# 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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Vol. 24, No. 1

**January 5, 2004** 

## WTO CLAIMS RIGHT TO JUDGE ITA POLICY BULLETINS

The U.S. victory before the World Trade Organization's (WTO) Appellate Body (AB) on the application of "sunset review" policies in the Japanese steel case included a poison seed that could open U.S. trade policies to future challenge. The AB Dec. 15 upheld a dispute-settlement panel's ruling that the U.S. appropriately applied international trade rules in deciding to maintain an antidumping order on corrosion-resistant carbon flat steel from Japan.

The ruling, however, overturned the panel's opinion on whether supposedly nonbinding policy bulletins issued by the International Trade Administration (ITA) are subject to WTO dispute-settlement review. The AB ruled that they are.

Over the years, ITA has issued numerous Policy Bulletins explaining how it intends to interpret trade rules under its jurisdiction. These bulletins are often technical, providing guidance on how ITA will calculate dumping or subsidies or how it will apply the legal standards in U.S. trade laws and its regulations. They are usually labeled as non-binding, interpretive guidance for the trade and legal community. Because ITA considers them interpretive, it does not always follow the guidance strictly, trade lawyers have complained.

"There is no basis, either in the practice of the GATT [General Agreement on Tariffs & Trade] and the WTO generally or in the provisions of the Anti-Dumping Agreement, for finding that only certain types of measures can, as such, be challenged in dispute settlement proceedings under the Anti-Dumping Agreement," the AB ruled. "Hence, we see no reason for concluding that, in principle, non-mandatory measures cannot be challenged as such," it added.

"We observe, too, that allowing measures to be the subject of dispute settlement proceedings, whether or not they are of a mandatory character, is consistent with the comprehensive nature of the right of members to resort to dispute settlement to 'preserve their rights and obligations ...under the covered agreements and to clarify the existing provisions of those agreements'," the AB stated. Since the panel did not review the ITA Policy Bulletin on Sunset Reviews to determine its consistency with WTO rules, the Appellate Body said it had no basis to judge the bulletin in this case.

#### BIS PROMISES TO IMPROVE DENIED PARTY IDENTIFICATION

The Bureau of Industry and Security (BIS) has agreed to accept industry's advice to take the lead in pushing all government agencies to improve the quality and details in the various lists that federal agencies maintain of denied parties who are subject to export sanctions. BIS

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 Deputy Assistant Secretary for Export Administration Matthew Borman said BIS is prepared to circulate a memo to other export control agencies recommending consideration of industry recommendations to improve these lists.

Borman told the BIS Regulations and Procedures Technical Advisory Committee (RAPTAC) that he was prepared to circulate to the agencies a letter from the group, which described the trouble companies have trying to screen proposed sales through the different lists of sanctioned parties. RAPTAC proposed several improvements to the current system. BIS will tell the agencies the committee "has made useful suggestions here and we urge you to strongly consider it so we can have a more standardized format for compliance purposes," Borman said.

RAPTAC's Sept. 3 letter cited the burden firms have trying to deal with different denied parties lists (DPLs) maintained by BIS, State, Treasury and intelligence agencies. The information on these lists is often inadequate, out of date, or inaccurate, which cause many "false positive" identifications. Some lists are not easily accessible and some are not made public, it complained. "We estimate a large company does 5,000 investigations per month and the vast majority (close to 100%) are false positive," it wrote. Agencies publish these names with "little thought to the cumulative impact on companies," RAPTAC stated.

In addition to taking the lead to urge other agencies to improve the quality of their lists, Borman said BIS has a proposed amendment to the Export Administration Regulations (EAR) circulating now for interagency comment to address the link between State's sanctions list and BIS licensing policies. "My experience is that generally those [State] parties are not parties that U.S. companies do a lot of business with; nonetheless, I think it is good for the regulations to make it clear that if you are thinking about doing business with one of these sanctioned parties, you should know that there is a policy of denial if it's a CCL item," Borman stated.

Borman was reluctant to promise any improvement in publication of "is informed" names of sanctioned parties that BIS usually gives to individual firms seeking licenses. "We try to publish proliferation entities that require a license for all items," he explained. But the decision on whether to publish a name goes through the Operating Committee (OC). Even though BIS might ask other agencies to publish more of these names and re-examine past decisions not to publish, "I would not be optimistic," Borman said. "To the extent entities are not published, it is almost always because of intelligence sources and methods," he explained.

