

# Washington Tariff & Trade Letter<sup>®</sup>

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. 25, No. 34

August 22, 2005

## **BIS WILL APPLY UN RESOLUTION 1540 TO SOME NUCLEAR EXPORTS**

The Bureau of Industry and Security (BIS) intends to apply United Nations Resolution 1540 to its current regulations implementing Nuclear Supplier Group (NSG) controls as part of a revision of the Export Administration Regulations (EAR) later this year. The change in controls would mark the first time the U.S. has applied the 2004 UN resolution which requires members to have in place effective appropriate export controls to prevent the proliferation of weapons of mass destruction (WMD). The resolution gives the UN authority to impose sanctions on nations that fail to implement the policy.

The expected change in Section 742.3 of the EAR would extend the policy of license denial for exports to facilities involved in nuclear explosive activities and unsafeguarded nuclear fuel-cycle activities to include facilities in countries that don't comply with the UN resolution. BISers say the change won't have any practical impact on exports since these exports are already denied for other reasons and the agency gets virtually no applications for such exports.

Nonetheless, a presentation on the planned changes at the Aug. 18 meeting of the BIS Materials Processing Technical Advisory Committee (MPTAC) raised concerns among attendees because the UN hasn't identified which countries haven't implemented 1540 and the U.S. appears to be making the judgment unilaterally. In addition, the UN 1540 Committee hasn't adopted "best practices" guidance that would provide criteria for judging compliance, one attendee noted. One TAC member suggested the regulation change "would be the camel's nose under the tent."

The regulation won't define "effective control" as used in 1540, nor will it use the new policy as a condition for individual license reviews, one BIS staffer told the committee. The policy is being adopted to show that the U.S. is taking the lead in enforcing 1540, he explained.

The new policy will be published with other EAR revisions that will implement control changes the NSG adopted at its last plenary meeting. Most of the changes will bring the NSG controls closer to those imposed by the Wassenaar Arrangement. Included in those changes will be the identification of four new NSG members: Croatia, Estonia, Lithuania and Malta.

## **CANADA QUILTS SOFTWOOD LUMBER TALKS IN PIQUE**

Annoyed at the way the U.S. dismissed the importance of an Extraordinary Challenge Committee's (ECC) ruling in its favor on softwood lumber, Canada has refused to hold the next round of talks with the U.S. on an agreement to settle the cross-border dispute. The meeting, which

Copyright © 2005 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

was set for Aug. 22, was supposed to follow up on initial efforts that started in July to re-launch negotiations that could replace the current antidumping and countervailing duty orders on Canadian lumber with a long-term deal that would limit the volume and price of Canadian exports to the U.S. (see **WTTL**, Aug. 15, page 3).

“Following consultations with provincial governments and in light of the U.S. response to the August 10, 2005, decision of the NAFTA Extraordinary Challenge Committee, the government of Canada has decided to not proceed with the negotiations planned for next week,” said Canadian International Trade Minister Jim Peterson. “I will take the necessary time to consult with provincial and Cabinet colleagues on next steps,” he added.

Cancellation of the talks doesn't mean the end of negotiations. Both the U.S. and Canada seem committed to settling the lumber dispute with an export restraint agreement. But the frustration level in Canada is extremely high because Washington has continued to maintain the dumping and CVD orders on Canadian lumber despite NAFTA and World Trade Organization (WTO) rulings that Canadian producers believe should have led to the termination of the penalties.

### **BIS FINES FIRMS FOR 1,136 AND 208 VIOLATIONS OF RED CEDAR CONTROLS**

Applying rarely invoked provisions of the Export Administration Regulations (EAR), BIS has fined two companies for exporting unprocessed western red cedar to Canada without licenses. The settlement agreements with McFarland Cascade Pole and Lumber Company of Tacoma, Wash., and The Oeser Company of Bellingham, Wash., came after an administrative law judge (ALJ) had issued a preliminary ruling in favor of BIS. Under the deals the companies reached, McFarland will pay a \$454,000 civil fine for 1,136 exports of western red cedar utility poles to Canada without licenses and Oeser will pay an \$83,200 fine for 208 unlicensed pole exports.

