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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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PENALTIES FOR IEEPA VIOLATIONS TO BE BOOSTED TO $250,000-$500,000

Firms that violate the Export Administration Regulations (EAR) are about to face significantly higher penalties under legislation awaiting President Bush's signature. The 2006 National Defense Authorization Act (NDAA) (H.R. 1815), which passed by the House on Dec. 18 and the Senate on Dec. 21, includes a provision increasing fines for violations of the International Emergency Economic Powers Act (IEEPA), which has been invoked to enforce EAR since the expiration of the Export Administration Act (EAA). Maximum civil penalties under IEEPA will soar to $250,000 per violation from $11,000. Maximum criminal penalties will jump to $500,000 per violation from $50,000.

> The legislation also includes new language making it clear that IEEPA can be used to enforce export licensing regulations, as well as rules prohibiting the facilitation of violations of rules covered by IEEPA. It also explicitly gives federal courts the power to issue warrants and orders to enforce the law.

The changes to IEEPA may undercut one of the driving forces behind the push of both the Clinton and Bush administrations for renewal of EAA. Although the fines in the new law are far below those that were proposed in failed EAA bills, which sought penalties ranging up to $1,000,000 and $5,000,000, they will give export control agencies more than sufficient muscle to encourage compliance with U.S. export controls. The new law also provides a stronger legal basis for using IEEPA to enforce export controls based on regulations rather than statutes.

Under the way the Bureau of Industry and Security (BIS) often frames export control charges in administrative cases, each violation may be multiplied three or four times. BIS regularly will charge a firm with the export, acting with knowledge of a violation, and filing a false statement on export documentation. It also may add conspiracy and aiding and abetting charges. Thus, a single act in the future could produce potential fines of $750,000 to $1,000,000.

But the IEEPA amendment could have an unintended negative consequence for BIS export enforce-ment. The agency's heavy promotion of voluntary self-disclosure in the last year could be severely hampered. With potential fines in the millions, exporters may wait to see the dis-counts BIS will offer under the new fine structure before making new self-disclosures.

BYRD AMENDMENT REPEAL MAY NOT SATISFY WTO RULING

Foreign appreciation for Congress' repeal of the Byrd Amendment as part of the Deficit Reduction Omnibus Reconciliation Act (DRORA) Dec. 21 may be tempered by the delayed

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effective date of the repeal. As a result, current retaliation imposed on U.S. exports by countries that had challenged the amendment at the World Trade Organization (WTO) may stay in place until distribution of duties ends. "All duties on entries of goods made and filed before October 1, 2007, that would, but for subsection (a) of this section, be distributed under Section 754 [the Byrd Amendment] of the Tariff Act of 1930, shall be distributed as if section 754 of the Tariff Act of 1930 had not been repeal by subsection (a)," the legislation declares.

> There was scant legislative history in the DRORA to explain the meaning of this provision, but a colloquy between Sen. Larry Craig (R-Idaho) and Senate Majority Leader Bill Frist (R-Tenn.) on the Senate floor before lawmakers voted 51-50 to pass the legislation may provide the guidance that will be used to interpret the law. "We understand that the bill requires distribution of all antidumping and countervailing duties finally determined, ultimately assessed on any and all imports of merchandise that are entered, or withdrawn from warehouse, for consumption by the deadline of October 1, 2007," Craig said.

"Further, we understand that liquidation or assessment of duties need not occur prior to the deadline of October 1, 2007, as a condition of distribution and that the duties ultimately assessed will be distributed regardless of the date on which they are finally determined and collected. In other words, while appeals to U.S. courts or NAFTA panels or other proceedings at administrative agencies may prevent final assessment and collection of the duties owed until after the deadline of October 1, 2007, so long as the imports are entered, or withdrawn from warehouse, for consumption by that date, the duties ultimately assessed will be distributed annually under the processes currently specified in law," he continued.

Frist replied: "It is my understanding that my colleague is correct in his interpretation of the language agreed to by the conferees." Frist also said he hoped the legislation would resolve the WTO case against the U.S. "This will bring us into compliance with that ruling and hopefully will bring to an end the sanctions U.S. companies are currently facing," he said.