BIS Under Secretary Kenneth Juster has already addressed the legal status of the DPL in an Oct. 26 to the committee, Borman reported. Juster's letter noted that BIS had put the DPL in electronic format at the request of industry as a convenience. "We didn't intend that to supplant the Federal Register," Borman stated. "The Federal Register notices still are the legally binding instrument for denied parties," he declared.

BIS is also planning a regulation to address industry's desire for a "safe harbor" rule that would provide protection from liability for firms that conduct appropriate screens of proposed customers against government lists and don't find the name, but later discover the customer to be related to a sanctioned party. "We have a rule that is nearly done with internal review that deals with a number of elements, one of which is the safe-harbor issue," Borman informed the committee without providing more details. Once that review is completed, BIS intends to publish the rule as a proposal for public comment, he promised.

# U.S. STILL GIVING CHINA MORE TIME TO IMPROVE TRADE PRACTICES

In the second annual report on China's compliance with its WTO obligations, the U.S. Trade Representative's (USTR) office gave no indication the U.S. will take tougher actions against Beijing's failure to meet its commitments. The report, released Dec. 18, gave a mixed review of China's trade practices and suggested that – with the exception of textiles and apparel – Washington prefers to use consultations and persuasion to deal with any trade problems. The

USTR argued that U.S. business success in China should not be the measure of China's WTO compliance. Instead, "WTO implementation progress should be measured by the degree to which China has begun to institutionalize market mechanisms and to made its trade regime more predictable and transparent," the report said.

In China's second year of WTO membership, "a number of positive developments occurred," the report asserted. These improvements mostly came in the area of bulk agriculture, soybeans, financial services and auto vehicle financing.

At the same time, "China fell far short of implementing its WTO commitments," the report concedes. In particular, the USTR's office raised a cautionary note about "an increasing use of the industrial policies to encourage domestic industries at the expense of imports from abroad or foreign business operating in China."

#### WASSENAAR ISSUES ITS VERSION OF "RED FLAGS" ADVICE FOR EXPORTERS

At its recent plenary session, the Wassenaar Arrangement on export controls issued what it called a non-exhaustive list of "advisory questions" exporters should ask themselves to determine whether a potential export requires a license or a new customer should raise suspicions. Similar to the "Red Flags" advice BIS publishes, the Wassenaar questions urge exports to "know your customer" before shipping items that might be subject to export controls or that come under the "catch-all" controls the regime adopted at the its latest meeting in December.

"The intended use for the list is to provide a guide for companies in any export situation," Wassenaar said in notice posted on its website. "The answers to the questions below will give guidance to when suspicion should be raised and a contact with national export licensing authorities might be advisable," it said (see **WTTL**, Dec. 22, page 1).

#### Wassenaars's Questions For Exporters:

- 1. Do you know your customer? If not, is it difficult to find information about him/her?
- 2. Is the customer or the end-user tied to the military or the defence industry?
- 3. Is the customer or the end-user tied to any military or governmental research body?
- 4. If you have done business with the customer before is this a usual request for them to make? Does the product fit the business profile?
- 5. Does the customer seem familiar with the product and its performance characteristics or is there an obvious lack of technical knowledge?
- 6. Is the customer reluctant to provide an end-use statement or is the information insufficient compared to other negotiations?
- 7. Does the customer reject the customary installation, training or maintenance services provided?
- 8. Is unusual packaging and labelling required?
- 9. Is the shipping route unusual?
- 10. Does the customer order an excessive amount of spare parts or other items that are related to the product, but not to the stated end-use?
- 11. Is the customer offering unusually profitable payment terms, such as a much higher price?
- 12. Is the customer offering to pay in cash?

## OFAC ISSUES GENERAL LICENSE TO ALLOW AID TO IRAN

Treasury's Office of Foreign Assets Control (OFAC) and State moved quickly Dec. 31 to implement President Bush determination that it was in the U.S. national interest to provide aid to earthquake victoms in Bam, Iran. OFAC issued General License No. 1 to the Iranian Sanctions Regulations to authorize transfers of funds to Iran through U.S. financial institutions.

The agency stayed open on Jan. 1 to handle requests for licenses for other exports from organizations previously registered to provide humanitarian relief in Afghanistan. State also announced that it was prepared to issue licenses for nongovernmental organizations (NGOs) as well as State and U.S. Agency for International Development (USAID) to get supplies to the

victims. Following the president's order, State said it would license exports to Iran of "certain items needed for the management of the relief effort, including controlled items such as transportation equipment, satellite telephones and radio and personal computing systems."

