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A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Trade Laws and Export Controls

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Opinion Says Artwork Exports to Cuba Exempt from EAR

Works of art can be exported to Cuba as "informational materials" without requiring a license from the Bureau of Industry and Security (BIS), the agency said in an advisory opinion dated Aug. 5, but just posted on its website. The International Emergency Economic Powers Act (IEEPA), which gives BIS authority to license exports to Cuba, prohibits the government from blocking exports of "information and informational material," and specifically lists "artwork" under that restriction, also known as the Berman Amendment.

> "Because BIS presently relies on IEEPA to implement the Cuba embargo, artwork is considered 'informational materials' exempt from the EAR's [Export Administration Regulations] jurisdiction when exported to Cuba if it is classified under Chapter headings 9701, 9702 or 9703 of the Harmonized Tariff Schedule of the United States (HTSUS)," BIS told a requestor whose name was blacked out in the opinion.

"If the material is exempt from the EAR, a BIS license is not required for its export to Cuba," the agency advised. It noted that the request had said the artwork would be shipped to Cuba using a vessel. "Please note that, pursuant to Section 746.2 of the EAR, an export license is required for the temporary sojourn of vessels to Cuba. The vessel may not travel to Cuba unless the exporter of the vessel first obtains a temporary sojourn license from BIS," it cautioned.

According to BIS, the request for advice involved plans for a number of museums and institutions to send artwork to Cuba for a exhibition of an artist whose name was blacked out in the letter. The request had asked for confirmation that an export license was not needed for the artwork.

Sanchez to Leave Commerce Post in November

Commerce Under Secretary for International Trade Francisco Sanchez told his staff Sept. 3 that he intends to leave his post in early November. At the request of Commerce Secretary Penny Pritzker, Sanchez is staying on the job until after the Select-USA with Investment Summit Oct. 31-Nov. 1, which is intended to bring foreign investors together

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state and local governments to encourage foreign direct investment in the U.S. Sanchez's International Trade Administration (ITA) has the lead role in the program. He has not revealed his future plans. President Obama used a recess appointment in 2010 to name Sanchez to the Commerce job after his nomination was held up in the Senate for almost a year over questions about loans made to a community development group on whose board he served. Even after questions about the loans were resolved, his confirmation was still blocked along with several of the president's other trade nominees. Before his nomination, Sanchez was a trade consultant in Tampa, Fla., and had worked as an advisor to Obama's presidential campaign.

> Sanchez has spent most of his time at Commerce working on trade promotion, pushing Obama's National Export Initiative (NEI), traveling extensively overseas advocating for U.S. exports and speaking in the U.S. to encourage exporting. He has also been involved in the U.S.-China Joint Commission on Commerce and Trade (JCCT).

"Since the launch of the NEI, ITA has helped 22,000 companies realize $190 billion in U.S. export content. It is easy to see that our trade promotion efforts have been hugely successful," Sanchez said in a memo to his staff announcing his departure. He also noted the success of his work with the Interagency Task Force on Commercial Advocacy that President Obama created. "Through our Advocacy Center, we have advocated on behalf of U.S. businesses to help them win international government contracts totaling more than $120 billion in U.S. export content since 2009," he said.

Court Remands Furniture Dumping Ruling for Third Time

Court of International Trade (CIT) Judge Jane Restani remanded to Commerce Sept. 4 for the third time its antidumping order on bedroom furniture from China, rejecting the department's use of a small sample of import data to use adverse facts available (AFA) when more data was available to set the rate (slip op. 12-119).

> "Commerce has cherry-picked from the available data in order to achieve the highest-rate possible, which is both results-oriented and unreasonable. Additionally, although Commerce notes that the selected AFA rates are large enough to deter future non-compliance, Commerce provides no explanation or evidence to suggest that a lower rate would not also be sufficient," Restani declared in *Dongguan v. U.S.* (*Dongguan III*).

