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"Specially Designed" Tool Could Mitigate Penalties, Wolf Says

Exporters who use the "Specially Designed Decision Tool" on the Bureau of Industry and Security's (BIS) website might be able to use a printed copy of the results of that process to defend themselves in a dispute with the agency over whether or not an item they exported needed a license. While the results won't preclude BIS legal action, going through the process and correctly answering its questions "is a huge mitigating factor," BIS Assistant Secretary Kevin Wolf told the agency's Regulations and Procedures Technical Advisory Committee (RAPTAC) June 11 (see **WTTL**, May 27, page 7).

> Wolf described the decision tool as a "very, very good compliance tool." The tool, which is under "Exporter Portal" on the BIS website, leads a user through a series of questions based on the new definition of "specially designed" and its "catch-and-release" formula for determining when an item falls under the definition and would require a license for export.

"By answering a series of yes-no questions, you can get to an answer that is reliable of whether something is or isn't specially designed," Wolf said. "You can print that out, so at the top you'll have your model number and at the bottom you'll have if it is or is not specially designed," he said. The printout will have all the decisions and facts put into that conclusion. "You can create a record not only of your conclusions but of the analysis that went into that conclusion that is then useful for others who come along down the road wondering...how someone can come to that conclusion," he added.

The questions in the tool are based on the regulations and the answers should reach the same conclusion as reading the regulations, which would still be the legal basis for any action, he noted. The tool was designed to follow the regulation, so "I can't imagine there would be a delta between the two," he said. "The function of whether that is a correct answer is dependent upon the facts that were put into it, not the regulation. So it's binding to the extent that the facts entered into it were correct," Wolf stated.

Launch of Transatlantic Talks Expected at G-8 Meeting

U.S. and European leaders attending the summit of industrial countries (G-8) in Lough Erne, Northern Ireland, June 17-18 are expected to announce formally the launch of

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negotiations on the Transatlantic Trade and Investment Partnership (TTIP), with talks likely to start in early July in Washington. At press time June 14, the European Union's (EU) Foreign Affairs Council was just completing debate on the text of the mandate EU governments will give to the European Commission, the EU's administrative branch, on goals for the negotiations and any carve-outs of what not to negotiate.

> Despite some concerns that the mandate would insist on taking several key areas of trade off the table for the talks, European sources say the mandate mentions a cultural exception but doesn't take it off the table, only highlighting it for special discussion with the U.S. France has called for the exception to protect its audiovisual services, film and TV from the talks.

While other issues were not be specifically excluded from negotiations, the wording of the mandate is likely to constrain EU negotiators in areas such as privacy and food safety. In addition, one source suggested the mandate takes into account concerns raised by the European Parliament, which like the U.S. Congress, will have to approve any final deal. "At the end of the day, the Parliament has to approve this and you don't want something the Parliament will shoot down," one source told WTTL.

A cultural exception in the mandate would have annoyed the U.S. but is not considered a major hurdle because U.S. films, TV and music are already pervasive in Europe even under existing rules. "The people in Hollywood have not been knocking down my door to protest" the exception, one European diplomat said. Despite some last-minute hand-wringing, EU sources are still upbeat about the coming talks. "We think the mandate will give us a good wind to make progress," the source added. In addition, EU sources see a positive sign in the nomination of Michael Froman to be the next U.S. Trade Representative because of his role in working with the EU for the Obama administration.

OFAC Calls "Out" on Payments to Iranian Tennis Official

Treasury's Office of Foreign Assets Control (OFAC) reached across the net into men's professional tennis June 12 to enforce Iran trade sanctions, imposing a $48,600 fine on ATP Tour Inc. for allegedly "approving, facilitating, and in some instances making," 18 salary payments to an Iranian officiating at its tournaments from May 2007 to July 2010. OFAC charged ATP with violating the Iranian Transactions Regulations (ITR).

> "ATP demonstrated reckless disregard for U.S. sanctions requirements because eight of the 18 payments to the individual occurred after OFAC issued a 'Warning Letter' to ATP on August 11, 2008, for acting as a funds transfer agent in connection with individuals in Iran," OFAC noted as a factor in the settlement amount.

