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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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HIGHER FINES UNDER IEEPA AREN'T SLOWING SELF-DISCLOSURES

Higher penalties facing exporters who violate the International Emergency Economic Powers Act (IEEPA) haven't discouraged firms from making voluntary self-disclosures (VSDs) to the Bureau of Industry and Security (BIS) or the Office of Foreign Assets Control (OFAC), officials of those agencies say. Until IEEPA was amended to raise maximum fines per violation to \$250,000 from \$50,000 as of October 2007, BIS was receiving about 180 VSDs a year, reported BIS Deputy Assistant Secretary for Export Enforcement Kevin Delli-Colli. During the first quarter of fiscal 2008, which began Oct. 1, 2007, VSD submissions are on pace to reach that same level this year, he told an American Conference Institute program.

"We have not seen a drop off in [VSDs] since the new penalties went into place," said OFAC Deputy Director Barbara Hammerle. Whereas Delli-Colli said BIS issues warning letters for 97% of the VSDs it receives, Hammerle said OFAC "will never give a pass." But it "will mitigate tremendously," she said.

OFAC can't insist that firms conduct audits as part of any remedial action to resolve violations, she noted. When a firm offers to conduct an audit, however, that "certainly goes a long way in helping us determine what kind of violation was involved," Hammerle suggested. She said not every count of a violation will garner a \$250,000 fine under the new IEEPA authority. That high fine "will be reserved for very, very serious cases," she added. Hammerle also noted that "OFAC cases make good criminal cases" because prosecutors don't have to prove that the technology of a particular export was subject to licensing requirements. "It's pretty simple to prove an OFAC case" because the mere export alone constitutes a violation, she explained.

When asked if exporters and banks have a legal obligation to screen prospective customers, Hammerle said they didn't. Nonetheless, it would be "grossly negligent" not to use modern technology to screen customers, she added. Delli-Colli said failing to screen might go beyond gross negligence and be considered "willful self-blindness." Delli-Colli advised firms not to expect fines to increase by five times because the maximum IEEPA penalty has risen five-fold. Firms that file VSDs can expect to continue seeing substantial reductions from the maximum penalty available, he said.

BUSH TRADE AGENDA OUTSIDE HIS CONTROL

President Bush spoke more about trade in his Jan. 28 State of the Union address than he had in any of his annual presentations to Congress in the previous seven years, but the trade agenda he laid out is outside his control. Bush called for Congress to approve the free trade agreements

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(FTAs) with Colombia, Panama and South Korea, but there is no sign that lawmakers will take up any of these deals or what price they may demand for their votes. The administration itself is holding back the Korean pact waiting for Seoul to open its market to American beef. The Panama accord will have to wait until Panama addresses the issue of the president of its legislature being wanted for the alleged murder of an American soldier.

The president also said the U.S. is working to conclude the Doha Round (see story below). The trade talks, however, need consensus from 150 other countries. The key to the round may be a question of desperation. Will Bush become desperate enough to reach a deal while he is still in office or will other WTO members become desperate for an agreement, knowing that the next president and next Congress, regardless of who wins, won't offer them a better deal than Bush? For now, it is a game of chicken to see which side will blink first.

Meanwhile, Senate Finance Committee Chairman Max Baucus (D-Mont.) declared in a Jan. 30 speech that no trade legislation will move in Congress until after a measure to renew and expand Trade Adjustment Assistance (TAA) is passed. "Let me be very clear. This task, and no other, must be our nation's trade policy priority," he stated. "Until we accomplish it, other issues on today's trade agenda must take the back seat. That includes congressional consideration of pending free trade agreements with Colombia, Korea, and Panama. I simply cannot support, or consider moving these agreements in the Senate, until we realize the goal of expanded and reauthorized Trade Adjustment Assistance," he told the Peterson Institute.