She noted that Commerce had argued that it need not rely on a larger percentage of sales to justify its selected rates because an AFA rate must reflect only a company's commercial reality and does not have to be an estimate of its average experience. "Commerce's position is inconsistent with the Federal Circuit's directives in *Gallant Ocean,* which require Commerce to provide substantial evidence demonstrating a rational relationship between the AFA rate selected and a reasonably accurate estimate of the respondent's actual rate," Restani wrote.

"None of Commerce's new explanations justify its reliance on the minuscule percentages of sales, and the court concludes that the selected AFA rates are not supported by substantial evidence for the reasons above and for the same reasons explained in Dongguan II," she stated. "The court finds it necessary, however, to clarify what it means by

substantial evidence on the record because Commerce appears to have not understood the previous two orders," she continued (see **WTTL**, April 15, page 6). "Unlike other AFA cases, which generally lack record evidence relating to the particular company, or of sales of a particular product or customer, the record here contains verified sales data relating to the same type of products, from the same producer, and during the same period of time as the unreported sales," Restani explained.

> "On remand, Commerce is directed to rely on a significant portion of the available evidence, already identified by Commerce as relevant and reliable, to determine the partial AFA rates. Commerce cannot substitute the adverse inference for substantial evidence demonstrating that the selected rates are related to Fairmont's actual rate. Commerce may impose an increase to deter future noncompliance, but it must demonstrate that the amount does not go substantially beyond what is necessary to deter non-compliance," she wrote.

Azevedo Strikes Upbeat Note in First Message as WTO Chief

Not surprisingly, Roberto Azevedo, who became World Trade Organization (WTO) director-general Sept. 1, sounded optimistic in his first message to members, saying he believes some elements of the stalemated Doha Round can be agreed upon at the WTO's ministerial in Bali though more work has to be done before then. "WTO members have identified some important areas of the Doha Round where agreement is within reach. This is only a small part of the overall Doha package, but agreement on these issues will provide an opportunity to help unblock other areas of the negotiations," he said.

> "Agreement in Bali on 'trade facilitation' measures to streamline customs procedures globally, on some agriculture issues and on areas of importance to developing countries — notably the least developed countries — would bring significant economic and development gains, and would have profoundly positive systemic consequences," Azevedo said.

"Regardless of the outcome in Bali, the WTO and its members will face the inevitable question: 'What next?' But what is evident to all is that the options available would be considerably richer and more diverse in the event that negotiations in Bali are successful," he continued. "Governments do have regional or bilateral trade negotiating options. But I have never heard a trade negotiator from any country say that these options were preferable to a global deal through the WTO," he said in his message.

"I believe that a deal can be struck despite the short time we have between now and Bali. I shall do everything I can to see that agreement is reached. But there is no such thing as a sure thing, and a great deal of work and commitment are required in the coming weeks if we are to succeed," he said.

EU Suspends All Export Licenses for Repression Items to Egypt

After the Egyptian army's violent crackdown on demonstrators, the European Union (EU) Council of Ministers agreed Aug. 21 to impose an EU-wide suspension of licenses for exports to Egypt of "any equipment which might be used for internal repression." The ministers said the EU believes "the recent operations of the Egyptian security forces have

been disproportionate and have resulted in an unacceptable large number of deaths and injuries." The United Kingdom's (UK) Department for Business, Innovation & Skills (BIS) followed that decision Aug. 28 by suspending 49 existing export licenses.

> "This suspension applies to licenses for the Egyptian Army, Air Force and internal security forces or Ministry of the Interior. It applies to applications for new licenses as well as extant licenses and will continue until further notice," BIS said. The 49 licenses now suspended cover a wide range of equipment, including spares for helicopters and aircraft, specialist software and communications equipment.

"The UK position is clear: we will not grant export licenses where there is a clear risk that goods might be used for internal repression," said UK Business Secretary Vince Cable in a statement. "As a result of the developing situation in Egypt, we have agreed with EU partners in this instance to go further and suspend all export licenses for goods which might be used for internal repression," Cable added. In July 2013, the UK revoked five licenses to Egypt because of concerns the items could be used for internal repression. Those licenses were for small arms and firearms components, armored vehicle components and communications equipment.

