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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

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ITT PAYS \$20 MILLION MORE IN PENALTIES TO SETTLE EXPORT CHARGES

With the signing of a consent decree Dec. 21 with State's Directorate of Defense Trade Controls (DDTC), ITT Corporation appears to have run all the bases in its settlement with the government for violating the Arms Export Control Act (AECA). The agreement will require ITT to pay another \$20 million in civil fines in addition to the \$100 million it will pay as part of the plea agreement it reached with Justice in March. ITT will pay the new fine in five equal annual payments of \$4 million starting Dec. 31. In October, it reached a compliance agreement with the U.S. Army to avoid debarment from Army contracts (see **WTTL**, Dec. 17, page 4).

As part the agreement, DDTC revoked a 2004 settlement it had entered with ITT on previous AECA violations. The 2004 decree allowed ITT to settle an \$8 million penalty by paying a \$3 million civil fine and spending another \$5 million on remedial actions to improve its export compliance. Under the new deal, DDTC is giving ITT credit for the \$3 million payment but will require an accounting of how the company has spent the \$5 million. Money already spent will be credited against the 2004 penalty and any still remaining funds will have to be applied to taking corrective steps required under the new agreement.

DDTC's draft charging letter to ITT cited 208 charges, including 163 charges of unauthorized exports and one charge of "misrepresentation and omission of facts" in statements to DDTC. The government claims ITT made a false statement when it filed a voluntary self-disclosure of the exports in 2000 and said it had just learned about the violations and was taking steps to correct the problem. "Documents, which ITT failed to provide with its voluntary disclosure, which were obtained during the criminal investigation, show that ITT was aware of the consignment violations since at least the mid-1990s but did not rectify or report them," DDTC charged.

The charges against ITT identified the unlicensed export of night vision technology to Singapore, the United Kingdom, Japan and China. In some cases, the export of the technology was by ITT contractors and suppliers, including companies in California and Japan. The government, however, claimed these transfers were made with the direct knowledge of ITT employees and reflected either lax compliance practices or intentional violation of U.S. export controls

SUPPORTERS STILL UPBEAT ABOUT CHANCES FOR COLOMBIA FTA

With the election primary season finally underway, supporters of the U.S.-Colombia Free Trade Agreement (FTA) say they are waiting until the primaries are over for a window of opportunity to bring the trade pact up for a vote in Congress. Changes in the primary schedules in many

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states have pushed those votes early in the year, making it possible for the Colombia accord to start getting congressional consideration and maybe a vote in the spring, sources suggest. FTA supporters say they need to get past both the congressional and presidential primaries so potential Democratic votes for the pact won't be under pressure, especially from unions, to oppose the agreement. The spring time frame also fits with the need to renew the current Andean Trade Preference Act (ATPA), which expires on Feb. 29. Senior administration trade official told WTTL that they think Congress will have to answer why it is willing to extend unilateral tariff-free access to Andean imports but won't support opening Colombia to U.S. exports.

Trade observers say it is important to get past the primaries because trade is often an issue in those contests but not in general elections. Despite negative statements on trade from several Democratic presidential candidates, National Foreign Trade Council President Bill Reinsch says he is skeptical that trade will be an issue in the presidential election in November. "If the economy deteriorates, as some people project, it will be eclipsed by more fundamental things," he argues.

Reinsch says the Colombia FTA will get approval because members of Congress will see the importance of the accord as a foreign policy measure to counter the influence of Venezuelan President Hugo Chavez. Nonetheless, each of the Bush administration's trade initiatives in Congress, including the FTAs with Colombia, Korea and Panama, will come with a price, he says. "Functionally, it means that for each of the things the administration wants, there will be a price paid. The administration understands this," Reinsch suggests. House leaders will want a separate price for each of these agreements, he adds.

Price of the Colombia FTA will be enactment of an extension of the Trade Adjustment Assistance (TAA) program with some additional benefits for workers, he says, predicting a vote sometime in the spring or by May. TAA authority was allowed to expire in December when a short-term extension of the program was blocked in the Senate. The program is continuing to operate, however, with previously authorized funds. A vote on Korea could come this summer, Reinsch predicts. "I suspect there the price is going to be China legislation," he opines.

