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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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WASSENAAR REACHES TEMPORARY COMPROMISE ON AMORPHOUS SILICON

After more than two years of debate over imposing new controls on thermal imaging devices, the political-level meeting of Wassenaar Arrangement members Dec. 9 could only reach a short-term agreement on new licensing parameters. The annual plenary session adopted a package of new controls on focal plane arrays and cameras but added a Validity Note imposing the new conditions for only six months. Unless the regime agrees to extend these changes or a modified set of controls within that time, the controls would automatically expire.

The package of new controls in Category 6 of the Wassenaar Control List includes an end to the exemption from controls given focal plane arrays made of amorphous silicon. It also adds several new control parameters for focal plane arrays and cameras, including new controls on non-space-qualified, non-linear, two-dimension infrared focal plane arrays.

Separately, the regime, as expected, revised controls on software and technology used to design, develop or produce computers, matching controls the U.S. adopted in November (see **WTTL**, Nov. 23, page 1). It raised the control threshold for technology on the non-sensitive list to 75,000 million theoretical operations per second (MTOPS) and to 190,000 MTOPS for sensitive list technology, while deleting all controls on the very sensitive list. Among other changes, the regime made permanent the controls in Category 9 for unmanned aerial vehicles (UAVs) and added new controls for jamming equipment in Munitions List category 11.

ITA "SERIOUSLY CONSIDERING" COMBINATION RATES FOR NME CASES

As it continues trying to balance opposing arguments over how to treat nonmarket economies (NMEs) in antidumping cases, the International Trade Administration (ITA) says it is now "seriously considering" the assignment of "combination" rates to exporters and producers when it grants separate dumping rates in these cases. In its third attempt at setting a new policy for granting separate rates, ITA in the Dec. 28 Federal Register offered more details on how it would apply combination rates. It also asked for comments on a draft application form it wants all NME firms to use when applying for a separate rate (see **WTTL**, Sept. 20, page 3).

NME exporters, who are not mandatory respondents in antidumping cases, can ask ITA to determine a separate dumping rate for them. Lawyers for petitioners in these cases have raised concern that firms that don't get separate rates or get high rates can divert their goods through exporters with separate lower rates. To avoid this diversion, ITA proposes issuing separate rates that specifically identify both the exporter and producer or supplier. Such combination

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rates are also referred to as “channel” rates or “chain” rates. Only goods from the identified exporter and suppliers would be eligible for the separate rate. If an NME exporter were to source goods from a new supplier, the cash-deposit rate for those goods would be based on the NMW-wide rate, ITA has proposed. The exporter could ask for a review of this NME-rate during the administrative review for the imports.

The extension of the separate rate back to the producer “would not mean that the separate rates analysis would be extended back to producers, or that producers would in any way be required to demonstrate their independence of government control,” ITA explains. “The separate rate test focuses exclusively on the independence of respondent’s export activities from *de jure* and *de facto* government control,” it adds.

“The department understands the concerns of both sides on this issue and recognizes that issuing combination rates in NME investigations and administrative reviews would constitute a significant change in practices,” ITA concedes. It said it would make the change only after “a full analysis of the advantages and disadvantages of this change in practice.”

EXPORT COUNCIL URGES BUSH TO MAKE EAA A PRIORITY

The President’s Export Council (PEC) has urged President Bush to “make new comprehensive export control legislation a priority early in your second term.” In a letter to the president approved during a Dec. 17 teleconference meeting, the PEC said: “As you begin your second term, the President’s Export Council urges you to renew your initiative to develop comprehensive legislation that transforms our current export control system, strengthens our national security and enables U.S. industry to compete on equal footing in the international marketplace.”

The PEC noted that Bush had made the streamlining and strengthening of export controls a part of his campaign platform. “Existing U.S. export control law is based on the Cold War framework of the past,” the letter stated. “Export controls must adapt to the changing nature of the international marketplace in order to promote the future strength of the U.S. economy,” the PEC argued.

The council, made up of top industry executives, pointed to the United Nations’ approval of Resolution 1540, which calls on nations to establish and maintain effective exports controls. “New U.S. legislation would demonstrate that the United States is leading the international community in this regard,” the PEC wrote. The PEC’s export administration subcommittee has agreed to review the current Export Administration Act (EAA) and produce recommendations on the elements of a new law (see **WTTL**, Oct. 25, page 4).

