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. 24, No. 42 **October 25, 2004**

SETTLEMENT SHOWS NEW BIS DEMAND FOR COMPLIANCE PROGRAMS

As part of new settlement agreements for export control violations, the Bureau of Industry and Security (BIS) may require firms to institute export management systems. One of the first companies that accepted that condition as part of a settlement was 3-G Mermet of Cincinnati, Ohio, which also agreed to pay a $17,500 civil fine to resolve BIS complaints that it attempted to export interior window shade fabric to Iran through its parent firm, Mermet, S.A. of France, without obtaining approval from Treasury's Office of Foreign Assets Control.

> In the settlement announced Oct. 18, 3-G Mermet promised to "implement an Export Management System not later than 12 months from the date of entry of the [BIS] order." That system "shall be in substantial compliance with the Export Management Systems Guidelines, which are available on the BIS website," it pledged. It also agreed to send a copy to the BIS Office of Export Enforcement.

BIS Assistant Secretary for Export Enforcement Julie Myers signaled the new requirement in her remarks to the agency's Update 2004 conference Oct. 5. "We are continuing to highlight the importance of good compliance programs by adding a compliance program factor into many of our settlements," she said. Companies in the past have promised to correct and improve their export compliance programs as part of their negotiations with BIS on settlements, but these commitments were not explicitly written into the agreements with the agency.

ANOTHER NAFTA RULING GOES AGAINST ITC INJURY DETERMINATION

The International Trade Commission (ITC) Oct. 19 lost another NAFTA binational panel ruling that examined the way it reached an injury determination in an antidumping and countervailing duty case. The latest ruling – following one on softwood lumber – rejected the ITC's decision to cumulate Canadian imports of corrosion-resistant carbon flat-rolled steel with imports from five other countries that were part of a "sunset review" in 1999. The NAFTA panel also said the commission's determination that the domestic industry is in a "weakened state" in light of its "profit center" rationale is unsupported by substantial evidence.

The panel remanded the case back to the ITC with instructions on what it had to do, if it wanted to justify its cumulation and economic analysis. To support cumulation, the ITC "must sufficiently explain and articulate – consistent with this opinion – the basis of its conclusions as to whether, in light of the high capacity utilization rates prevalent in Canada during the period of review, there exists substantial evidence in the record upon which to base the commission's determination that there was available excess capacity in Canada sufficient to

Copyright © 2004 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

lead to an increase in imports having a discernible adverse impact upon the domestic industry, if the antidumping order were to be revoked," the five-member panel stated unanimously.

> "If the commission still chooses to find the domestic industry is in a vulnerable or weakened state, the commission must sufficiently explain and articulate – consistent with this opinion – the basis of its conclusion as to whether the commission's analysis of the impact of Canadian imports involves the profits of the domestic corrosion-resistant steel industry or those of the broader steel industry, and the impact of the profit analysis upon the commission's affirmative vulnerability determination regarding the domestic corrosion-resistant steel industry," the panel explained.

POST-9/11 FEARS CAUSED MANY FIRMS TO STOP EXPORTING

International security concerns after Sept. 11, 2001, and the downturn in the global economy apparently caused many U.S. firms to give up exporting in 2002, according to Census Bureau statistics just released. Overall, 18,749 fewer firms, mostly small and medium size companies, exported in 2002 than in 2001. This was an 8% decline to 223,013, Census reported.

> While the number of companies still exporting seems large, the report, released Oct. 14, underscores that fact that trade is dominated by a small number of large firms. For manufactured exports, for example, the top 50 largest firms accounted for 45.2% of all goods exports in 2002. For all sectors, manufacturing, wholesaling and others, the top 1,000 firms accounted for 72.2% of all exports.

The importance of offshoring to U.S. trade or the old adage that trade follows investment is seen in the volume of exports to related parties in other countries. For all identified exporters, 34.7% of the value of their exports went to related parties offshore. For large firms with over 500 employees, that value was 41%, representing 30% of the total of known value exports and excluding small shipments for which the size of the exporter couldn't be determined. At the same time, nearly 61% of exporters export to only one country, with Canada, Mexico, the United Kingdom, Japan and Germany being the top five destinations for exporters.