WTO ZEROING DECISION WILL TEST APPELLATE BODY CHANGES

A Dec. 20 World Trade Organization (WTO) panel ruling on the International Trade Administration's (ITA) use of "zeroing" in an antidumping case against stainless steel sheet and coil from Mexico may show the impact of changes in the membership of the WTO Appellate Body (AB) and whether previous AB rulings have precedential standing in the dispute-settlement process. The panel sided with Mexico in declaring that zeroing in the investigation phase of an antidumping case is inconsistent with WTO rules. But it defied previous AB decisions and sided with the U.S. in ruling that zeroing is okay in "periodic" or administrative reviews.

Since the AB's previous rulings on zeroing, its membership has changed. Two new members, former U.S. International Trade Commission member Jennifer Hillman and Lilia Bautista of the Philippines, joined the group in December. Two other new members, including a lawyer from China, will join June 1.

With the AB already having ruled against the use of zeroing in administrative reviews, Mexico is almost certain to appeal that part of the panel decision. Its victory on the use of zeroing in investigations is largely moot, however, since the U.S. lost on this issue in three previous disputes and changed its regulations in February to comply with those rulings. Moreover, the draft Doha Round text on rules released in December would partially restore the ability of the U.S. to use zeroing in investigations and administrative reviews (see **WTTL**, Dec. 3, page 3).

Arguments presented during the panel review of the case debated whether past AB rulings have to be followed by dispute-settlement panels as precedents -- or *stare decisis* in legal terms. The panel acknowledged that it was going against those previous rulings in reaching its decision in administrative reviews. "We are troubled by the fact that the principal basis of the

Appellate Body's reasoning in the zeroing cases seems to be premised on an interpretation that does not have a solid textual basis in the relevant treaty provisions," the panel wrote in its decision. "We recall that according to the standard of review that we have to follow in these proceedings, we are precluded from excluding an interpretation which we find permissible, even if there may be other permissible interpretations," it declared.

LACHMAN LOSES BID FOR RETRIAL ON "SPECIALLY DESIGNED"

The offer of former Bureau of Industry and Security (BIS) licensing officer Surendra K. Dhir to recant his testimony in the trial of Walter Lachman and Fiber Materials, Inc.(FMI) on criminal charges for violating the Export Administration Regulations (EAR) wasn't enough to win them a new trial. Boston U.S. District Court Judge Douglas Woodlock Dec. 14 rejected their motion for a new trial based on what they claimed was new evidence in Dhir's affidavit claiming he was unaware of the differing interpretations of the meaning of "specially designed" when he testified for the government in Lachman's and FMI's trial. The pair still have an appeal of their conviction pending in the First Circuit Court of Appeals (see **WTTL**, Dec. 17, page 3).

"The proffered new testimony would not be appropriate in this case even if recast under a *Brady* theory," Woodlock ruled, citing a Supreme Court ruling on need for knowledge in criminal prosecutions. "Evidence regarding the views of others unknown to a defendant would require, as a predicate to be material, at the minimum some showing that those others express reasoning -- not merely results - - similar to the reasoning of the defendant," he explained.

"That is not what the defendants are proffering with their new evidence. And, in this connection, the government had no duty to search out and disclose immaterial information," he wrote. "Consequently, I find nothing in the Dhir Proffer related to Contention (C) of the defendants' new trial motion to support reopening or reconsideration," he declared.

Lachman and FMI got some good news, however, Dec. 21 when the Justice Department file a motion in the First Circuit Court of Appeals withdrawing its appeal of the sentences handed down to Lachman and FMI by Woodlock in 2005. Justice claimed the fine and probation imposed was insufficient given the national security concerns raised by their export to India of a control panel for a hot-isostatic press without a license. The motion was granted on Jan. 3.