SPRING MINI-MINISTERIAL WILL SEEK BREAKTHROUGH IN DOHA ROUND

If trade negotiators can narrow the number of unresolved issues in the Doha Round, particularly in agriculture, "down to a finite number of moving parts," a group of trade ministers are likely to hold a mini-ministerial this spring to seek a breakthrough in the negotiations, U.S. Trade Representative (USTR) Susan Schwab said Jan. 29. There are about 40-plus open issues in the agriculture talks, but that number needs to be reduced to a "half dozen or a dozen," she said. Unless the range of topics is narrowed so ministers can make the needed deals, "it will be hard to have a ministerial with any prospects for success," Schwab warned.

During a meeting of about 20 trade ministers during the World Economic Forum in Davos, Switzerland, there was general consensus that an agreement on modalities in agriculture and non-agriculture market access (NAMA) would have to be reached between April and June, if the talks are to finish by the end of 2008.

"If, as we all appeared to agree, we want a successful conclusion of the Doha Round in 2008, and if you work backward from a document that would be initialed at the end of the year, then you need six to eight months to develop schedules and then negotiate differences associated with the schedules," Schwab said. In particular, negotiators will want to know what is sheltered by the "flexibilities" offered to some developing countries, she said.

While a general text on services, which won't have specific commitments, may be ready for the mini-ministerial, talks on service schedules won't be, Schwab indicated. Other parts of the Doha agenda also could be dealt with in the six to eight months after the ministerial, she said. In the coming weeks, World Trade Organization (WTO) Director General Pascal Lamy is expected to work with the heads of delegations in Geneva to determine the scope, speed and substance of what could be addressed at the spring meeting, Schwab noted.

CHINA CURRENCY LEGISLATION "WON'T WORK," PADILLA WARNS

Legislation to require Commerce to include the undervaluation of the Chinese renminbi in calculating antidumping and countervailing duty (CVD) margins "won't work," Commerce Under Secretary for International Trade Chris Padilla said Jan. 30. While stopping short of

threatening a veto of such legislation, Padilla offered the Bush administration's strongest criticism to date of proposed bills to hit Chinese imports with higher trade penalties because of the currency's valuation. Padilla's critique also could become the foundation for future legal challenges of the use of the currency rules in trade cases if they were ever enacted.

"The blunt instrument of punitive legislation won't work," he said in a speech to the Center for Strategic and International Studies. "Many of the pending bills are not designed to solve problems with China but simply to reduce U.S. imports from China," he added; warning that during the current period of "economic uncertainty," it would be very unwise to raise consumer prices.

Padilla emphasized the administrative problems of applying a currency rule in trade cases. "There are serious questions about how the Commerce Department would administer a trade-remedy regime that turns on currency valuation," he said. In particular, it would be hard to determine the exact amount that the renminbi is undervalued. "I could pick up the phone today and call five economists who would give me five different opinions about the relative value of the renminbi," Padilla stated; noting that some say it undervalued by 40% while others say 25%. "I can only imagine what would happen the first time a petitioner appeals to the Court of International Trade, arguing that the currency valuation used in a trade remedy case was wrong," the Commerce official said. "Do we really want judges to arbitrate the fair market value of the dollar against foreign currencies?" he asked.

Even though Bush administration officials have been pressing Beijing to allow the Chinese currency to appreciate, an increase in the value of the renminbi won't necessarily mean a drop in the U.S. trade deficit with China. Since China ended the renminbi's dollar peg in July 2005, the currency has appreciated 15%, but during that same period, the bilateral trade deficit has increased 30%, Padilla pointed out.

Padilla also warned that U.S. adoption of a currency test in trade cases could lead other countries to do the same. Since the U.S. is the third largest target of antidumping cases globally, adoption of similar measures abroad "would be directed against our exports," he said. Padilla was careful not to point out that the decline in the value of the dollar has help spur U.S. exports in the last two years.