CIT RULING OFFERS OPEN-ENDED PRELIMINARY INJUNCTION

Concerned by the way the government has been too quick to liquidate imports intentionally or by error, Court of International Trade (CIT) Chief Judge Jane Restani Oct. 19 issued a preliminary injunction that bars the government from liquidating certain steel imports until all legal proceedings involving the goods are completed. "This statutory injunction is not an ordinary preliminary injunction but a special injunction to prevent liquidation until a final and conclusive judicial decision, as referenced in 19 U.S.C. Section 1516a(e) is reached," she said.

> "[G]iven the recent difficulties in this court with liquidation in violation of court orders...it seems prudent to attempt to avoid creating any opportunity for error and to bar any liquidation until all litigation is complete," Restani declared. She said the trade law doesn't limit the court's discretion in fashioning an injunction or its length, which can be adjusted as the court sees fit (Slip Op. 04-132).

BIS WILL EXAMINE DE MINIMIS RULES FOR HARDWARE AND SOFTWARE

Industry complaints about the difficulty in applying current Export Administration Regulations (EAR) requirements for calculating the *de minimis* U.S. content in foreign products have finally been heard by BIS. The agency will begin to review its current *de minimis* rules in the coming year, BIS Assistant Secretary for Export Administration Peter Lichtenbaum told the President's Export Council's subcommittee on export administration (PECSEA) Oct. 20. "The de minimis

rule continues to need reform and updating," Lichtenbaum said. Noting the current separate treatment given to software and hardware, he said "we're going to look very carefully at that in the coming months." The *de minimis* rules were imposed in the mid-1980s as a way to limit foreign governments' complaints about Washington's policy of applying U.S. export controls extraterritorially to products made abroad with U.S. technology or components.

> Foreign products that contain more than a *de minimis* level of U.S. content are subject to U.S. export control laws. Industry has complained that the current rules have pushed foreign firms to "design out" U.S. content to avoid being caught under those rules.

In addition, exporters contend that measuring hardware and software content separately fails to recognize the state of art in product design, which often embeds software into hardware as "firmware." This has raised the potential incongruity of a $50,000 foreign car being subject to U.S. export controls because its low-cost navigation system uses U.S. software.

ADVISORS TO STUDY FUTURE EXPORT CONTROLS ON NANOTECHNOLOGY

In an effort to get ahead of the curve on future export control, foreign availability and competitiveness issues, the President's Export Council's subcommittee on export administration (PECSEA) will launch a study on the impact of these issues on the nascent field of nanotechnology. The review of these issues was requested by Commerce Secretary Don Evans in March, noted PECSEA Chairman Brian Ferguson, who is CEO of Eastman Chemical, at the subcommittee's Oct. 20 meeting.

> Social and political concerns about the application of nanotechnology might be comparable to the debate over genetically modified organisms (GMOs), Ferguson suggested. "You've seen what's happened in the regulatory environment. There has been a great emotional debate," he noted. "That is an issue that people did not see coming," he added.

"We judge that nanotechnology has the same potential. We could get into the same types of ethical and moral debates that you hear on GMOs," Ferguson told the subcommittee. "That is why we want to get a headstart on this before it overtakes us," he continued.

"We all believe this is going to be a crucial technology to U.S. competitiveness, revolutionary in many ways," Ferguson said. It also raises national security issues, he noted. The PECSEA study, which will go to the PEC for forwarding to the president, will examine availability of nanotechnology in foreign countries, potential export control parameters, and the effect of imposing export controls on nanotechnology items, Ferguson reported. It also will review international standards, how other countries are assisting their nanotechnology industries, market access, environmental concerns and energy.

CHINA AND VIETNAM DEFEND SEPARATE RATES FOR NME FIRMS

China and Vietnam, two of the world's last communist states and among the biggest targets for antidumping actions, urged the International Trade Administration (ITA) to stop considering all their exporters to be state controlled and to maintain a system that would allow them to obtain separate rates in dumping cases. The plea from the two countries came in response to an ITA request for public comments on a proposal to create an application system under which exporters from nonmarket economies could seek separate rates (see **WTTL**, Sept. 20, page 2).