OFAC said other factors it applied to the settlement included the allegation that ATP's supervisory and managerial staff knew of the payments to the individual and the group did not have an OFAC compliance program at the time of the alleged violations. ATP, which has administered the worldwide circuit of men's professional tennis tournaments since 1989, did not voluntarily self-disclose the matter, OFAC said.

Mitigating factors, however, included the fact that ATP has not received a Penalty Notice or Finding of Violation from OFAC in the five years before the alleged violations; ATP

cooperated with OFAC's investigation, including by agreeing to toll the statute of limitations; ATP's transactions represent relatively low harm to the sanctions program; ATP's transactions may have been licensable under then-existing policies; ATP is a nonprofit, member-based organization; and ATP has implemented an OFAC compliance plan.

> "The statement published by the U.S. Office of Foreign Assets Control regarding alleged civil violations of Department of Treasury regulations relates to payments made to an individual that performed services as a chair umpire at several events," an ATP spokesperson told WTTL in an e-mail. "The statement is otherwise self-explanatory. ATP has no further comment regarding the matter," he added.

Punke Optimistic about Seeing Services Offers This Summer

While Deputy U.S. Trade Representative (USTR) Michael Punke hopes other countries put down formal offers in the ongoing negotiations toward a Trade in Services Agreement (TISA) by the end of the summer, the U.S. won't be tabling one itself. "I don't antici-pate we will be tabling a formal offer … specifically in the context of the upcoming meeting," Punke said June 12 in Washington. With the Obama administration having concluded its 90-day consultations with Congress eight week ago, Punke said he hopes TISA talks will now move forward rapidly.

> Before the U.S. can present an offer in the talks, interagency coordination and outreach with stakeholders must be done first, as well as continuing informal consultations with Congress, Punke explained. "That's not something I'm anticipating in a matter of weeks, rather that's something that's part of a broader discussion that is going on to formulate that position and will unfold more over the months to come," he said.

"What we're aiming at as the next phase in TISA is for countries to begin, hopefully in the context of the end of the summer, and putting actual offers on the table. It's when they do that, that we'll begin to get a better sense in a tangible way of what is there," Punke said. The next round of discussions is planned for the week of June 24.

"A big part of what we are trying to do at this juncture is to lay down and specify the fundamental architecture of the agreement. The idea behind establishing the architecture is that it will allow countries to come in … and put on the table their formal market access offers which then will allow us to have the very traditional request-offer negotiating process that we see as being at the heart of this negotiation," he added.

Court Rejects Discrimination Challenge to Tariff Schedule

The fact that certain shoes, clothing and apparel are classified as "boys", "men's" "women's" or other and subject to different tariff rates under the Harmonized Tariff Schedule of the U.S. (HTSUS) is not intentionally discriminatory and does not violate the due process or equal protection clauses of the Constitution, the Court of Appeals for the Federal Circuit (CAFC) ruled June 12. The appellate court upheld a decision by the Court of International Trade (CIT) and set the stage for the dismissal of 171 other pending cases challenging tariff rates based on gender or age (see **WTTL**, June 11, 2012,

page 4). This was the second time the CAFC addressed charges of discrimination and due process violations from tariff classifications. The court also upheld a similar CIT ruling in the *Totes-Isotoner Corp. v. U.S.* case in February 2010. In its new decision, the court relied extensively on and quoted from its earlier opinion.

> Rack Room Shoes and Forever 21, Inc. appealed the CIT decision, claiming the trade court had failed to address or incorrectly addressed its argument that the HTSUS classifications it challenged were facially discriminatory. "Neither Rack Room nor Forever 21 has pleaded facts sufficient to make plausible their claim that Congress enacted the relevant provisions of the HTSUS with discriminatory intent, and we therefore affirm the dismissal of their claims," the CAFC ruled.