Under restrictions inserted in the Export Administration Act in 1988 by then-Rep. Don Bonker (D-Wash.), exports of western red cedar are prohibited except from states that produce more than 400 million board feet of such timber. The ALJ's preliminary report upheld BIS charges that licenses were needed for exports made by the two firms. In fiscal years 2003 and 2004, BIS neither approved nor denied any export licenses for western red cedar, according to the BIS annual reports.

### **U.S., CHINA MOVE TOWARD DEAL ON TEXTILE RESTRAINTS**

The U.S. and China completed two days of talks Aug. 16-17 on a broad restraint agreement on shipments of Chinese textiles and apparel to the U.S. with most of the toughest issues apparently unresolved. The two sides plan to meet again in China before the end of August to try and resolve such basic issues as the products to be covered, how long the restraints will remain in place, what growth rates will be allowed, what base period will be used as the starting point for calculating growth, and how to deal with expected short-supplies in certain categories.

Both sides want a deal and both brought proposals to the meeting, although industry sources say the offers were far apart on the basic components of an agreement. David Spooner, the U.S. Trade Representative's chief textile negotiator, told reporters both offers “were in the ballpark.”

Pushing Washington and Beijing to a deal are political and economic concerns caused by the surge in Chinese shipments to the U.S. since quotas were lifted in January and uncertainties about the availability of Chinese goods in the months ahead. Even U.S. importers and retailers now agree a deal is needed to prevent what one industry source called the “race to the dock” that is now going on as Chinese producers and U.S. customers rush to get goods into the U.S. before new quotas kick in. One of the likely provisions of a new deal will be the reestablish-

ment of a licensing and visa system to bring order back to the shipment of apparel from China. "For the Chinese, there are lots of business reasons for a deal, but I don't know at what cost," one source said. Because of concerns about safeguard quotas, U.S. retailers are slowing down their orders for goods that would come in later in 2005 as quota levels are expected to fill up and close. "Look at what's going on in Europe; it's a disaster," one importing source said.

Spooner said he recognized the importing community's concerns about short-supplies and filled quotas. "There are concerns about what effect the embargoes will have on retailers' ability to stock their shelves," he said. "A vague but honest answer is that we won't do anything outside the scope of a broad agreement, but it is possible that a broad agreement will provide relief for [short supplies] in the fall and winter," he added.

Potential shortages also may be eased by the choice of the 12 months before July 2005 as the based period for calculating import growth for pending safeguard cases and any new categories not yet targeted. This would give the Chinese the benefit of the jump in trade since January. Importers take credit for this later starting base period, noting the delay in safeguard actions due to their suit to block sanctions based on a "threat" of market disruption.

### **WTO REJECTS ITA SECTION 129 SUNSET RULINGS ON PRIVATIZATION**

NAFTA and WTO panels continue to find faults with the way Washington uses the Section 129 process to bring U.S. trade rulings into compliance with panel determinations that have found those ruling to be inconsistent with trade agreements. Panels are also targeting determinations that maintain antidumping and countervailing duty orders in the "sunset review" process. The main complaint against 129 rulings is that the U.S. is circumventing the intent of the panels by not following their instructions and finding new justifications to keep the orders in place.

In the latest set of rulings, a WTO panel examining U.S. compliance with previous decisions against three sunset reviews, found the U.S. still not complying with decisions affecting countervailing duties on carbon steel plate imports from the United Kingdom and Spain. The panel's Aug. 17 ruling, however, upheld the 129 redetermination on corrosion-resistant flat steel from France.

The cases reflect a long-running legal battle over the privatization of government-owned steel companies, the determination of what constitutes an arms' length transaction, and the calculation of fair-market value. They also address what type of investigation and determination the International Trade Administration (ITA) must make in sunset review case to show that previous government subsidies are still benefitting the privatized firm.

The panel agreed with how ITA treated the sale of a portion of France's Usinor to company workers. In dealing with the privatization of British Steel and Spain's Aceralia, the U.S. failed "to properly determine the likelihood of continuation or recurrence of subsidization prior to its decision to maintain countervailing duties," it ruled. It recommended that the WTO Dispute Settlement Body ask the U.S. to bring its measures into conformity with WTO agreements.