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

<u>TEXTILES</u>: U.S. Dec. 24 formally asked China for consultations on imports of three textile and apparel products that Commerce has determined have surged. In Dec. 29 Federal Register, CITA also announced imposition of quotas on these goods. It set 12-month quota, starting Dec. 24, of 4,094,382 dozen dressing gowns in category 350/650; 16,828,971 dozen bras in categories 349/649 and 9,664,477 kilograms of knit fabric in category 222 (see WTTL, Nov. 24, page 3).

<u>CHILE/SINGAPORE</u>: President Bush Dec. 30 signed proclamations formerly putting FTAs with Chile and Singapore into effect Jan. 1, 2004.

EXPORT ENFORCEMENT: <u>TLC Precision Wafer Technology</u> of Minneapolis has agreed to pay \$35,000 civil fine as part of settlement agreement with BIS. Agency will suspend and then waive \$20,000 of penalty, if company remains in compliance with export rules for one year. BIS had charged TLC with five violations of export regulations for exporting aluminum gallium arsenide/gallium arsenide epitaxial wafers to Brazil and Israel without approved licenses and for false statement on SEDs.

<u>MORE EXPORT ENFORCEMENT</u>: <u>Honeywell</u> voluntarily disclosed to BIS 12 shipments of hydrogen fluoride from its Geismar, La., plant to Mexico from December 2001 to February 2002 without approved export licenses. As part of settlement agreement with agency, firm will pay \$36,000 civil fine.

MORE, MORE EXPORT ENFORCEMENT: BIS has reached settlement agreement with <u>Mahmoud</u> <u>Haghsheno Kashani</u>, who is also known as Mike Kashani, under which he will have his export licensing privileges denied for five years. Kashani, officer in Zimex, Inc. of Ontario, was charged with attempting to export replacements parts for multiple gas analyzers to Iran through Germany and Saudi Arabia without approval. He was charged with violating EAR and Iran Transactions Regulations.

SOFTWOOD LUMBER: Just after ITC sent remand determination back to NAFTA panel to support its injury determination in dumping and countervailing duty cases against softwood lumber from Canada, WTO dispute-settlement panel released its separate interim report to parties also finding commission's original "threat" ruling to be flawed (see WTTL, Dec. 22, page 4). Canadian Trade Minister Jim Peterson revealed still-confidential WTO ruling Dec. 19. "We have consistently maintained that countervailing and antidumping duties imposed by the U.S. on Canadian softwood lumber exports violate international trade rules," Peterson said. "We are pleased with today's interim report," he added. Canadian statement said Ottawa "would continue to work with the provinces and industry on our two-track strategy of litigation before NAFTA and WTO panels and negotiations to find a lasting resolution to this dispute."

<u>THAILAND</u>: President Bush Dec. 30 designated Thailand as Major Non-NATO Ally making it eligible for increased defense financial and trade relations with U.S., including expedited processing of export licenses for commercial satellites and systems.

<u>HAND TRUCKS</u>: ITC Dec. 29 made preliminary determination, on 6-0 vote, that allegedly dumped imports of <u>hand trucks from China</u> may be injuring U.S. industry.

<u>WATERWORKS FITTINGS</u>: Having ruled in Section 421 case that surge in imports of <u>ductile iron</u> <u>waterworks fittings from China</u> are injuring U.S. industry, four ITC commissioners (Okun, Koplan, Lane, Pearson) Dec. 15 recommended that President Bush impose tariff-rate quota on imports for three years. Commissioner Hillman recommended imposition of quota alone for three years. Commissioner Miller suggested increased tariff for three years at rates of 50%, 40% and 30%.

<u>SHRIMP</u>: In complaint expected since September, Ad Hoc Shrimp Trade Action Committee Dec. 31 filed antidumping petitions at ITA and ITC against <u>frozen and canned warmwater shrimp from Brazil, China,</u> <u>Ecuador, India, Thailand and Vietnam</u> (see **WTTL**, Sept. 1, page 4). Industry originally was considering cases against 10 countries and only against frozen shrimp.

<u>TRADE PEOPLE</u>: Terence Murphy has joined <u>MK Technology</u>, export consulting firm, as general counsel and senior trade policy advisor. Formerly with law firm of Murphy Ellis Weber, he serves on BIS Regulations and Procedures Technical Advisory Committee.

<u>OIL PIPELINE</u>: Ex-Im Bank Dec. 31 approved long-term financial guarantee to support \$160 million in exports of U.S. goods and services for construction of oil pipeline linking Sangachal terminal near Baku, Azerbaijan, through Georgia, to marine export terminal at Ceyham, Turkey.