DEAC RECOMMENDS SCRAPPING CURRENT DEEMED EXPORT RULES

The final report of Commerce's Deemed Export Advisory Committee (DEAC) Dec. 20 not only calls for eliminating current deemed export policies and licensing rules, but it also recommends broader changes to the list of goods and technologies that are subject to export controls. It also revives a 20-year-old proposal once known as the "gold card" for giving exporters with good compliance records special liberalized export licensing treatment. "It is the Committee's principal conclusion that the existing Deemed Export Regulatory Regime no longer effectively serves its intended purpose and should be replaced with an approach that better reflects the realities of today's national security needs and global economy," the committee says.

"It is the Committee's opinion that by adopting a more rational construct for managing Deemed Exports based on building high walls around small fields comprised only of the most militarily consequential technologies, the nation's security, which depends increasingly on access to the latest commercial technologies generated around the world, can actually be enhanced," it concludes.

The DEAC's more specific recommendations would require a broad review and adjustment of the current Commerce Control List, resuscitation of BIS's dormant foreign availability assessment mechanism, creation of a new category of exporters who would be known as "trusted entities", broadening the criteria for determining the trustworthiness of foreign nationals and

changing the meaning of what constitutes “fundamental research”. The committee recognized that its recommendations would require extensive changes in current regulations and offers no advice on the specifics of how to implement its suggestions. “My default argument is that we were trying to establish policy and not write a regulation,” said committee chairman Norman Augustine in an exclusive interview with WTTL.

At the heart of the DEAC’s recommendations for changing current deemed export licensing requirements is a seven-step process that produces a flow chart and a series of yes-or-no answers. Depending on the answer, a deemed export license is either required or not required. The seven-step decision process would require a series of considerations and questions that would examine the strategic military application of the technology being released, the trustworthiness of the exporter, foreign availability, whether the technology is fundamental research and loyalty of the foreign national obtaining the technology.

The committee was willing to touch the “third-rail” of the academic community, which wants to keep the exception from deemed export requirements for fundamental research. It called the current definition in the Export Administration Regulations (EAR) “circular in reasoning”. As an alternative, it suggests narrowing the definition to exclude only research that “(1) falls within a more conventional definition of fundamental research (e.g., ‘curiosity-driven research seeking new knowledge’); or (2) is not *precluded* from publication in the relevant contractual documents or other regulatory mechanisms.”

Curiosity-drive research would be research “seeking new knowledge and not building a specific product,” Augustine explained. [**Editor’s Note:** A full discussion of the DEAC’s findings and recommendation appears in the January issue of our affiliated publication, *The Export Practitioner*. A copy will be sent to WTTL subscribers on request.]

ANTIGUA COMES UP SHORT IN WTO GAMBLING RULING

Like any gambler dreaming of a big payoff on a bet, Antigua and Barbuda was disappointed Dec. 21 when a WTO arbitration panel awarded the country only \$21 million annually in compensation from Washington for U.S. laws banning access to the U.S. market for online gambling originating in the Caribbean nation. Antigua, which claimed it was due \$3.4 billion in compensation, now is likely to ask for arbitration as the U.S. moves to removing gaming from its commitments under the General Agreement on Trade in Services (GATS).

The panel authorized Antigua to suspend its obligations to the U.S. under the Agreement on Trade Related Intellectual Property Rights (TRIPS) on copyrights, trademarks, industrial designs, patents and protection of undisclosed information. Antigua hasn’t decided yet whether to recoup damages by suspending those obligations, said Mark Mendel, Antigua’s lead legal counsel in the dispute. “It is not the remedy Antigua wants,” he added, noting that Antigua’s goal has been to sit down with the U.S. and reach a settlement, which so far hasn’t happened.

A few days before the Antigua ruling, the U.S. on Dec. 17 reached separate agreements with Canada, the European Union and Japan, which claimed their gambling industries had also been harmed by the U.S. ban. Although the EU claimed it had won important compensation from the U.S. in the agreement, the U.S. Trade Representative’s (USTR’s) office said the U.S. merely gave a commitment to bind existing market access for services activities in warehousing services, technical testing services, research and development services and postal services relating to outbound international letters. “The U.S. gave the EU very little because it thought the EU was a free rider” in the dispute, one source close to the negotiations said. EU Trade Commissioner Peter Mandelson “took a fig leaf at the end of the day,” he observed.