ANTIGUA, COSTA RICA REQUEST WTO ARBITRATION ON U.S. GATS MOVE

Costa Rica and the Caribbean nation of Antigua and Barbuda separately filed requests Jan. 28 at the World Trade Organization (WTO) for an arbitration panel to review the U.S. proposal to withdrawal its cross-border gambling services commitment under the General Agreement on Trade in Services (GATS). The U.S. has claimed it inadvertently included gambling in its Uruguay Round services commitments and has asked to have that commitment removed from its schedule. Under WTO rules, a country withdrawing a concession could be required to offer compensation to other WTO members affected by the lost trade. An arbitration panel would be asked to determine the level of compensation the U.S. would have to pay.

Washington's effort to revise its GATS commitment came after Antigua won a WTO panel ruling that U.S. restrictions on Internet gambling violated that commitment. USTR Susan Schwab met Jan. 17 with Antigua's Finance Minister Errol Cort to try to reach a settlement on compensation on the panel ruling, but no progress was reported (see **WTTL**, Jan. 21, page 4). The U.S. and Antigua agreed not to talk publicly about the negotiations, which are expected to continue, says Mark Mendel, Antigua's lead attorney in the WTO actions said.

Antigua is preparing for the worst in its fight for compensation. The country may ask a WTO compliance panel to assess whether the U.S. request to remove gambling from its GATS schedule complies with the ruling in the dispute. A compliance panel is the most likely way to assess whether the U.S. can "escape their commitment" by removing cross-border gambling

services, says Mendel. A decision on whether to request a WTO panel "will happen relatively soon," Mendel reports. One concern raised by the gambling dispute is that countries will unilaterally remove WTO commitments once they reach the end of an unfavorable dispute process. All countries in the WTO will use the strategy, if it works for the U.S., Mendel warns.

REP. MARKEY ASKS BIS TO EXPLAIN VEU SELECTIONS

Rep. Edward Markey (D-Mass.), who sits on the House Homeland Security Committee, asked BIS Jan. 29 to respond to accusations in a recent report that said two of the Chinese companies that were selected as the first Validated End Users (VEU) under the China Rule are linked to the Chinese People's Liberation Army. Markey cited charges in a report from the Wisconsin Project on Nuclear Arms Control which identified BHA Aerocomposite Parts (BHA) and Shanghai Hua Hong NEC Electronics Company (HHNEC) as companies that are closely affiliated with companies that have been the subject of U.S. sanctions for proliferation activities.

"I am concerned that the VEU program may increase the risk that dual-use exports will fall into the wrong hands, undermining the national security of our country," Markey wrote in a letter to Commerce Secretary Carlos Gutierrez. The lawmaker asked Commerce to respond to a long list of questions on how VEU candidates were chosen, what information was reviewed in their selection, how the inter-agency review process worked and what the department's response is to the Wisconsin Project charges.

EU, CHINA STYMIE DOHA TARIFF DEAL ON ELECTRONIC PRODUCTS

The European Union (EU) and China are balking at a deal to cut tariffs on electronic products in Doha Round sectoral talks because of concerns that several Asian countries will use their "special and differential" (S&D) treatment rights to opt out of a tariff agreement. The EU is also concerned about protecting some of its consumer electronics companies. Without EU and Chinese participation it will be difficult to reach the goal of covering 90% of global trade in the sector, the amount needed for the "critical mass" that would make an agreement possible.

Tariff talks on electronic products are also caught in the EU's dispute with the U.S. over coverage of the Information Technology Agreement (ITA). The U.S. has been hinting that it might ask for a WTO dispute-settlement panel to hear its complaints that the EU has violated the ITA with its decision to raise tariffs on digital cameras and other consumer electronics products.

Washington has held off action in hopes of bringing these products under the electronics sectoral agreement being negotiated under the umbrella of talks on non-agriculture market access (NAMA). The dispute was one of the topics that USTR Susan Schwab and EU Trade Commissioner Peter Mandelson discussed when they met in Brussels Jan. 21.

Although European, American and Asian consumer electronics companies are pressing for the sectoral agreement, the EU has not decided to participate in the talks, said a high-ranking trade diplomat to the WTO. "There is not much enthusiasm to participate in a sectoral that would involve the EU lowering its tariffs [in the electronics sector] ... if that is not matched by tariff reductions by others," he said. Malaysia, Thailand, Philippines and Indonesia still have relatively high tariffs in the electronics sector, he noted.

