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Justice Argues Court Erred in Ordering Release of License Data

A Justice appeal brief claims a federal court erred when it ruled that Commerce must release information in export license applications under the Freedom of Information Act (FoIA) because the Export Administration Act (EAA) has expired and with it the protection of the law's Section 12(c). "Every appellate court to consider a challenge to Commerce's invocation of [FoIA] Exemption 3 during a lapse has rejected that challenge," said the Nov. 25 brief to the Ninth Circuit Court (see **WTTL**, July 22, page 1).

> The government is seeking reversal of a San Francisco U.S. District Court decision in July in a suit by the Electronic Frontier Foundation (case no. 13-16480). Although there have been previous legal challenges to the use of the International Emergency Economic Powers Act (IEEPA) to retain EAA export controls and 12(c), including in *Wisconsin Project* in 2003 and *Times Publishing* in 2001, District Judge Thelton Henderson ruled that the new challenge is different because Congress has not acted to renew the EAA.

The courts in those previous challenges "recognized the overall statutory scheme and clear congressional intent to continue – by way of the IEEPA, as implemented by executive order – the nation's vital export control system, including its critical confidentiality provision, during a lapse in the EAA," the brief noted. It cited earlier decisions that agreed with the government that Commerce's invocation of Exemption 3 during a lapse is part of "the comprehensive legislative scheme as a whole."

"Finally, affirmance of the district court's misguided ruling would upset the settled, longstanding and universal expectations of export licensees and all three branches of the federal government that during periods of lapse in the EAA the Executive Orders issued pursuant to the IEEPA continue the protection of export license application information 'by statute.' The Court should not countenance the serious harm to the export administration system that would flow from such a holding," Justice declared.

Appellate Court Rejects Claim for Prejudgment Interest

The Court of Appeals for the Federal Circuit (CAFC) Dec. 27 rejected the government's request for prejudgment interest on a forfeited surety bond under Section 580 of the

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Tariff Act, saying the government's new effort to apply the section wasn't fully argued in the case before the Court of International Trade (CIT). In *U.S. v. Great American Insurance*, the appellate court upheld the CIT's ruling that Great American Insurance and Washington International Insurance were liable for bonds on imports of freshwater crawfish tail meat from China that was the subject of an antidumping order. It also upheld CIT Senior Judge Richard W. Goldberg's decision that the government wasn't entitled to prejudgment interest on duties owed, but it remanded the case for the CIT to grant postjudgment insurance, which was within the CIT's authority to impose.

> "The government has informed us that only recently did it even begin to invoke section 580 in cases involving antidumping (or, apparently, countervailing) duties—a seemingly major change in the government's asserted position on the scope and relationship of old laws," CAFC Judge Richard Taranto wrote for the three-judge panel.

"The government stated at oral argument that it has only lately asserted entitlement to section 580 interest in the antidumping context and that no court has ever considered this issue," he said in a footnote which also noted that Section 580 has its origins in a 1799 law, whose language was revised slightly in the 1870s.

"In several respects, then, the government's invocation of section 580 here presented anything but a ministerial matter; it raised significant issues that the trial court could properly view as calling for development before judgment," Taranto wrote. "In seeking to apply section 580 here, the government contends that, unlike equitable prejudgment interest, interest under section 580 is not compensatory, but rather is a 'statutory exaction' in the nature of a penalty—and, for that reason, applies *in addition* to equitable prejudgment interest," he noted.

"Moreover, the characterization of section 580 as a penalty hardly makes it a ministerial matter—and not just because the correctness of the characterization is a substantial issue," Taranto wrote. "The characterization leaves, rather than disposes of, questions about whether section 580 applies to antidumping duties at all and whether, if so, case-specific equitable considerations are relevant to its application, as is common under other, variously worded authorizations to apply penalties," he continued.

"On the question of failure to preserve the point, that characterization, whatever its merits, does not help the government, which identifies no precedent or principle suggesting that a penalty characterization would license waiting until after judgment to develop the claim under section 580 (let alone as a part of claim for dual-source interest). Penalties are commonly part of the merits relief sought, not something collateral to a judgment," Taranto added.

