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State Settlement Targets Missile Parts Exports to Korea

Alpine Aerospace Corporation and TS Trade Tech Inc. of Closter, N.J., agreed April 5 to suspended civil penalties of \$30,000 and \$20,000, respectively, as part of separate consent agreements with State to settle nine charges of violating the Arms Export Control Act and the International Traffic in Arms Regulations with the export of Hawk missile parts to the Korean Air Force. State's Directorate of Defense Trade Controls (DDTC) apparently only noticed the violations after Justice filed a criminal information against Alpine in October 2010. DDTC then asked the company for more information. Alpine entered a corporate plea and in June 2011, was sentenced to three years' probation and a \$5000 fine.

In the consent agreements, DDTC agreed to suspend the fines on the condition that the firms use the money on remedial compliance measures. "The companies will implement additional remedial compliance measures, provide additional training to staff and principals, and will undergo two external audits of their compliance programs," State said in announcing the agreements.

The criminal information claimed Alpine exported defense articles, including a Hawk Missile Flywheel, a Hawk Missile Latch and Release, a Spider Differential and a Hawk loader link, without first obtaining licenses on six occasions from July 2005 to January 2007. Alpine caused shipper's export declarations to be filed that "falsely and fraudulently stated and caused to be stated that: (1) the defense article being exported was an aircraft and engine part; and (2) Alpine had a State Department issued license authorizing the export," the information said.

Marsha McIntyre Bailey of Hughes Hubbard & Reed, which represented Alpine in the criminal case and helped it set up its compliance measures, said "this was a great result for the client." Tae Hoon Kim, owner and CEO of both Alpine and TS Trade, "made an effort to do what was right and protect his companies," she told WTTL.

Search for New Paths in NAMA Talks Remains Blocked

The effort of the chairman of the Doha Round's non-agriculture market access (NAMA) negotiating committee to find new approaches to the deadlocked talks remains blocked by opposition from developing countries to cutting tariffs and U.S. resistance to pursuing new talks on non-tariff barriers to trade (NTB). In an exclusive interview with WTTL, NAMA Chairman Luzius Wasescha, the Swiss Ambassador to the World Trade Organization (WTO), said a series of committee meetings in March were aimed at following up on directions from



the WTO ministerial in December to see if there are new approaches to trade negotiations. “We are in a period where a large number of members are pushed to take protective measures in the tariff field and the non-tariff field, and there seems to be no a priori readiness to enter into further tariff liberalization at this stage,” Wasescha told WTTL. “The question is: Is it possible to come to a balanced outcome? Our masters for the time being say ‘no’,” he said.

“You don’t have the readiness to lower tariffs, which would lead to a structural adjustment in a certain number of important economies in developing countries. There’s just no political basis for that,” he added. At the same time, Wasescha noted differences of opinion between the U.S. and European Union (EU) over NTB talks on standards and U.S. reluctance to push talks on two baskets of NTB issues that are being called Wagon I and Wagon II.

“Now, in my consultations, I detect a certain readiness of a large majority of members to continue work on non-tariff measures, but the United States are of the view that this wouldn’t be a new approach and that we would not progress,” he said. “Whilst the idea to do some work in the tariff area appears to be too sensitive to embark rapidly into these kinds of operations. And those NTBs which I classify as Wagon II, there’s no readiness to embark on these proposals before we finalize those in Wagon I,” Wasescha said.

NAMA meetings in March discussed NTB issues under Wagon I, including a so-called horizontal mechanism, remanufactured goods and transparency, and Wagon II, which includes, export licensing, export taxes, unilateral trade measures, fireworks, forestry products and lighters. Discussions also addressed conformity assessment, textile labeling, international standards, and NTBs in the chemical and auto industries. According to other sources in Geneva, U.S. representatives expressed skepticism about continuing the talks. They said the U.S. was assessing the value of continuing discussion to decide if talks would be worthwhile without parallel progress in tariff negotiation or further talks would just lead to more frustration.