If Asian countries use developing country S&D treatment to avoid taking real commitments in electronics, then it is not very interesting to the EU, the diplomat said. Global electronics production is complicated because many Asian manufacturing facilities are owned by U.S. or EU companies or work under contract for them. Tariff liberalization can cut both ways, lowering production costs but also increasing local competition. Officials in the electronics sectoral negotiations have draft modalities, but agreement is needed between the co-sponsors on

product coverage, one trade negotiator told WTTL. S&D clauses and product coverage still need to be defined, he said. Product coverage is expected to include and be broader than the ITA, he said. The Chinese have indicated some interest, but they also have sensitive products that they'd like to protect by excluding them from the agreement. Asian countries export 52.4% of the global total of ITA products. About 14% of world merchandise exports in 2005 were products covered by the ITA.

COURT SUSTAINS ITC DECISION TO PUT PS CHEZ SIDNEY ON BYRD LIST

In a one-paragraph ruling Jan. 24, Court of International Trade (CIT) Judge Evan Wallace sustained an International Trade Commission (ITC) remand decision to place PS Chez Sidney on the list of U.S. companies eligible to receive payments under the Byrd Amendment (Slip Op. 08-13). PS Chez Sidney had successfully argued in a 2006 CIT case that it was unconstitutional to exclude it from Byrd Amendment benefits because it had not supported the antidumping petition against imports of crawfish tail meat from China (see **WTTL**, July 17, 2006, page 1).

In its Nov. 27, 2007, remand order, the ITC placed the company on the list of beneficiaries. While saying it was unconstitutional to base Byrd eligibility on whether or not a party supported the original petition, the court in 2007 said that flaw in the legislation was severable from the rest of the statute's provisions. Under the court's ruling, also written by Wallach, all affected domestic producers who are petitioners or interested parties in an antidumping petition are eligible to be included on the list of those that will get a share of the dumping duties that are distributed under the law.

BRIEF IN LACKMAN CASE WARNS OF EXPORT CHAOS FROM INTERPRETATION

If the jury instructions that led to the conviction of Walter Lachman and Fiber Materials, Inc., were applied to all items where the words "specially designed" appear in the Commerce Control List the result would be "export control chaos," contends an amicus, friend of the court, brief filed by trade consultant William Root Jan. 30 in support of Lachman's and FMI's appeal to the First Circuit Court of Appeals (see **WTTL**, Jan. 7, page 3). There are 68 equipment items on the CCL where those words appear, he noted. "Each covered product contains numerous such devices, most of which are general purpose items for which neither the government nor the manufacturer or exporters have ever imagined even the possibility of export license requirements other than to embargoed countries," says the brief, prepared by attorney Donald Weadon.

At issue are the jury instructions which interpreted "specially designed" to mean "capable of" use for rather than "exclusively for" use. The brief, which hasn't been accepted yet by the appellate court, says BIS has not used this interpretation in any other enforcement case. "Since 1995, ongoing discriminatory enforcement of the jury instruction interpretation against the defendants but not against any other exporter is unacceptable," it declares (original emphasis).

UKRAINE SET TO JOIN WTO AS RUSSIAN ACCESSION REMAINS STALLED

After 15 years of work, a WTO working group has completed Ukraine's accession package and will present it to the WTO General Council on Feb. 5. Following approval of the package, Ukraine will have until July 4 to ratify its provisions and will become a WTO member 30 days later. The package consists of the working party's report, market access schedules for goods and services, a draft General Council decision and a draft Protocol of Accession. While Ukraine's accession process nears its end, Russia's path to WTO membership is held up waiting for Moscow to adopt legislation and rules to satisfy U.S. concerns. "The pace of Russia's accession is almost entirely within Russia's hands because there are certain decisions that have to be made and legislation and regulatory changes that need to be made, just like any other

country that's acceding to the WTO," USTR Susan Schwab told reporters Jan. 29. Schwab said she had a two-hour meeting with Russian Finance Minister Kudrin while they were at the World Economic Forum in Davos. "It was very clear that first of all, the scope of what needs to be done is a manageable scope, it's a finite manageable scope. Two, that the Deputy Prime Minister, because he also has that title, has a real focus on getting this done," she said.