DDTC Provides Some Reasons for Returning Export Applications

Simple omissions are often the reason State's Directorate of Defense Trade Controls (DDTC) will return an export application with a Returned Without Action (RWA) determination, according to examples the agency posted Sept. 3 to explain its common reasons for issuing RWAs. Without going into specific names or sectors, DDTC provided seven reasons cases were RWA'd over the prior week. Those reasons were:

> (1) Failure to provide purchase order; (2) Provided letter of intent vice purchase order for Significant Military Equipment; (3) Not all party names and addresses were included in submission; (4) Insufficient technical data submitted for technical review; (5) Per applicant request; (6) Not following firearms guidelines regarding suppressors; (7) Exporting Commerce Control List (CCL) items on a DSP-5

UK Denies Exporting Chemical Weapons Precursors to Syria

The United Kingdom's (UK) Department for Business, Innovation & Skills (BIS) Sept. 3 denied claims that it had approved the export of chemicals to Syria could be used by the Assad regime to produce chemical weapons. The allegations were first published in the British newspaper the *Sunday Mail* and then were raised by members of Parliament. "The UK government operates one of the most rigorous arms export control regimes in the world, and has been at the forefront of implementing an international sanctions regime on Syria," the statement said.

"In January 2012, we issued licenses for sodium fluoride and potassium fluoride. The exporter and recipient company demonstrated that the chemicals were for a legitimate civilian end use – which was for metal finishing of aluminium profiles used in making aluminium showers and aluminium window frames," it said. "The licenses were revoked

following a revision to the sanctions regime which came into force on 17 June 2012 and the chemicals were not exported to Syria . This shows that the system works and reflects changes made by this government to ensure that the system of export controls is robust, responsive and effective in upholding the highest international standards," it added.

> In Parliament Sept. 3, member Thomas Docherty questioned UK Defense Minister Philip Dunne about the report. "Notwithstanding the growth of the industry, does the Minister accept that the recent debacle over parts of chemical weapons being sent to Syria shows that this Government still have not learned the lessons from Matrix Churchill and must be much more joined up between the Department for Business, Innovation and Skills and the MOD?" Docherty asked.

"I think that the honorable gentleman misunderstands the nature of the export application that was declined for Syria recently, as described by my right honorable friend the Secretary of State," Dunne replied. "We have a very clear policy for export controls that is supervised by BIS," Dunne said.

CIT Rejects Constitutional Challenge to Duty Requirements

It is not unconstitutional for Customs and Border Protection (CBP) to require payment of duties before an importer can protest a tariff classification, CIT Judge W. Gregory Carman ruled Sept. 4. Carman rejected a claim by International Custom Products (ICP) that requiring prepayment violated its Fifth Amendment right to due process, although he admitted a change in CBP policy that raised the duty on ICP's "white sauce" by 2400% and required it to pay duties of $28 million was novel in its magnitude (slip op. 12-120).

> "Plaintiff appears to be correct, though, in pointing out the novelty of the facts of this case. The parties have not informed the Court, and the Court is not aware, of any other case in which the allegedly unlawful reclassification and liquidation of an importer's goods has resulted in an increase in duty liability approaching the magnitude alleged in this case, either in relative (2400%) or absolute ($28 million) terms. Plaintiff's concerns are well founded," Carman wrote.

Despite the novelty of the case, Carman said the policy of payment before protest is well established in U.S. law and common law. "The requirement to pay all outstanding duties prior to commencing litigation on an import transaction has been a fixture of the customs laws since the Act of February 26, 1845," the judge noted. "Prior to the implementation of that statute, the same principle of prepayment as the basis for suit against a collector of customs duties was a fixture of common law since at least 1774. Plaintiff has presented no case from the last two and a quarter centuries where any court has found that the requirement to pay customs duties prior to litigating some aspect of an import transaction contravened the Constitution. The Court, likewise, has uncovered no such holding, and is persuaded that none exists," Carman wrote.