“If there is not a general mood in the house to move forward on certain issues, it’s of no use to move forward there because any additional effort will be counter productive,” said Wasescha, who will be retiring July 31. He also said he sees no chance for any sectoral tariff talks. “For the time being, I don’t see any point,” he told WTTL. “It’s certainly an issue that falls under the assessment of the ministers but for the time being there is no chance for a solution. But we should address these issues, discuss them and see how we could facilitate the ministers’ task to overcome these difficulties in the future. But for the moment, there is no readiness at all to embark on such an exercise,” Wasescha said.

Easing Burma Sanctions Won’t Help Trade – For Now

The partial lifting of sanctions against Burma that Secretary of State Hillary Rodham Clinton announced April 4 likely will do little to increase trade and foreign investment in that country for a while. After apparently fair elections in Burma, Clinton said the U.S. plans to name a U.S. ambassador, offer USAID funds and allow a United Nations Development Program presence in the country. The U.S. also will permit nonprofit activities for democracy building, health care and education, while lifting travel bans for select government officials.

For business, the U.S. is “beginning the process of a targeted easing of our ban on the export of U.S. financial services and investment as part of a broader effort to help accelerate economic modernization and political reform,” Clinton said. However, “sanctions and prohibitions will stay in place on individuals and institutions that remain on the wrong side of these historic reform efforts,” she added.

A senior U.S. official said U.S. sanctions are only part of the problem hindering American businesses in Burma. “The Burmese government retains restrictions on international investment in the banking sector, so that still remains...a constraint on any international investment... There are still restrictions, I think, the Burmese place on that kind of activity that would have

to be lifted even if we wanted to lift restrictions,” he explained. When business executives have examined opportunities in Burma, they say “the business environment is not conducive for investment; it’s not appropriate for their activity. I don’t think there’s going to be a huge rush right now. There will be a rush, I think, in terms of looking fresh at Burma,” he continued.

U.S. Loses Another WTO Fight over Clove Cigarettes

The WTO Appellate Body ruled April 4 that a dispute-settlement panel had correctly found that the U.S. had violated the Technical Barriers to Trade (TBT) Agreement by imposing a ban on clove-flavored cigarettes while allowing menthol cigarettes to remain on the market. In reaching part of its finding, the Appellate Body decided that the 2001 “Doha Ministerial Decision constitutes a subsequent agreement between the parties” on the interpretation of the TBT requirement to give countries a “reasonable interval” in which to come into compliance with new regulations (see **WTTL**, Sept. 12, page 3). The effective date for the U.S. rule was three months rather than the six months required under the accord, it ruled.

The Appellate Body upheld the panel’s ruling that clove and menthol cigarettes are “like products” under the TBT, but for different reasons. While the panel based its ruling on traditional criteria for likeness, such as end-uses, consumer tastes and habits and tariff classification, the Appellate Body said regulatory concerns underlying a measure, such as the health risks associated with a product, may be relevant to the determination of “likeness” to the extent they have an impact on the competitive relationship between the products.

Court’s Denial of Rehearing Request Draws Sharp Dissent

The Court of Appeals for the Federal Circuit’s (CAFC) refusal March 30 to grant Hitachi’s request for an en banc rehearing of its appeal of a Court of International Trade (CIT) ruling drew a sharp dissent from Appellate Judge Jimmie Reyna, who was joined by Judge Pauline Newman. Reyna complained that the denial of rehearing will allow Customs to ignore legislation that supposedly requires it to decide on protests within two years. “The majority’s decision frustrates these legislative objectives by interpreting the statute in a way that disincentivizes timely and meaningful administrative review and converts protestors into unwilling plaintiffs who face further considerable delay and litigation costs,” Reyna wrote.

Hitachi Home Electronics had asked for en banc rehearing of the CAFC’s split decision in October 2011 on its appeal from a CIT ruling which dismissed for lack of jurisdiction its plea for duty-free treatment of certain plasma flat panel televisions made or assembled in Mexico and the recovery of tariffs it paid.