Once Russia joins the WTO, Congress will have to pass legislation permanently graduating it from the restrictions of the Jackson-Vanik Amendment and granting it permanent-normal-trade-relations (PNTR) status. "When the time comes, we will go to the Congress and do what we need to do in terms of Jackson-Vanik," Schwab said. "But in the next couple of weeks and months, I think we'll have some more clarity on this. But there's progress being made," she said.

NORTHROP GRUMMAN GETS BIG DISCOUNT FOR VSD IN BIS SETTLEMENT

In settlement with BIS, Northrop Grumman, a major defense aviation firm, received a 73% discount from the maximum penalty it could have faced because it made a voluntary self-disclosure to BIS of unlicensed exports made by Litton Industries, Inc., which it acquired in April 2001. Under its successor liability, Northrop agreed to pay a \$400,000 civil fine for 131 alleged violations. The BIS Charging Letter claimed Litton exported specially designed components for navigation equipment and manufacturing data to the Philippines, Singapore, Malaysia, Italy, Qatar and the United Kingdom between January 1998 and September 2002. Most of the exporters were made through Litton's Aero Products London Service Center.

"Northrop Grumman acquired Litton Industries, Inc. in April 2001 and beginning in 2002, Northrop Grumman submitted voluntary self-disclosures to the U.S. Commerce Department describing potential violations of U.S. Export Administration Regulations by the former Litton Aeroproducts Division, many of which occurred prior to the acquisition," said Northrop Grumman spokesman Jack Martin.

"Northrop Grumman cooperated in subsequent investigations by the Bureau of Industry and Security and voluntarily performed a complete review of the company's Aeroproducts exports, which resulted in the submission of supplemental voluntary self disclosures and enhancements in the company's Export Control programs and procedures intended to ensure compliance with all U.S. Export Administration Regulations," he said in an e-mail to WTTL.

*** * * BRIEFS * * ***

TRADE PEOPLE: Charles Skuba, ITA director of public affairs, moves to be chief of staff in ITA office of Market Access and Compliance; Justin J. McCarthy, assistant USTR for congressional affairs, appointed special assistant to President Bush for legislative affairs; export control specialist Steven Brotherton named partner in law firm of Fragomen, Del Rey, Bernsen and Lowrey in its San Francisco and DC offices.

PIPE: Bristol Metals LP, Felker Brothers Corp., Marcegaglia U.S.A. Inc., Outokumpu Stainless Pipe, Inc. and United Steel Workers of America filed antidumping and countervailing duty petitions Jan. 30 at ITA and ITC against imports of welded stainless pressure pipe from China.

CORRECTION: The \$20 million civil fine ITT Corporation paid as part of its consent agreement with Directorate of Defense Trade Controls (DDTC) in October 2007 for unlicensed exports of night vision products was NOT in addition to \$100 million settlement it reached with government in March 2007 but was included in that earlier penalty (see **WTTL**, Jan. 7, page 1). "The \$20 million penalty in the Department of State's consent agreement is the same \$20 million in the original plea agreement with the Department of Justice," Allison Moore, manager of communications and market intelligence for Night Vision at ITT, informed us. "The total penalty is \$100 million and does not exceed that amount," she pointed out. John Brownlee, U.S. Attorney in Roanoke, Va., who prosecuted case, confirmed this and said it was stated in deferred prosecution agreement Justice reached with company. "I also put it in three places in my statement" announcing the original settlement," he told WTTL. Initial WTTL article on the March settlement also said \$20 million of the \$100 million was going to State. DDTC consent agreement did not make it clear that its penalty had already been imposed. [**Editor's Note**: Copy of Deferred Prosecution Agreement will be sent on request to WTTL subscribers.]