"Essentially, Rack Room asks us to infer from the availability of nondiscriminatory alternatives the discriminatory intent necessary to plead an equal protection violation. We decline to do so because the Commerce Clause embodies a different standard than the standard for evaluating the equal protection challenge in this case," wrote Appellate Judge Jimmie Reyna for the three-judge panel. "Permitting an inference of discriminatory intent merely on the basis of the government's decision to forgo an alternative that does not mention age or gender would eviscerate the requirement that claimants must plead intent to state an equal protection claim," he wrote.

The ruling quotes from the *Totes* decision, which said the HTSUS is designed to promote policy objectives in international trade negotiations with other countries and for different products, manufactured by different entities in different countries with differing impacts on domestic industry and U.S. trade concessions in return for unrelated trade advantages.

USTR Can Keep Negotiating Proposals Secret, Court Rules

The USTR can keep U.S. proposals in trade negotiations secret and doesn't have to release them under the Freedom of Information Act (FOIA), the Court of Appeals for the Federal Circuit (CAFC) ruled June 7. The decision reverses a D.C. U.S. District Court decision that said the texts had to be released. "We see no basis for doubting that the effectiveness of these negotiating strategies could very well be limited if a negotiating partner were aware of the positions the United States has taken in the past," wrote Senior Judge A. Raymond Randolph for the appellate court in *Center for International Environmental Law [CIEL] v. USTR.*

> At issue was a white paper the USTR's office had prepared for now-defunct talks on a Free Trade Agreement of Americas (FTAA). Although countries in the talks had agreed to release publicly other documents, the USTR denied an FOIA request for its white paper, claiming U.S. foreign policy would be hurt by the disclosure of its position on the meaning of the phrase "in like circumstances" in the FTAA Negotiating Group on Investment.

The white paper addressed application of "in like circumstances" to "most-favored-nation treatment" and "national treatment" provisions in trade and investment agreements. While the FTAA talks have failed, the government argued that release of the paper would give other countries an advantage in other trade negotiations if they knew the U.S. position in the FTAA. "It is important to keep in mind that the Trade Representative was

expressing concerns about the United States' flexibility in future negotiations not necessarily with the governments that participated in the Free Trade Agreement of the Americas negotiations, but with governments that did *not* take part in those negotiations. Absent disclosure of the white paper, these other governments would not know the position the United States had taken in the earlier negotiations," the CAFC decision stated. "We do know that disclosure of the white paper would reveal a position taken by the United States in the past. It seems perfectly reasonable to think that could limit the flexibility of U.S. negotiators," it said.

> "It is with great irony that at a time when reports about government intrusion into individual privacy are escalating by the day, the US government would go to such lengths to protect the confidentiality of its trade negotiations – the terms of which will have real impacts on its citizens," said CIEL President Carroll Muffett in a statement after the ruling. "By denying the public access to these negotiations, the U.S. has created a fundamental barrier to the development of democracy. Most troubling, we have already seen the U.S. aggressively pushing information in a similar black box in other trade negotiations, like the recently announced Transatlantic Trade and Investment Partnership with the European Union," she added.

CAFC Reverses ITC Decision on Arbitration in 337 Case

The International Trade Commission (ITC) erred in dismissing a Section 337 patent case based on the assertion of the respondent that the dispute should be subject to mandatory arbitration instead of ITC review, the Court of Appeals for the Federal Circuit (CAFC) ruled June 7. While the appellate panel agreed on the ITC's mistake, it split 2-1 over whether the CAFC had jurisdiction to review the ITC ruling.

> The ITC had terminated the 337 investigation of certain wireless devices with 3G capabilities and components based on a claim by LG Electronics (LG) and two of its related firms that a patent licensing agreement it had with complainant, InterDigital Communications, Inc., required any dispute to be subject to arbitration. InterDigital argued unsuccessfully that the contract had expired and, thus, the arbitration clause no longer applies. InterDigital appealed the ITC decision.