Final Rules Issued for USML Categories IV, V, IX, X and XVI

The Bureau of Industry and Security (BIS) and the Directorate of Defense Trade Controls (DDTC) moved quickly after Congress completed its review in December of proposed transfers of items in five U.S. Munitions List (USML) categories to the Commerce Control List (CCL), publishing companion final rules in the Jan. 2 Federal Register covering USML categories IV (launch vehicles and missiles), V (explosives/energetic

materials), IX (training equipment), X (personal protective equipment) and XVI (nuclear) will become effective on July 1, 2014. The DDTC rules convert the five categories into positive lists, while the BIS rule creates new 600-series Export Control Classification Numbers (ECCN) for items being moved to the CCL from the USML. Additional conforming modifications are made throughout the CCL and the Export Administration Regulations (EAR), including in license exception rules, to reflect the new ECCNs and the new controls that apply to them. In addition to the transition rules, BIS and DDTC published separate notices of "corrections" to rules that apply to previous changes that go into effect Jan. 6 for Categories VI, VII, XIII and XX.

> The BIS regulation creates ECCNs 0A604, 0B604, 0D604 or 0E604 and ECCNs 9A604, 9B604, 9D604 or 9E604 for vehicles, missiles, rockets, and military explosive devices that were controlled under Category IV; ECCNs 1B608, 1C608 and 1D608 for energetic materials and related items transferred from Category V; ECCNs 0A614, 0B614, 0D614 or 0E614 for training equipment transferred from Category IX; and ECCNs 1A613, 1B613, 1D613 or 1E613 for personal protective equipment, shelters and related items in Category X.

In its final transition rule, BIS rejected most comments and objections that industry made on the original transition proposals, although it agreed to make some clarifications and modifications for consistency. For example, BIS amended the final rules to provide consistency of controls on software and technology related to end-items and their operation, installation, maintenance, repair, overhaul or refurbishing. As proposed, the rules would have created varied controls.

"While this variation was not technically inappropriate and did not receive public comments when proposed in four separate rules, BIS is concerned that retaining this variation would complicate compliance," the agency said. "Standard text across ECCNs is a simpler approach," it added.

In its final rule, DDTC also amended its provisions on technical data in response to a comment it received concerning potential jurisdictional conflicts over technical data for parts and components transferred to the CCL from the USML. "The Department clarifies that unclassified technical data directly related to the parts and components that are controlled under the CCL would not be controlled under the ITAR. The Department would, however, have export jurisdiction over aggregated technical data that included technical data directly related to a defense article. Unclassified technical data directly related to parts and components that would be controlled under the CCL would remain subject to the EAR if they were proposed for export apart from the ITAR controlled technical data," DDTC explained.

CIT Says: Take Yes for an Answer

Court of International Trade (CIT) Chief Judge Donald Pogue refused Dec. 27 to continue a suit by a tobacco importer after Customs bowed to the firm's request to change a tariff classification. After the government "moved to confess judgment in favor" of plaintiff Shah Brothers and Customs and Border Protection (CBP) agreed to change the classification of the firm's imports to chewing tobacco instead of snuff, the importer asked the court to continue the case to win declaratory and injunctive relief. "Because

the Government's agreement to provide all legally available relief to Shah Bros. both ends the concrete controversy between the parties and provides the Plaintiff with all available redress, Shah Bros.' claim regarding the Government's decision-making methodology is no longer justiciable," Pogue ruled. "Accordingly, the Government's motion for an entry of judgment in the Plaintiff's favor is granted, judgment shall be so entered, and Shah Bros.' outstanding motion to compel discovery is dismissed as moot," he wrote (Slip Op. 13 -157).

> Shah argued that the case must be litigated, notwithstanding the government's agreement to reliquidate its imports, because the claimed misclassification is "capable of repetition, yet evading review." Pogue disagreed. "If or when another controversy involving the classification of Shah Bros.' merchandise arises, Shah Bros. is free to litigate the matter and obtain all redress lawfully available to it," the judge asserted.

"Accordingly, no live case or controversy remains regarding the classification, duties, or taxes owed for the merchandise in question. Because this Court decides legal questions only in the context of actual cases or controversies, the Government's agreement to reliquidate the subject entry as 'chewing tobacco' under HTSUS Subheading 2403.99.2030 concludes this litigation," Pogue ruled.

