is that it would not apply beyond the Commerce Control List, not apply to EAR99 items,” Lichtenbaum said. “It would only apply to items the U.S. government has identified as sensitive items,” he added.

Lichtenbaum denied that BIS was pulling back from the Wassenaar Arrangement’s 2003 Statement of Understanding, which called on members to enact catch-all rules to require licenses for “non-listed dual-use items” going to military end uses in countries subject to arms embargoes. “We will act fully consistent with the statement,” he declared. “The statement refers to unlisted dual-use items, so it is limited in its formulation to dual-use items,” he asserted.

“Not all items on the Commerce Control List require licenses for China, nor are we required to do so by Wassenaar or other regimes,” Lichtenbaum explained. “There are items that are controlled for antiterrorism reasons that do not require a license for China. Antiterrorism items to China could require a license for China, if the decision were made to apply the catch-all to all CCL items,” he continued. Lichtenbaum further explained that the revised catch-all could impose new or tougher license requirements for some aviation and nuclear products.

Industry sources complain that BIS hasn’t explained what items would require licenses under the new rules. “Industry has challenged them to tell us what these items are and they have never told us,” one source told WTTL. Another source said BIS “is doing this very carelessly

and sloppily. They just don't have the details down." This source also pointed out that if BIS isn't going to cover EAR99 items, it could revise its existing regulations to tighten exports to China without a new catch-all regulation.

RETAILERS CLAIM 27.5% TARIFF ON CHINESE GOODS WOULD HURT U.S. JOBS

A report prepared for the National Retail Federation claims that Chinese imports actually create a net positive number of jobs in the U.S. and that imposing a 27.5% tariff on Chinese goods, as proposed in pending legislation, would actually cause a net loss of jobs in the U.S. While the report concedes that Chinese imports have caused a loss of 122,822 jobs in manufacturing, it stresses that they have created 968,160 jobs in the services sector, including in retailing, design, finance, wholesaling, transportation, advertising and accounting. This adds up to a net plus of 845,338 jobs, claims the report, prepared for NRF by Trade Partnership Worldwide.

The report attempts to calculate the job losses that would occur if Congress enacted a 27.5% tariff on Chinese goods in retaliation for Beijing's alleged manipulation of its currency. The report says such a sanction would cause the loss of 311,598 jobs in the U.S. versus the creation – mostly in the manufacturing sector – of 24,053 jobs, for a net loss of 287,546 jobs.

Meanwhile, a separate statement from the China Currency Coalition, which is spearheading efforts to get China to revalue the yuan or face trade sanctions, claims China is vastly understating its global trade surplus. China has said its trade surplus in 2005 rose to \$102 billion from \$32 billion in 2004. "The Coalition contends that this is a huge understatement and believes that the surplus is closer to \$435.5 billion based on an analysis of trade data from 40 trading partners that account for over 90% of total trade with China," it said.

ENDING CHINA'S NME STATUS WOULD HAVE MIXED IMPACT, GAO REPORTS

If the U.S. decides to end China's status as a nonmarket economy (NME) in antidumping investigations, the final duties imposed on some Chinese goods would decline while others would increase, according to a Government Accountability Office (GAO) report (GAO-06-231) released Jan. 10. The long-term impact, however, may be small because an increasing number of Chinese firms are getting lower individual rates in dumping rulings, the GAO says.

Another factor that will reduce the impact of ending China's NME status is the likelihood that Commerce under existing rules will find more Chinese producers to be "market oriented" in character because their costs for labor and materials are based on free-market prices. In such cases, Commerce would use that Chinese firm's own costs as the basis for determining the existence of dumping and calculating dumping margins and not the costs in a "surrogate" country.

"Eliminating country-wide rates would likely reduce duty rates applied to companies not receiving individual rates," the GAO concludes. "Individually determined rates would likely diverge into two distinct groups, with companies that do not cooperate in Commerce investigations receiving rates that are substantially higher than those that do cooperate," it notes. Rates also would vary based on industry and on a company-to-company basis, GAO says.