The Coalition for Fair Lumber Imports said it was disappointed with the repeal of the Byrd Amendment, but it praised Craig and other lawmakers for assuring continuation of the law until 2007. The policy of distributing dumping and CVD duties to injured industries "is a good one, as evidenced by the fact that the Bush Administration has put this issue on the agenda in the WTO negotiations to obtain international approval for this type of compensation for injury related to unfair trade," a Coalition statement said. While the DRORA provision will end Byrd payments, "it makes clear that duties assessed on subsidized Canadian lumber that is imported before October 1, 2007 are to be paid to the U.S. lumber industry," it asserted

WASSENAAR ADOPTS NEW HIGH-PERFORMANCE COMPUTER CONTROL

As expected, the Plenary Meeting of the Wassenaar Arrangement in Vienna Dec. 13-14 approved a new methodology for calculating the power of high-performance computers (HPC). The multilateral export control regime agreed to adopt "adjusted peak performance" (APP) as a replacement for composite theoretical performance (CTP) as measured by million theoretical operations per second (MTOPS) (see **WTTL**, Oct. 31, page 2).

> APP is defined as "an adjusted peak rate at which 'digital computers' perform 64-bit or larger floating point additions and multiplications." It is expressed in weighed teraFlops in units of 10^{12} adjusted floating point operations per second.

"The WA continues to keep pace with advances in technology, market trends and international security developments, such as the threat of terrorist acquistion of military and dual-use goods," regime members said in statement. "The Plenary agreed to a number of amendments to the control lists, including in relation to items of potential interest to terrorists such as jamming equipment and unmanned aerial vehicles. The Plenary agreed to keep under review other items that could pose a threat if acquired by terrorists," they added. The meeting

also "considered growing international concerns about unregulated 'intangible' transfers, such as by oral or electronic means, of software and technology related to conventional weapons and dual-use items," the statement noted. The regime, however, didn't take action to address those concerns. Separately, Wassenaar members welcomed South Africa as a new member and said the regime is continuing its outreach to China.

> The meeting made relatively few or minor changes in the multilateral dual-use and military control lists. Among the changes in addition to adoption of APP were a new note moving control of global navigation satellite systems (GNSS) jamming equipment to the Munitions List, the decontrol of certain underwater digital cameras intended for consumer use, and addition of a new definition of "quantum cryptography." Also added were a new definition of unmanned aerial vehicle (UAV) and new controls on associated equipment and components for UAVs and software "specially designed or modified for the use of UAVs."

OFAC VIOLATIONS INCLUDED IN $80 MILLION FINE IMPOSE ON ABN AMRO

In one of the largest settlements ever for violations of money laundering laws and trade sanctions, Dutch banking conglomerate ABN AMRO Dec. 19 agreed to pay $80 million in fines and donations and to conduct additional audits of its operations in India and the United Arab Emirates. The global settlement resolved charges made by the Federal Reserve Board, Treasury's Office of Foreign Assets Control (OFAC) and New York and Illinois bank regulators.

> ABN AMRO in 2004 discovered that certain employees in Dubai, UAE, "were not observing the bank's policies and standards in relation to certain U.S. dollar payment instructions sent to the bank's U.S. dollar clearing centre in New York," the bank said in a statement. These payments involved transfers to and from Libya and Iran from 1997 to 2004 without OFAC approval. "Once these procedures were detected internally, they were terminated,' the bank stated.

The settlement and assessment agreement said ABN AMRO violated the Iranian Transactions Regulations (ITR) and Libyan Sanctions Regulations (LSR) and "lacked adequate risk management and legal review policies and procedures to ensure compliance with applicable U.S. laws and failed to adhere to those policies and procedures it did have." The bank also lacked effective systems of governance, audit and internal control to oversee its branches, it stated.

Under the agreement, ABN AMRO will pay $40 million to the Federal Reserve Board to cover violations of banking and OFAC rules. It will pay $20 million to the New York State Banking Department and $15 million to the Illinois Department of Financial and Professional Regulations. In addition, it will make a $5 million donation to the Illinois Bank Examiner's Education Foundation. ABN AMRO also agreed to hire qualified independent auditors to review transactions at its Chennai, India, and Dubai branches and to present the results of those audits to OFAC within three months from the agreement and annually for three years.