U.S. "Monitoring" Russia's Compliance with WTO Commitments

The U.S. Trade Representative's (USTR) office is "monitoring" a lot of Russian actions to meet the commitments it made as part of its accession to the World Trade Organization (WTO) but so far there have been no outright violation of those promises, the office said in a report released Dec. 20 on Moscow's implementation of its WTO obligations. In its first annual report to Congress on Russia's compliance, the USTR office's main concerns appear to be trade policy changes Russia is adopting as part of its customs union (CU) with Belarus and Kazakhstan in the Eurasian Economic Commission (EEC).

> The report notes that Russia adopted more than 500 changes to its laws and policies before it became a WTO member. "Changing its laws does not guarantee Russia's WTO compliance or ensure that U.S. workers and businesses will realize the full benefits of Russia's WTO membership; actual implementation is what counts," said USTR Michael Froman in a statement.

Russia has continued to reduced tariffs since becoming a WTO member as required, the report acknowledged. "Importantly for U.S. exporters of information technology products, Russia completed the process to become a participant in the Information Technology Agreement. In the past year, however, the Eurasian Economic Commission (EEC) introduced some 'combined tariffs' (adding a minimum specific duty to ad valorem rates), on both agricultural and industrial goods, that warrant monitoring to ensure consistency with Russia's WTO bound rates," the report states.

The report also says the U.S. is concerned about how Russia and the EEC are applying international standards, developing inspection guidelines, establishing lists, and veterinary certificates, because their actions could affect Russia's commitments on sanitary and phytosanitary (SPS) standards. In addition, the U.S. "continues to monitor Russia's regulatory regime for importation and distribution of encryption products and alcoholic

beverages," it says. "The recent imposition of a safeguard measure on combine harvesters has raised concerns about that measure's consistency with the WTO rules. The United States is also watching Russia's export regulatory regime, especially with regard to ferrous scrap," the report says.

> Russia's protection of intellectual property rights (IPR) "continues to evolve," the report states. "Russia's record with regard to enforcement, however, is weak," it adds. In particular, it raises concerns about the use of ex officio authority by customs officials at the CU border, the system of collective management of rights, and the protection of IPR on the Internet. These issues are being addressed by an action plan drafted by a bilateral working group in December 2012, it says.

"If Russia or the CU adopts or implements measures that appear not to be consistent with Russia's scheduled commitments -- for example, by restricting market access, imposing discriminatory rules on U.S. exports of goods or services, failing to meet its transparency requirements, or other actions -- USTR will investigate and use all appropriate means to resolve the matter," the report promises. But the USTR's ability "to effectively monitor and enforce Russia's implementation of their WTO commitments is affected by resource constraints," it cautions.

SolarWorld's Trade Complaint Targets Solar Components

SolarWorld Industries America, Inc. made good on its long-pending threat to take new action against imports of solar panels from China with the filing Dec. 31 of antidumping (AD) and countervailing duty (CVD) complaints at the International Trade Commission (ITC) and the International Trade Administration (ITA) against certain crystalline silicon photovoltaic products from China and Taiwan (see **WTTL**, Sept. 30, page 1). The products are key components in solar panels. The company has complained that China has circumvented the current AD/CVD orders it won against Chinese solar cells by offshoring production of the components to Taiwan.

> In a statement, SolarWorld said it was filing the cases to close a loophole that "enables Chinese producers to evade duties averaging about 31 percent by assembling modules from cells manufactured in third countries." It also claims to have the support of the Coalition for American Solar Manufacturing, although the group is not a party to the complaint.

The filing comes as U.S.-China negotiations aimed at reaching agreement to curb Chinese imports have stalled because of Beijing's apparent lack of interest in a deal, sources report. Chinese panel makers had previously reached a pact with the European Union to limit exports to Europe. In addition to the new cases, SolarWorld is continuing its suit in the Court of International Trade seeking to have the scope of the AD/CVD orders on photo cells expanded to include components and finished panels.

"We're finishing the job of presenting the facts to our trade regulators to prevent China from further damaging yet another manufacturing industry and another rich base of employment," said SolarWorld President Mukesh Dulani in a statement. "Therefore, we are once again simply asking our trade regulators to investigate the facts and apply the well-established laws that enable free trade, robust competition and lower long-term

pricing. If fair competition can be restored, the U.S. industry will return to growth," he said. SolarWorld contends the Chinese are circumventing the AD/CVD orders on cells by producing crystalline silicon photovoltaic ingots and waifers, shipping the products to Taiwan for manufacture into cells and then reimporting the cells and fabricating panels and modules for shipment to the U.S. The company wants ITA and ITC to consider two out of three steps in the process – production of modules, cells and wafers – to be within the scope of the trade remedies to prevent circumvention.