At issue was a decision by CBP to reclassify the white sauce, which it originally classified in a ruling letter as sauce "other" with a rate of 6.4%, to "dairy spread" with a rate of $1.996 per kilogram in a later notice of action. ICP asserted that CBP's failure to revoke the advance ruling letter properly, violated its rights under the Due Process

Clause. "The Court is not persuaded, however, that the harshness and unfairness of this result rises to the level of unconstitutionality," Carman declared.

* * * Briefs * * *

REBARS: Rebar Trade Action Coalition filed antidumping petitions at ITA and ITC Sept. 4 against concrete reinforcing bars (rebars) from Turkey and Mexico and countervailing duty complaint against imports from Turkey. There are already trade remedy orders on rebar from seven other countries (see **WTTL**, June 17, page 9).

EXPORT CONTROL REFORM: Starting Sept. 1, DDTC says it will review newly submitted commodity jurisdiction (CJ) requests for articles or services under USML categories VIII (aircraft) and XIX (gas turbine engines) under new rules that go into effect Oct. 15. "This change is necessitated due to current processing times for CJs (approximately 60 days), as the final determinations for CJs submitted after September 1 will not be issued until after the effective date (October 15, 2013) for the above referenced rule. Please note that this change does not affect those requests that have already been submitted and are under review," DDTC said in notice Aug. 30.

EXPORT ENFORCEMENT: Arsalan Shemirani, Iranian citizen, was sentenced Aug. 15 in D.C. U.S. District Court to 48 months in prison for conspiracy to illegally export more than 3,000 electronic components, including high performance electronic power equipment such as field programmable microchips, acceleration sensor semiconductors, and analog converters to Iran through Hong Kong without OFAC authorization. He pleaded guilty Jan. 25.

MORE EXPORT ENFORCEMENT: Brothers Rex and Wilfredo Maralit, Manhattan police officer and L.A. Customs and Border Protection officer, respectively, were arrested Sept. 6 and charged in Brooklyn U.S. District Court with conspiracy to violate Arms Export Control Act by exporting high-powered weapons, including assault rifles, sniper rifles, pistols and firearm accessories, to Philippines without State license, and with conspiring to engage in unlicensed firearms dealing. Third brother Ariel, also charged in scheme, lives in Philippines.

TRADE FIGURES: U.S. merchandise exports in July increased 1.87% from year ago to $132.7 billion, Commerce reported Sept. 4. Services exports increased 6.85% to $56.7 billion from year ago. Goods imports went up 0.82% from July 2012 to $191.3 billion, as services imports gained 0.58% to $37.3 billion.

VEU: BIS in Federal Register Sept. 6 added Intel Semiconductor (Dalian) Ltd. and two eligible destinations in China to its list of Validated End-Users (VEUs). BIS also changed name of existing VEU Lam Research Corporation to Lam Research Service Co., Ltd.

IRAN: Communications and Power Industries LLC (CPI), Palo Alto, Calif., Sept. 6 agreed to pay $346,530 to settle charges of violating Iran sanctions from March 2006 to October 2010. Swiss branch of CPI's U.S. subsidiary, Communications and Power Industries International Inc., sold x-ray generators to entity in Tehran; attempted to sell x-ray generators and medical digital imaging workstation; and directed its Canada affiliate to ship of x-ray generators and automatic exposure control field kits to entity in Istanbul, Turkey, OFAC said. CPI voluntarily self-disclosed this matter to OFAC. Exports likely would have been licensed, OFAC said.

MORE IRAN: Deutsche Bank Trust Company Americas (DBTCA) agreed Sept. 5 to pay $18,900 to settle to charges of violating Iran sanctions in Executive Order 13382. DBTCA did not voluntarily self-disclose matter. In October 2008, DBTCA allegedly processed funds transfer to account of "IAC," later determined to be Iran Airport Company, with reference to Bank Melli, designated entity, OFAC charged. In March 2009, it rejected rather than blocked $10,000 funds transfer destined for account at Export Development Bank of Iran, also designated entity.