AFFILIATES OF U.S. FIRMS INCREASE BUSINESS IN CHINA

The U.S. may never overcome its trade deficit with China, because the pattern of trade and investment in the country is following the same pattern that U.S. businesses follow in most of the world, a report from the Government Accountability Office (GAO) suggests. The GAO says U.S. firms now produce more goods in China for sale in the domestic Chinese market than they export from the U.S. "For goods alone, U.S. affiliate sales in China in 2003 were $34 billion versus $29 billion in U.S. exports to China," states the GAO report (GAO-06-162) which was released Dec. 9. Services exports still exceed service sales by affiliates in China by $6 billion to $4 billion, but that is expected to change as Beijing further liberalizes its services sectors in compliance with its WTO obligations, the report predicts. Manufacturing where they sell is a common business model for many multinational companies, and China appears to be following

that model. U.S. industry investment in China grew from $2 billion in 1995 to $15 billion in 2004, making it the fifth largest foreign investor in China. The build-and-sell locally model is working in China because "economic growth also enhanced the purchasing power of Chinese citizens, especially those living in urban areas," the report notes. "This created a relatively large middle class with the ability to buy foreign consumer goods and services," it adds.

> As sales of U.S. affiliates increased in China, the U.S. share of China's imports declined, the GAO points out. Even though U.S. exports to China grew at an accelerating rate of 19% annually from 2000 to 2004 compared to the previous five years, exports from neighboring Asian nations such as South Korea and Taiwan grew faster. China's Increased imports of oil also tilted the picture.

SUSPENSION DEAL MAY AVERT CRITICAL CIRCUMSTANCE RULING

A new court ruling may make it difficult in the future for the International Trade Administration (ITA) to claim "critical circumstances" exist in dumping cases involving products coming out of a suspension agreement in an earlier antidumping case. In a Dec. 20 ruling that overturned a Court of International Trade (CIT) decision, the Court of Appeals for the Federal Circuit rejected an ITA critical circumstances order on imports on honey from China (case No. 05-058). The CIT erred in holding that the suspension agreement was not designed to eliminate dumping, wrote CAFC Judge Pauline Newman for the court.

> "The government argues that Zhejiang [the Chinese producer] was properly imputed with knowledge that prices that conformed with the Agreement were dumped prices," Newman noted. "That position is negated by the statute itself, for the prices in compliance with the Suspension Agreement were required to be at a level that would eliminate sales at less than fair value," she wrote.

* * * BRIEFS * * *

STEEL PIPE: President Bush Dec. 30 rejected ITC advice and decided not to impose import quota on circular welded non-alloy steel pipe from China under Section 421 (see **WTTL**, Oct. 17, Page 2).

EXPORT DENIAL: BIS in Dec. 20 Federal Register issued denial order against Zhan Gao of Herndon, Va., who was convicted in 2004 on charges related to unlicensed exports of microprocessors to China.

CAFTA: USTR'S office now concedes Central American countries won't be ready to implement CAFTA as of Jan. 1. "The United States will implement the CAFTA-DR on a rolling basis as countries make sufficient progress to complete their commitments under the agreement," said USTR spokesman Stephen Norton Dec. 30 (see **WTTL**, Dec. 12, page 4).

WHEAT: NAFTA panel Dec. 12 rejected appeal by North Dakota wheat growers and sustained ITC ruling which followed earlier panel decision which lead to ITC finding of no injury due to subsidized and dumped imports of hard red spring wheat from Canada (see **WTTL**, Oct. 10, page 4).

TRADE PEOPLE: William Merkin, a lead negotiator on USTR team that concluded U.S.-Canada FTA and later one of leading experts on U.S.-Canadian trade relations, died Dec. 23 after long battle with cancer.

EXPORT PLEA: Chin Kan Wang pled guilty Dec. 12 in Miami U.S. District Court to one count of conspiracy to violate U.S. export controls for his export of communications encryption modules to Taiwan without approved licenses (see **WTTL**, Sept. 5, page 4).

FORKLIFT TRUCKS: In "sunset review" ruling Dec. 21, ITC voted 6-0 that revoking antidumping order on industrial forklift trucks from Japan would not lead to renewed injury to U.S. industry.

STEEL WIRE ROD: U.S. industry isn't being injured by allegedly dumped imports of alloy steel wire rod from China, Germany and Turkey, ITC voted unanimously Dec. 23.

FTAs: Senate by unanimous consent Dec. 13 joined House in approving Bahrain FTA (see **WTTL**, Dec. 12, page 4). Separately, President Bush Dec. 22 issued proclamation implementing Morocco FTA Jan. 1.