The ITC ruling upheld the finding of its administrative law judge (ALJ). "However, the ALJ failed to construe the provisions in the Agreement cited by LG to the limited extent necessary to assess whether its arguments were plausible," wrote Circuit Judge Sharon Prost for the court. "If the ALJ had performed the proper analysis, he would have found that LG's license defense is not plausible. Rather, a cursory review of the relevant provisions in the Agreement confirms that LG no longer holds a license to InterDigital's patents for 3G products," she added. The CAFC reversed the ITC decision and remanded the case to the commission for further proceedings in line with its ruling.

Aside from the substance of the ITC decision, CAFC split over whether it had jurisdiction to review an ITC decision based on whether the commission's ruling was a final determination or not. It divided over the meaning of changes Congress enacted in 1994 to Section 1337(c) of the Trade Act regarding "an agreement between the private parties to the investigation, including an agreement to present the matter for arbitration." The

language of the revised wording permits the ITC to terminate an investigation based on an arbitration agreement without determining whether there is a violation of Section 337. "The threshold question we must consider is whether this court has the power to entertain InterDigital's appeal," the court noted.

> "We find, however, that the reading of Section 1337(c) urged by LG and the ITC, permitting appeals only of final decisions on the merits, is overly restrictive. It contravenes *Import Motors* and its progeny, which establish that a party may appeal an ITC order that is not a final decision on the merits if 'its effect upon appellants is the equivalent of a final determination'," Prost wrote for herself and Circuit Judge William Bryson, quoting from *Import Motors*.

When Congress changed the section, "it was envisioning a situation where the parties indisputably agreed to arbitrate—not a situation like the present case, where there is a serious disagreement as to whether the dispute is subject to arbitration," she wrote.

In a dissenting opinion, Judge Alan Lourie agreed that the ITC erred in dismissing the case, but disagreed on whether the CAFC has jurisdiction to review the decision. "In my opinion, that language is clear: a determination due to an arbitrability agreement is a termination 'without . . . a determination'," he wrote. "As it is not a determination, it is also not a 'final determination.' As none of the other appeal provisions of section 337(c) apply, I believe we lack jurisdiction to hear this appeal," Lourie wrote.

Freight Forwarders Seek Change to "Routed Transaction" Rules

Rules that dictate the responsibilities of the U.S. Principal Party in Interest (USPPI) and the Foreign Principal Party in Interest (FPPI) in "routed export transactions" need to be amended to make sure the freight forwarder handling the shipment is made part of any arrangement, the National Customs Brokers and Forwarders Association of America (NCBFAA) urged June 11.

> The current provisions in the Export Administration Regulations (EAR), which require "a writing" from the FPPI to the USPPI when the FPPI takes responsibility for obtaining export licenses, need to be amended to require the FPPI to demonstrate to the USPPI that its forwarder offers that service and accepts any responsibility in the "writing," said a letter from the association to the Bureau of Industry and Security's (BIS) Regulations and Procedures Technical Advisory Committee (RAPTAC).

The NCBFAA letter reflects concerns that many exporters have raised about the confusion caused by both EAR rules for routed transactions and those in the Census Bureau's Foreign Trade Regulations. In a recent speech, BIS Under Secretary Eric Hirschhorn said bringing those regulations closer together is one of his goals for his second term (see **WTTL**, May 20, page 1).

The current regulatory language in EAR Part 758.3(b) does not take into consideration any existing agreements between the FPPI and its forwarder, Liz Grant, a compliance analyst with freight forwarder Samuel Shapiro & Co. in Baltimore, told the RAPTAC. These agreements may conflict with the agreement between the FPPI and the USPPI, she

noted. "The FPPI rarely, if ever, understands the responsibilities associated with signing the writing," the NCBFAA's letter to RAPTAC said. Sometimes these agreements say the forwarder will not act as agent for export licensing purposes. In most cases, forwarders don't become aware of the writing until the time of shipment. As a result, cargo may be exported incorrectly identified as "no license required." The NCBFAA wants the rules changed to require the FPPI early in the transaction and before the writing is issued to confirm that the forwarder offers this service and accepts the responsibility stated in the writing.