THAILAND COULD LOSE ITS PLACE IN FTA QUEUE

Because of the slow pace of negotiations on a U.S.-Thailand free trade agreement (FTA), USTR Rob Portman will have to decide soon whether proposed FTA talks with Egypt, Malaysia, South Korea and Switzerland should be put ahead of the Thai negotiations on the U.S. priority list. After the latest round of U.S.-Thai talks the week of Jan. 9, Assistant USTR Barbara Weisel told reporters the U.S. will be assessing the progress in the negotiations to determine whether

Thailand is willing to “redouble” its efforts to reach an accord by this spring and “if the will is there or not.” She said the U.S. was not at the point of wanting to break off the talks, but admitted that less progress has been made in some areas than Washington had wanted.

Although no decision has been announced yet on additional FTA talks, any negotiations that were to start soon would have to be completed by April 1, 2007, to allow President Bush to notify Congress of his intent to sign an FTA and use the current fast-track, also known as Trade Promotion Authority (TPA), approval process. If those talks were launched, “we would have to get them underway so we could get them concluded before TPA expires,” Weisel said.

The goal of finishing a U.S.-Thailand FTA by this spring seems unachievable at this point. Weisel said the two countries have not yet exchanged offers on services; haven’t discussed sensitive industrial or agriculture products, including sugar; are still discussing market access modalities for agriculture; have just begun talks on textile rules of origin; and are not close on a deal on intellectual property rights. “The government was a lot calmer about the [IPR] proposal than the public,” Weisel noted, referring to demonstrations in Thailand against the IPR provisions of a potential deal and its impact on the availability of HIV/AIDs drugs.

OFAC INTERIM RULE FURTHER CLARIFIES ITS RISK-BASED ENFORCEMENT

Treasury’s Office of Foreign Assets Control (OFAC) says it will look at a banking institution’s total record of compliance with U.S. trade sanction rules when evaluating any individual violations. In the preamble to an interim final rule published in the Jan. 12 Federal Register entitled, “Economic Sanction Enforcement Procedures for Banking Institutions,” OFAC attempts to clarify its enforcement policies for institutions overseen by U.S. bank regulators.

As in other recent guidance, OFAC lays out conditions that will be weighed in considering legal action (see **WTTL**, Jan. 9, page 2). “The matrices provide a guide for evaluating a banking institution’s risk of encountering accounts or transactions subject to OFAC regulations and for determining the quality of an institution’s compliance program,” OFAC says.

* * * BRIEFS * * *

EXPORT ENFORCEMENT: As expected, GasTech Engineering Corp. of Tulsa, Okla., pleaded guilty as part of a plea agreement Jan. 11 in Tulsa U.S. District Court to one count of conspiracy in connection with exports of equipment and technology to Iran’s National Oil Gas Company (see **WTTL**, Nov. 4, page 4).

KRAFT LINERBOARD: Three days after U.S. threatened to file complaint at WTO, China Jan. 9 decided to revoke antidumping order on kraft linerboard from U.S. American exporters had filed request for reconsideration of order. Senior U.S. trade officials claim review of Chinese order found it violated Beijing’s own antidumping regulations.

USTR PEOPLE: USTR Rob Portman has named Everett Eissenstat to be new Assistant USTR for the Americas, succeeding Regina Vargo who retired Jan. 13 after 32 years in government, including tenure as Commerce Deputy Assistant Secretary for Western Hemisphere. Eissenstat has been international trade counsel for Senate Finance Committee. Portman also appointed Douglas Hartwick to be assistant USTR for South Asian Affairs. He replaces E. Ashley Wills who is leaving to join private sector. Hartwick is career State Department officer who served as ambassador to Laos from 2001 to 2004 and at other Asian posts dating back to 1983. His last assignment was to faculty of National Defense University.

ITA PEOPLE: Michelle O’Neill, who was deputy under secretary of Commerce for technology, has been appointed deputy under secretary for international trade, filling post left vacant by death of Tim Hauser last summer. Also joining ITA after Senate confirmation in late December are Assistant Secretary for Market Access and Compliance David Bohigian and Assistant Secretary of Commerce for Import Administration David Spooner

FTAs: President Bush Jan. 6 sent Congress 90-advance notice of his intention to sign U.S.-Peru FTA (see **WTTL**, Dec. 12, page 4). On Jan. 11 he signed U.S.-Bahrain FTA implementing legislation.