Ending Import Barriers Would Add $1.1 Bil. to Economy, ITC Says

Total private consumption in the U.S. would rise on average by $1.1 billion annually if the U.S. unilaterally ended all significant import restraints, the ITC noted in a report released Dec. 23. Removing import barriers on cheese, sugar, canned tuna, textiles and apparel, and certain high-tariff manufacturing sectors would result in expanded exports and imports of about $6.2 billion, said its eighth annual report on the economic effects of significant U.S. import restraints (Pub. No. 4440).

> These significant import restraints include high tariff rates and restrictive "quantitative restraints," such as tariff-rate quotas (TRQs), ITC noted. "Among agricultural products, the most restrictive restraints are currently applied to sugar. Among manufactured goods, the most restrictive restraints are in the textile and apparel sectors."

In contrast with prior updates, the report did not include ethanol, tobacco, and certain dairy products as sectors with significant restraints. "The exclusion of ethanol, which accounted for more than half of the welfare gain from liberalization in the previous update, reflects the expiration of the 'other duty or charge' (ODC) on fuel ethanol imports at the end of 2011. Imports of tobacco and dairy subject to TRQs… have continued to decline in recent years, which has resulted in much less restrictive TRQs that are far from being filled," the report stated.

The ITC report specifically highlighted the role of services in manufacturing. "On average, 25.3 percent of intermediate inputs purchased by manufacturers in 2011 were from the services sector. For certain manufacturing sectors, such as computer and electronic products, this percentage—a measure of 'services intensity'—is as high as 47.6 percent," it said.

As with any trade, liberalization of services trade can reduce costs and increase the variety of services available to manufacturers, the ITC noted. "Estimates in the literature suggest that reducing services trade costs would have strong positive effects on motor vehicles, plastics, and rubber, but no effect in apparel," it added.

U.S. Sees Hope in Chinese Plans for Opening Economy

Along with an extensive recital of all the bad things China is doing to keep its markets closed and raise barriers to foreign investment, a report on China's compliance with its WTO obligations also sees a bright spot in the Chinese Communist Party's recent plans for liberalizing the Chinese economy. The party's 18th meeting endorsed "a number of

far-reaching economic reform pronouncements," noted the USTR's 12th annual report to Congress on Beijing's WTO compliance released Dec. 24. "Although these important developments have yet to translate into changes in China's trade regime, the United States is encouraged by the direction that they provide," the report said.

> The 159-page report described in detail many of the disputes the U.S. has had with China since its accession to the WTO in 2001. "In 2006, once China had taken steps to implement the last of its key WTO commitments, China's policy shift became more evident," it said.

"The United States began reporting on China's stronger embrace of state capitalism, which continued into 2012. The United States also reported that some Chinese government policies and practices raised increasing concerns that China had not yet fully embraced the key WTO principles of market access, non-discrimination and transparency," it added.

Of particular concern is China's unofficial policy of requiring foreign firms to transfer technology to Chinese partners as a condition for getting approval to make investments in China. Although China has adopted laws and regulations to eliminate these WTO-inconsistent performance requirements, "some of the revised measures continue to 'encourage' these requirements, and it appears that Chinese government officials at times continue to use the foreign investment approval process to pressure foreign companies to accept one or more of these requirements or other conditions," the report said.

"These same accounts also indicate that the Chinese government officials at times tell the foreign company that it will have to transfer technology, conduct research and development in China or satisfy performance requirements relating to exportation or the use of local content if it wants its investment approved," it added.

While progress has been made in some areas, the report identified continuing problems with China's investment restrictions, innovation, intellectual property rights, technology localization, industrial policies, state-owned enterprises, government subsidization, excess production capacity, administrative licensing, government procurement, taxation, standards development, express delivery services, financial services, telecommunications services, Internet-related services, legal services, pharmaceuticals, medical devices and transparency, along with agriculture, beef and the biotechnology approval system.