The \$21 million annually compensation for Antigua is “almost absurdly low,” Mendel said. “I fully expected ... the \$1 billion range,” he noted. The losses began accruing in April 2006. The

ruling is extraordinary in almost every way, he argued. There has never been a dissenting opinion in an Article XXII context and only about six dissents in the history of the WTO, Mendel said. Suspending TRIPS obligations has only happened once before, he pointed out. With one of the three panelists disagreeing with the method of determining damages, Mendel claimed the majority ruling could have future repercussions.

“I think it's going to cause terrible problems going forward,” he said. The panel's decision “to limit our remedy to a hypothetical involving gambling on horse racing is fundamentally unsound and sets a very bad precedent,” he contended. “What the panel decided to do was to give the United States the benefit of a hypothetical method of compliance without giving Antigua the ability to fully test it and more importantly to run it by the WTO's Appellate Body on review,” Mendel complained. “That's very troubling”

The U.S. dismissed the arbitration panel's ruling, saying it will come into compliance by seeking to revise its GATS commitments to clarify that gambling isn't covered. “Once the process of clarifying the U.S. schedule of commitments is complete, any issues in our bilateral dispute with Antigua will be moot, and there will no longer be any basis for suspending WTO commitments in accordance with the arbitrator's award,” said USTR Spokesman Sean Spicer.

GAO REPORT CITES SHORTFALLS IN DDTC LICENSING

Measures that DDTC put into place last year – a so-called “winter offensive – to reduce its backlog of U.S. Munitions List (USML) export licensing cases haven't achieved their goals and aren't sustainable, claims a report released Jan. 3 by the Government Accountability Office (GAO), the investigatory arm of Congress. The broader problems at DDTC involve “inefficiencies and problems in the license review process” that are due to procedural weaknesses, shortfalls with the electronic processing system, and human capital challenges, the GAO says. In addition, the lack of screening procedures for referring arms export cases outside DDTC has resulted in cases languishing for weeks before any action is taken.

To correct these problems, the GAO says the secretary of State needs to direct DDTC managers “to conduct systematic analyses of licensing data to assess root causes of inefficiencies and to identify and implement actions to better manage workload, reexamine its processes, determine the most effective workforce structure, and target industry outreach.”

While the DDTC “winter offensive” cut open cases by over 40% over three months, it did so by “extending work hours and canceling staff training and meetings and other activities to focus on the mounting number of open cases,” the GAO notes. “However, such measures are not sustainable in the long term, do not address underlying inefficiencies and problems, and may adversely affect the mission,” it contends.

“While DDTC's new electronic processing system, D-Trade, was intended to improve processing times, the system has not been the panacea the agency expected,” the GAO claims. “Our analysis shows that processing times for like types of cases are virtually the same, regardless of whether the case was submitted through D-Trade or on paper,” it states. D-Trade “lacks tools to aid the licensing officer to process cases more efficiently,” it claims.

“DDTC also faces human capital challenges in establishing and retaining a sufficient workforce with the experience and skills needed to efficiently and effectively process arms export cases,” the report points out. The DDTC licensing process has not been able to keep up with the growing number of cases it receives each year. The number of applications that DDTC received rose 20% from 2003 to 2006, rising from 55,000 to 65,000. During that time, median processing times almost doubled from 14 days to 26 days. The number of open arms export cases increased 50% from about 5,000 in October 2002 to about 7,500 in April 2007, reaching a high of more than 10,000 cases in September 2006.

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CORRECTION: Headline on WTTL article on USTR report on China's WTO compliance incorrectly placed quotation marks on word "backsliding" which was not in report (see WTTL, Dec. 17, page 3).

SRI LANKA: DDTC Dec. 26 issued notice saying "it is the policy of the United States to deny applications for licenses and other approvals to export or otherwise transfer defense articles and services to Sri Lanka." It said only exception to this policy is that licenses may be issued for "technical data or equipment made available for the limited purposes of maritime and air surveillance and communications."