"Clearly, the department's assumption of a monolithic state-controlled enterprise no longer holds," commented Vietnamese Trade Minister Truong Dinh Tuyen. China claimed its accession agreement to the World Trade Organization (WTO) barred countries from unilaterally changing antidumping rules to treat Chinese exports harsher. "Any decision by the United

States making it more difficult for Chinese companies to qualify for separate rate status would effectively nullify the benefits accruing to China upon it accession to the WTO," it contended.

Domestic manufacturers, including furniture makers, shrimp fisherman and crawfish farmers, called on ITA to maintain high standards for granting separate rates. King and Spalding, attorneys for U.S. furniture firms currently involved in an antidumping case against Chinese imports, urged the department "to make the separate rate test meaningful so that it will effectuate the purpose for which it was established and only grant separate rates to those companies that affirmatively demonstrate the absence of government control."

NEW EFFORT LAUNCHED TO CONSIDER EXPORT ADMINISTRATION ACT

What Samuel Johnson said about an unhappily married friend who was remarrying after the death of his wife may apply to a new effort to restart discussions about an Export Administration Act (EAA). It represents "a triumph of hope over experience." Undeterred by but aware of the difficulties that have plagued attempts in the last ten years to rewrite and renew the EAA, the President's Export Council's subcommittee on export administration (PECSEA) has made a review of the law and needed changes part of its agenda for the coming year.

> Rather than trying to write a new bill, the group is expected to look at "first principles" that should be addressed by a new export control statute. Except for a short renewal in 2001, EAA hasn't been renewed since 1994. At the start of the meeting, BIS Under Secretary Kenneth Juster told the PECSEA that a new EAA is really needed. "My hope is that it would not be a 180-page piece of legislation that tries to micromanage a process that is dependent on being flexible in response to rapid technological changes," Juster said.

"It would be helpful if this group developed some underlying principles that should be the foundation for the Export Administration Act, so that after the election, whether there is a second Bush term or a first Kerry term, this issue can be on the agenda to work on," he continued. 'It's not an easy one because, as you all well know, there are folks who believe the security component always needs to be beefed up and others who believe the trade component. The question is how do you treat both of those in a way that is mutually compatible rather than mutually exclusive," Juster said.

* * * BRIEFS * * *

EXPORT ENFORCEMENT: GE's Ultrasound and Primary Care Diagnostics division agreed to pay $32,000 civil penalty in settlement agreement to resolve BIS charges that firm it acquired in Europe, Lunar Europe, N.V., exported bone densitometers to Iran without OFAC approval. Exports were made between 1998 and 2000, before GE acquired firm in 2000. "Under the principles of successor liability, corporations may be held liable for violations of export control laws committed by businesses that they acquire," BIS said.

BULGARIA: State issued order in Oct. 22 Federal Register barring two Bulgarian firms from doing business with U.S. government or obtaining export or import licenses because of their transfer of military equipment to state sponsors of terrorism. Debarred for one year are Beta JSC and KAS Engineering Consortium/BMG-M OOD.

IRAQ: State published notice in Oct. 20 Federal Register formally rescinding determination that Iraq is state supporter of terrorism. Presidential order in May 2003 already lifted restrictions.

SOCKS: In response to safeguard petition filed by U.S. hosiery manufacturers, Committee for the Implementation of Textile Agreements (CITA) decided Oct. 22 that imports of cotton, wool and man-made fiber socks from China are disrupting U.S. market. Decision starts process that calls for U.S.-China consultations, and if no bilateral agreement can be reached to restrain imports, U.S. will be able to impose restrictions unilaterally for one year.

POLYVINYL ALCOHOL: ITC split 3-2 in Oct. 21 preliminary determination that U.S. industry is not being injured by allegedly dumped imports of polyvinyl alcohol from Taiwan.