The USTR's office concluded with a buzzword bingo recitation of its policy toward China, which includes its promise to "vigorously pursue increased benefits" for U.S. firms, to use "all available tools" to achieve that goal, including "dispute-settlement where appropriate," along with "rigorous enforcement of U.S. trade remedy laws," and "intensified negotiations," and to "consult closely with Congress and U.S. stakeholders."

* * * Briefs * * *

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EXPORT ENFORCEMENT: Amplifier Research (AR) in Souderton, Pa., Dec. 27 agreed to pay civil penalty of $500,000 to settle 50 BIS charges of exporting U.S.-origin amplifiers under

ECCN 3A001 to China, India, Russia, Hong Kong, Singapore, Malaysia, Taiwan, Korea and Thailand without licenses between January 2008 and June 2011. Amplifiers were controlled for national security reasons and worth $2.98 million. AR's former export coordinator and shipping supervisor, Timothy Gormley, was sentenced to 42 months in prison in January 2013 in Philadelphia U.S. District Court for his role in illegal exports.

MORE EXPORT ENFORCEMENT: Smith International (North Sea) Limited (SINS), now part of Schlumberger Limited, in West Sussex, United Kingdom (UK), agreed Dec. 23 to pay BIS civil penalty of $130,000 to settle nine charges of unlicensed reexports of EAR99 drilling tools and equipment worth $174,000 from UAE to Syria between April 2008 and January 2010. SINS neither admitted nor denied the charges. BIS settlement "relates to activities prior to the merger between Schlumberger and Smith. As such Schlumberger has no comment," wrote Stephen T. Harris, communications manager for Schlumberger North America, in e-mail to WTTL.

ENTITY LIST: In Dec. 31 Federal Register BIS removed one company under three countries from its Entity List: T-Platforms was listed under addresses in Hanover, Germany; Moscow; and Taipei, Taiwan. It was removed "as a result of a request for removal submitted by the person, a review of information provided in the removal request," notice said. It said decision "took into account this person's cooperation with the U.S. Government, as well as this person's assurances of future compliance with the EAR." Company was added to list in March (see **WTTL**, March 11, page 9). Some blogs and websites claimed Russian President Putin had protested firm's initial listing. BIS did not respond to request for reason it dropped company from list.

CUSTOMS BORDER PILOT: U.S. Customs and Border Protection (CBP) reported Jan. 2 that its five-month pilot test with Canada of cargo pre-inspection has "deemed the concept feasible." Truck cargo pre-inspection pilot began June 18, 2013 at Pacific Highway crossing adjacent to Surrey, British Columbia. Phase 1 of pilot tested feasibility of using certain technologies and jointly developed procedures to conduct CBP primary truck processing in Canada. Phase II will be conducted at Peace Bridge Crossing in Buffalo, N.Y./Fort Erie, Ont., starting in January and running for up to one year. "Phase II will test the ability of the pre-inspection process to reduce wait times and border congestion—streamlining the flow of cross-border trade that is vital to both country's economies," CBP said.

TRADE PREFERENCES: In Dec. 23 proclamation, President Obama revised trade preference standings and free trade rules with several countries. He made Mali eligible for AGOA and Curacao eligible for CBERA. He also revised rules on imports from Israel, Korea and Chile.

TAA: House Ways and Means Committee Ranking Member Sander Levin (D-Mich.) called Dec. 31 for extension of Trade Adjustment Assistance (TAA) benefits that expired at end of year. "TAA is our commitment to workers competing in a globalized economy and we must immediately extend the improvements that we made in 2009 when Congress returns," he said in statement. Expired provisions include benefits for service workers and program for older workers.

EXPORT-IMPORT BANK: Bank's total export financing in fiscal 2013, which ended Sept. 30, 2013, dropped to $27.5 billion from $35.8 billion year before, Ex-Im's annual report reveals. While dollar amount went down, number of individual authorizations hit all-time high of 3,842, with 90% of those transaction for small firms, albeit for total of only $5.2 billion. For first time since 1997, financing for non-aircraft related manufacturing exceeded financing for commercial aircraft. In 2013, bank provided $8.5 billion in aid for non-aircraft related manufacturing exports, while providing $7.9 billion for commercial aircraft and $8.3 billion for aircraft-related manufacturing. Other major sectors getting financing include $4 billion for goods and services to support gas and oil development and refining and $420 million for business aircraft and helicopters, bank reported. Ex-Im returned $1.057 billion to U.S. Treasury from its profits.