Separately, ITA in Aug. 15 Federal Register proposed changes in how its handles "sunset reviews." Changes would revise "waiver" provisions governing treatment of interested parties. Proposed rules would bring U.S. into compliance with WTO dispute-settlement panel ruling on oil country tubular goods from Argentina, the ITA notice asserted.

### **FIRM HIT WITH EXPORT CHARGES AFTER GETTING BIS WARNING**

A firm that received a warning letter from BIS in 1995 for unlicensed exports of controlled vaccines to 22 countries on 243 occasions was charged with violating the Export Administration Act again for two unlicensed shipments to Syria in 2001. The EAA charges against Maine

Biological Laboratories (MBL) of Winslow, Maine, were just part of a multi-statute set of charges that led to the company being fined \$500,000 and placed on five-years' probation in the Portland, Maine, U.S. District Court Aug. 6. The case against the firm also led to fines, and in several instances, prison terms, for eight of its executives and employees.

On July 20, MBL pled guilty to receiving an avian influenza virus smuggled from Saudi Arabia, mail fraud, violations of the Virus-Serum Toxin Act, making false statements to the government and two violations of the EAA. One EAA count was for the unlicensed exports of more than 14 million vaccine doses to Syria and the other was for violation of antiboycott requirements in connection with information provided to an agent in Lebanon.

In June 1995, MBL made a voluntary self-disclosure to BIS, revealing that it had shipped Newcastle disease vaccines without licenses on 243 occasions between 1992 and 1995, noted the "prosecution version" of the information filed against the firm and its employees in June 2004. "On July 27, 1995, the Department of Commerce issued an administrative warning letter regarding these violations," said court papers obtained by WTTL.

"In the letter, the Department of Commerce informed MBL that the violations could have resulted in the initiation of administrative proceedings and the imposition of sanctions," the prosecution version said. "However, in light of all the circumstances, including MBL's efforts to report the violations before their discovery by government authorities, the department agreed to issue a warning letter instead," the U.S. Attorney's office explained. "The department warned that the letter 'will become part of the record to be considered if future violations occur' and emphasized that it expected MBL to 'make every effort to adhere strictly to the provisions of the Regulations in all future export transactions'," it added.

As part of its deal with prosecutors, MBL will pay its fine over five years. In related sentencing, which didn't include any EAA violations, MBL's ex-president John Donahoe, was sentenced to 364 days in prison, fined \$30,000 and ordered to serve two years of supervised probation after release. Other executives received jail terms of up to 12 months and one day and fines of \$5,000 to \$10,000. Others were fined and placed on one-to-two years' probation.

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

GAMBLING: Although U.S. claims it won WTO dispute with Antigua over restriction on cross-border supplying of gaming and betting services, WTO arbitrator Aug. 19 gave U.S. until April 3, 2006 to bring its legislation into compliance with General Agreement on Trade in Services (GATS).

EAR: Some exporters who have received recently updated CD version of Export Administration Regulations note typographical errors in some ECCN specifications possibly due to format changes.

ARAB LEAGUE: During WTO General Council meeting at end of July, U.S. and Israel blocked Arab League request for observer status at WTO Ministerial Meeting in Hong Kong in December.

TRADE PEOPLE: Jack Colvin, formerly with International Business-Government Counsellors, has joined National Foreign Trade Council as director of USA\*Engage...Randi Levinas, who was international trade advisor with Kaye Scholer, has become director of policy and programs for U.S.-Russia Business Council.

EXPORT ENFORCEMENT: Quantachrome Instruments of Boynton Beach, Fla., has agreed to pay \$6,000 civil fine to settle BIS charge that it exported automated surface area and pore size analyzer and other scientific instruments without license in 2002 to Department of Atomic Energy, Bhabha Atomic Research Center in Mumbai, India. Center was on BIS Entity List.

MORE EXPORT ENFORCEMENT: BIS and Zoll Medical of Chelmsford, Mass., have reached settlement agreement to resolve charges that firm exported medical defibrillator through South Africa to Iran without license and also made false statements on SEDs. Zoll will pay \$82,500 civil fine.

EDITOR'S NOTE: In keeping with our regular publishing schedule, there will be no issue of *Washington Tariff & Trade Letter* on August 29, 2005. Our next issue will be Sept. 4.