Industry Cool to Census Post-Departure Pilot Test

Industry representatives objected June 11 to Census Bureau plans for a pilot test of a partial pre-departure filing requirement for exports eligible for post-departure filing under Option 4. One member of the BIS RAPTAC said the pilot was "a backdoor way to eliminate post-departure" filing and is intended to "gut the program."

> Another member said firms will not want to face duplicate requirements for pre-departure and post-departure filings in the Automated Export System (AES). The strong negative reaction to the pilot idea came as Joe Cortez, director of the Census regulations branch, provided RAPTAC with more details about plans for the pilot and the nine mandatory and three conditional data elements that pilot participants would have to file.

RAPTAC members complained that the benefits of the post-departure filing option have already been reduced by changes in the Census Foreign Trade Regulations, cutting the time for filing export data to five days after shipment from 10 days. One member said his firm is already spending a lot of money to revise its export documentation software to comply with changes to the regulations and would not want to face additional changes if the pilot plan became a mandatory requirement (see **WTTL**, Dec. 10, 2012, page 4).

Cortez said Census is working toward publishing a notice about the pilot in August or September to seek volunteers to participate. It will be looking for current post-departure filers in all modes of transportation to be part of the pilot, which it wants to run in early 2014. The results of the pilot will be evaluated next summer and a decision on adopting any changes would be made after that, he reported.

The nine mandatory items that would be required pre-departure under the pilot are: (1) USPPI identification, (2) ultimate consignee, (3) commodity classification number, (4) commodity description, (5) port of export, (6) date of export, (7) carrier identification, (8) conveyance name/carrier name, and (9) shipment reference number. The three conditional data elements would be; (1) name of agent if authorized to prepare and file Electronic Export Information (EEI), (2) license code/license exception code, and (3) Export Control Classification Number.

Obama Administration Eases Exports for Syrian Reconstruction

As the White House was acknowledging that the Syrian government used chemical weapons on the opposition forces, the Obama administration took a number of commercial, non-military steps June 12 to allow exporters and nonprofits to benefit the

Syrian people directly. Under one measure, BIS will be allowed to issues licenses on a case-by-case basis for the export and reexport to opposition-controlled areas of certain "reconstruction-related" commodities, software and technology, including water supply and sanitation, agricultural production and food processing, power generation, oil and gas production, construction and engineering, transportation, and educational infrastructure.

> This is "a way of providing some concrete material benefit to people in those liberated areas because of the needs for reconstruction in those areas," a senior administration official said. While the administration wouldn't comment on specific companies requesting these licenses, "there have been a number of specific instances of companies from the U.S. that wanted to send equipment to opposition-controlled parts of Syria and consistent with supporting the Syrian people," the official noted.

At the same time, OFAC issued a Statement of Licensing Policy, which "establishes a favorable licensing policy regime through which U.S. persons can request from OFAC specific authorization to engage in transactions" in the telecommunications and agricultural sectors of Syria, as well as those related to "petroleum or petroleum products of Syrian origin for the benefit of the National Coalition of Syrian Revolutionary and Opposition Forces or its supporters." It also issued General License 11a allowing nongovernmental organizations to export services to Syria to support humanitarian projects to meet basic human needs, democracy building, education, non-commercial development projects and the preservation and protection of cultural heritage sites.

Global Trade Growing More Slowly, World Bank Reports

The sharp bounce back of trade from the lows of the global recession is starting to fade, and the World Bank June 12 said it sees trade growing only 4% in 2013. This is also slower than the pre-recession pace of 7.3%. "Not only will the volume of trade grow less quickly than in the past, the value of trade will grow even less quickly as commodity prices begin to ease in response to rapidly increasing supply," the bank said in its *Global Economic Prospects* (GEP) report. "The prices of metals and minerals are already down by 30% and that of energy by 14% since their peaks in early 2011," it noted.

> After contracting in late 2012, global trade grew at an annualized rate of 5% in the first quarter of 2013, it reported. The upturn was driven by developing country imports, which rose at an 18% annualized pace in the quarter. "Most recently, there are signs of an easing in the pace of global trade. Developing-country import demand slowed to an annualized pace of 10.8 percent in April, and both export (-5.4%) and import demand (-3.6%) from high-income countries turned negative in April," it noted.