U.S. CLAIMS VICTORY IN DISPUTE OVER GEOGRAPHICAL INDICATIONS

A World Trade Organization (WTO) dispute-settlement panel reportedly has ruled in favor of the U.S. in a complaint against European Union (EU) regulations that are intended to protect geographical indications (GIs) from being misused. Although the panel’s report won’t be made public for a month or more, U.S. trade officials revealed its findings Dec. 21, claiming the decision supports Washington’s contention that the EU rules violate WTO national treatment requirements and the agreement on trade-related intellectual property rights (TRIPS).

The report, which was distributed to the parties, agreed with the U.S. “that Europe’s regulation discriminates against U.S. products and producers,” said a statement from the U.S. Trade Representative’s (USTR) office. The decision also backed Washington’s complaint that the EU regulations deny U.S. trademark holders their rights in Europe. The EU rules are intended to protect the names of certain foods and agriculture products that are uniquely associated with certain locations, such as Parma hams or Roquefort cheese. The rules provide separate tracks for registering GIs for EU products and non-EU products. The U.S. claimed the regulation

imposes barriers that make it almost impossible for foreign GIs to get registered. During oral arguments before the panel, USTR staffers had noted that in the 12 years that the regulation was in place over 600 European GIs were registered but not one non-EU name.

U.S. officials also say the report backed the U.S. complaint that the regulation weakened trademark protection for American products because it allows use of “linguistic variations” of GIs which may be similar to U.S. trademarks. “The panel agreed with the United States that this would present concerns under the TRIPS Agreement, and found that the GI regulation could only protect GI names as registered and not linguistic variations of the GIs,” the USTR statement said.

FEDERAL RESERVE BANKS TO SCREEN INTERNATIONAL TRANSFERS

Regional Federal Reserve Banks will begin using “interdiction software” to flag incoming international Automated Clearing House (ACH) transactions for potential violations of U.S. trade sanctions, the Office of Foreign Assets Control (OFAC) has revealed. Any potential violations that are discovered will be reported to OFAC and relevant Receiving Depository Financial Institutions (RDFIs), said OFAC Director Robert Werner in a letter to Elliott McEntee, president of NACHA, the electronic payments association. RDFIs will continue to be responsible for investigating, blocking and reporting non-complying transactions, he wrote.

The screening conducted by the Fed banks, acting in their role as a FedACH service, “will include scanning all parties to every transaction, as well as data contained in originator-to-beneficiary information and details in payment fields,” Werner said in the Nov. 9 letter which was just released. The FedACH will not screen outbound transactions, he said.

“With regard to outbound cross-border ACH transactions, United States Originating Depository Financial Institutions (ODFIs) and their originators will continue to be responsible for ensuring that all parties to transactions, as well as the underlying purpose of transactions, are not in violation of OFAC regulations, and they will need to take appropriate steps to investigate, suspend, reject, block and report on transactions as necessary,” Werner stated.

Werner’s letter to NACHA supported the association’s efforts to adopt a new cross-border standard and formatting requirements to assure that ACHs collect more information on international transactions. He noted, however, that the speed and efficiency of ACH make it vulnerable to abuse. “Treasury believes that cross-border ACH transactions currently do not contain sufficient mandatory field information to permit an adequate degree of scrutiny of transactions for OFAC compliance,” he declared.

IMPORTERS CLAIM SMALL IMPACT FROM DUMPING DUTIES ON SHRIMP

The tragic tsunami which struck the nations on the rim of the Indian Ocean Dec. 26 may have a greater impact on curbing shrimp exports from the region than ITA’s final antidumping decision Dec. 20 on imports from Brazil, Ecuador, India and Thailand. The generally low rates imposed on the four countries were similar to the low rate the agency imposed on shrimp from Vietnam in the first stage of its decision (see **WTTL**, Dec. 4, page 4). The ruling leaves China, which was hit with rates ranging from 27.89% to 84.93%, as the worst off of all exporters.

ITA imposed an all-other rate of 10.40% for imports from Brazil; 3.26% for Ecuador; 9.45% for India; and 6.03% for Thailand. Thailand has already asked for WTO consultations to protest ITA’s continued use of “zeroing” in its dumping calculations. The U.S. has agreed to stop use of zeroing in the softwood lumber case but has argued that the WTO ruling in that case doesn’t apply to other investigations. The largest U.S. importer of Thai shrimp, the Rubicon Group, issued a press release claiming the 5.79% duty placed on its imports “will not affect its ability to continue to provide reliable shipments of the highest quality shrimp in the marketplace.”

* * * BRIEFS * * *

BIS: Speculation that James Jochum might succeed Ken Juster as BIS under secretary has proven wrong (see WTTL, Dec. 20, page 4) Jochum, currently Commerce assistant secretary for import administration, will leave ITA Jan. 7 to join law firm of Mayer, Brown, Rowe and Maw in Washington, D.C.