1-HYDROXYETHYLIDENE: Compass Chemical International LLC Dec. 31, filed antidumping petitions at ITC and ITA against imports of 1-Hydroxyethylidene-1, 1-diphosphonic acid and Aminotrimethylene-phosphonic acid from China and India.

INNERSPRINGS: Yohai Baisburd Dec.31 filed antidumping complaints at ITA and ITC against imports of uncovered innerspring units from China, South Africa and Vietnam.

USTR: President Bush Dec. 19 sent Senate nomination of current ITC member Deanna Tanner Okun to be deputy USTR, filling post left vacant when Karan Bhatia left government. Okun was appointed to ITC by President Clinton in 1999. Before that she was counsel for international affairs to Sen. Frank Murkowski (R-Alaska) from 1993-1999 and earlier was the senator's legislative assistant.

EXPORT ENFORCEMENT: Marubeni Citizen-Cincom, Inc., division of Murubeni, giant Japanese conglomerate and trading company, has reached agreement with BIS after making voluntary self-disclosure of unlicensed exports to Mexico and Brazil of machine tools. Company agreed to pay civil fine of \$32,940 to settle four charges, but it neither admitted nor denied BIS charges.

MORE EXPORT ENFORCMENT: In settlement with BIS, State of the Art, Inc., of State College, Pa., will pay \$35,000 civil fine for allegedly making false statements on Shipper's Export Declarations. It will be allowed to pay fine in two equal payments of \$17, 500. Company neither admitted nor denied BIS charges.

MORE EXPORT ENFORCEMENT: BIS imposed \$6,000 civil fine on Quality Penn Products, Inc. of Philadelphia for attempting to export wooden pallets to Cuba. Firm neither admitted nor denied charges.

MORE EXPORT ENFORCEMENT: Alleged release of controlled technology in U.S. to one Chinese professor and five Chinese students led BIS to issue Charging Letter to 3DSP Corporation of Irvine, Calif., claiming it violated "deemed export" regulations. In settlement with BIS, 3DSP agreed to pay \$36,000 civil fine. It neither admitted nor denied BIS charges.

EAR: In Jan. 2 Federal Register BIS published extensive number of "revisions and technical corrections" to regulations, including to listings in Country Group D and VEU import certificate requirements.

CENSUS: Bureau Dec. 21, posted policy statement on its website on procedures for filing voluntary self-disclosures of violations of its foreign trade regulations. Voluntary self-disclosure "reflects due diligence in detecting, and correcting violations when required information was not reported or when incorrect information was provided that violates the regulations (whether deliberate or unintentional)," it states. Violations involving exports subject licensing or other controls "must be made to the appropriate Federal department or agency, in addition to the VSD required by the Census Bureau," it notes

FCPA ENFORCEMENT: Akzo Nobel N.V., Dec. 20 reached settlements with SEC and Justice to resolve charges that two of its subsidiaries violated FCPA with bribes paid to obtain business under UN Oil for Food Program in Iraq. In agreement with SEC, it agreed to permanent injunction against future violations of FCPA's books and records provisions, to disgorge \$1,647,363 in profits, plus\$584,150 in pre-judgment interest, and to pay civil penalty of \$750,000. In non-prosecution agreement, Justice said it won't fine company on understanding that its N.V. Organon subsidiary would entered criminal disposition with Dutch National Public Prosecutor and pay criminal fine of no less than of €381,602.

MORE FCPA ENFORCEMENT: In non-prosecution agreement Dec. 21 with Lucent Technologies for FCPA violations, Justice revealed that it is also investigating separate FCPA violations at Lucent's merger partner Alcatel SA. Separately, Lucent entered agreement with SEC to pay \$1.5 million civil fine.

STEEL: ITA Dec. 27 issued Section 129 findings to come into compliance with WTO ruling against agency's use of zeroing in case of cut-to-length carbon-quality steel plate from Japan. ITA eliminated zeroing in case and recalculated dumping margin for exports of Kawasaki Steel Corporation to 9.46%.