"Also, China's economic growth appears to be losing momentum as export growth slowed from 12.7 percent (y/y) in April to one percent (y/y) in May - its slowest in 15 months. With China being an important trading partner in many developing countries, weaker growth there will weigh down on the imports of other developing countries," the GEP stated. One positive phenomenon reported in the GEP is the rise in South-South trade among developing countries. More than half of developing-country trade is now with other developing countries, up from 37% in 2001. "China has played a big role in this

process (26% of total exports from all developing countries are going to China, up from 14% in 2001). But even excluding China's trade with other developing countries, and not withstand-ing rhetoric suggesting that developing-country growth has come on the back of high-income imports, growth of trade between the remaining developing countries has also outpaced trade with high-income countries by a wide margin throughout the first decade of this century," it said.

* * * Briefs * * *

EXPORT ENFORCEMENT: Federal jury in Greenbelt, Md., convicted Nader Modanlo June 10 of conspiracy to violate and violating Iran Sanctions Regulations by providing services to arrange launch of Iran's first satellite on rocket launched by Russia's POLYOT in October 2005 (see **WTTL**, June 14, 2010, page 4). According to court documents, Modanlo brokered agreement between POLYOT and Iran to construct and launch satellite. Along with his Iranian co-conspirators, he went to Zurich, Switzerland in April 2002 to form Prospect Telecom to conceal Iranian participation as investor/ lender in his satellite telecommunications activities. Investigation of case by Homeland Security Investigations (HSI) "spanned multiple countries and involved close partnership with the U.S. Attorney's Office for the District of Maryland, the Defense Criminal Investigative Service and the Internal Revenue Service," said HSI Special Agent in Charge in Baltimore William Winter in statement.

USTR: Senate Finance Committee voted unanimously June 11 to recommend Senate confirmation of Michael Froman to be next USTR (see **WTTL**, June 10, page 1). "We need to quickly approve this nomination so Mr. Froman can hit the ground running and get to work," said statement from Committee Chairman Max Baucus (D-Mont.).

COMMERCE: Senate Commerce Committee recommended by voice vote June 10 confirmation of Penny Pritzker to be secretary of Commerce.

BIS: Popular BIS Senior Engineer Joe Young retiring June 29 after 35 years in government. He has been longtime designated federal officer for BIS Information Systems TAC.

EXPORT CONTROL REFORMS: BIS is rushing to publish batch of final regulations implementing portions of export control reform initiative and other rules before agency's annual Update conference July 23, BIS Assistant Secretary Kevin Wolf told RAPTAC June 11. By mid-July, BIS and DDTC expect to publish final transition regulations revising USML categories 6, 7, 13 and 20 and moving many items from those categories to CCL, he reported. BIS also plans to publish final rule implementing Wassenaar Arrangement changes approved in December 2012. Also expected is final EAR "cleanup" rule, he said. Congressional notifications should be submitted in July for USML categories 4, 5, 9, 10 and 16, Wolf told RAPTAC.

WTO: Trade-Related Aspects of Intellectual Property Rights (TRIPS) Council agreed June 11 to extend until July 1, 2021, requirement for least developed countries (LDCs) to comply with WTO TRIPS Agreement. LDCs already have waiver that expires July 1, 2013. "The agreement reached by members makes very clear that we can come together and get things done," said WTO Director-General Pascal Lamy. "This is the spirit we will need to see in full display over the coming months in order to produce a meaningful outcome to the Bali Ministerial Conference in December," he added.

REBAR: In "sunset" review June 13 ITC found revoking antidumping duty on steel concrete reinforcing bar (rebar) from Belarus, China, Indonesia, Latvia, Moldova, Poland and Ukraine would likely lead to continuation or recurrence of material injury to U.S. industry. Vote on China was 6-0; Belarus, Moldova, and Ukraine 5-1; and Indonesia, Latvia, and Poland 4-2.