DOMINICAN REPUBLIC: DR is back on track to being included as part of CAFTA when agreement is sent to Congress for approval. More positive outlook comes after DR legislature Dec. 27 approved bill to repeal tax on soft drinks made with high fructose corn syrup (see WTTL, Nov. 22, page 4). "We are very pleased that both the Dominican Republic Senate and Chamber of Deputies have voted to repeal the HFCS-related tax," said a USTR spokesperson. "We look forward to the president of the Dominican Republic signing the bill into law so that the Dominican Republic can remain a good CAFTA-DR partner," she said.

RICE: U.S. will let Korea maintain "special treatment" limiting rice imports as part of deal to guarantee import of 50,000 metric tons of American rice annually over next 10 years, USTR announced Dec. 30. Korea consumes about 5 million metric tons of rice annually but imports only about 200,000 tons.

EXPORT ENFORCEMENT: Long-running enforcement action against Yaudat Mustafa, also known as Joseph Talyi, of Slidell, Louisiana, took another twist with BIS imposing \$121,000 civil fine and 20-year denial of export privileges for his export of oil field parts to Libya without approved licenses, BIS reported in Dec. 27 Federal Register. Talyi has been subject to temporary denial order since 2002. In January, he pled guilty in federal court to violating IEEPA. He paid \$25,000 criminal fine and was sent to jail for five months. As part of plea agreement, Talyi was also to sign settlement agreement with BIS and pay \$75,000 civil fine. BIS says he never signed agreement and failed to respond to charging letter.

ANTIBOYCOTT: Alison Transport of Oceanside, N.Y., has agreed to pay \$22,500 civil fine to settle BIS charges that it provided prohibited boycott information to customers in Oman, Kuwait and Saudi Arabia.

LAWYERS FEES: CIT Chief Judge Jane Restani Dec. 23 awarded \$28,015.78 in legal fees to Allegheny Bradford under Equal Access to Justice Act for expenses firm had to pay to get Customs to refund duties that were liquidated despite court order barring liquidation (Slip Op. 04-161). "It is unjustifiable to construe an injunction using mandatory language as meaning that the enjoined party is required only to use its best efforts," Restani wrote in *Allegheny Bradford v. U.S.* "Further it is unreasonable to require...the party protected by the injunction to bear all the costs of enforcing the injunction," she added.

IVORY COAST: President Bush Dec. 21 signed executive order revoking Cote D'Ivoire's designation as beneficiary under Africa Growth and Opportunity Act (see WTTL, Nov. 22, page 4).

ORANGE JUICE: Florida Citrus Mutual and four Florida processors filed antidumping complaints at ITA and ITC Dec. 27 against imports of orange juice from Brazil.

CHEMICAL CONTROLS: BIS in Dec. 23 and 29 Federal Registers amended chemical and biological export controls to implement Australia Group list changes adopted at June 2004 plenary. Agency has eliminated CB licensing requirement for toxic gas monitoring systems but maintains AG controls on equipment. Other changes add new bacteria and viruses to pathogen list and name new AG members.

TRADE BARRIERS: EU Dec. 23 issued its 20th annual report on U.S. trade barriers. Among EU's major concerns are Byrd Amendment and use of "zeroing" in antidumping cases.

SEMICONDUCTOR EQUIPMENT: Ex-Im Bank in Dec. 23 Federal Register asked for public comments on request it has received for \$1.5 billion in export financing to support sale of semiconductor manufacturing equipment to foundries in China. U.S. exports of semiconductor manufacturing equipment to China jumped to more than \$611 million in first 10 months of this year, 215% increase over same period in 2003.

OFAC: Treasury's Financial Crimes Enforcement Network (FinCen) publish guidance in Dec. 23 Federal Register explaining when it is sufficient for financial institutions to report blocking transactions to OFAC involving designated parties and when separate reports still must be filed with FinCen.

BEDROOM FURNITURE: Dumping duties on wooden bedroom furniture from China shrunk even further Dec. 28 when ITA corrected rates for ministerial errors. With changes, firms given separate rates – which account for 65% of Chinese exports – had their rate reduced to 6.65% from 8.64%.

ITC: Administrative Law Judge Delbert "Chip" Terrill Jr. retiring Jan. 3, 2005.

AUSTRALIA: President Bush Dec. 20 signed proclamation putting U.S.-Australia FTA into effect Jan. 1.