Reyna noted that Hitachi’s first protests, filed in 2005, remain undecided nearly five years after the two-year deadline. “The government attempts to ease this court’s concerns regarding delay by representing that only about 8.7% of protests require more than the two-year statutory time period for Customs to complete its review,” he wrote. Reyna cited data in a government brief that said 36,040 protests were filed in 2009 and 32,908 protests (approximately 91.3%) were decided within two years. “On the scale at which protests are filed, however, even this small fraction amounts to 3,132 undecided protests in 2009 alone,” he noted.

CVD Law’s Constitutionality Challenged at Appellate Court

Congressional action that amended the Trade Act to allow countervailing duties (CVDs) to be applied retroactively to imports from non-market economies (NMEs) is unconstitutional, lawyers for GPX International Tire argued in a brief filed in the Court of Appeals for Federal Circuit (CAFC) March 23. The GPX “letter brief,” along with briefs from the government and

domestic tire firms, was filed in response to a request from the CAFC for further arguments on what to do with its ruling that Commerce did not have the legal authority to impose both CVDs and antidumping (AD) duties on the same NME goods (see **WTTL**, March 5, page 1).

How Commerce will apply the law is still a question. “I would refer you to the law which requires us to make that decision. The law speaks for itself,” Commerce Assistant Secretary for Import Administration Paul Piquado told reporters March 27. Regarding the law’s requirement for Commerce to make a “reasonable estimate” of the level of double counting when CVDs and ADs are both applied, “I think we are examining that question right now,” he said.

In its brief, the government urged the CAFC to vacate its Dec. 19 *GPX* ruling. “Furthermore, the panel should remand the case to the trial court for proceedings consistent with the new law because the amendment precludes the trial court’s remedy, requires a reevaluation of the reasoning upon which it was based, and will require the trial court to decide numerous calculations and methodology issues that trial court did not decide,” government lawyers argued.

GPX’s attorneys with the law firm of Curtis, Mallet-Prevost, Colt & Mosle said “the retroactive provisions of this new law represent an unprecedented rush to nullify this Court’s *GPX* decision and raise grave constitutional concerns.” They said the law violates the separation of power by impermissibly interfering with a judicial function and due process “by serving no legitimate purpose furthered by rational means.” The five-year retrospective application is a departure from customary congressional practice to confine retroactivity to short, limited periods “required by practicalities.”

Four USTR Trade Reports Show Mixed Results

The U.S. Trade Representative’s (USTR) annual reports on foreign trade barriers raise questions about the value of an ad hoc approach to thousands of allegedly unfair trade practices in hundreds of countries. Although the USTR claims success in resolving many disputes, the total number of identified practices appears to remain unchanged year after year. The reports comprise 650 pages of complaints, many of which have been lingering for years without resolution.

The 2012 Report on Foreign Trade Barriers, which is the 27th annual report mandated by Congress, still contains 420 pages of complaints against scores of countries. New reports on technical barriers to trade (TBT) (100 pages) and sanitary and phytosanitary (SPS) barriers (113 pages) and one on telecommunications barriers (17 pages) also contain long-running problems.

* * * Briefs * * *

EXPORT ENFORCEMENT: Dresser Inc. of Houston, Texas, agreed March 28 to pay \$88,000 fine to settle 20 BIS charges of unlicensed exports of items controlled for reasons of chemical and biological weapons proliferation and misrepresentation of facts on shipper’s export declaration. From June 2002 through December 2005, Dresser allegedly exported control valves valued at \$164,912 and classified under ECCN 2B350 to various destinations (Saudi Arabia, Kuwait, UAE and Mexico) without Commerce licenses. Dresser neither admitted nor denied charges.

MORE EXPORT ENFORCEMENT: GrafTech USA LLC of St Mary’s, Pa., formerly known as C/G Electrodes LLC agreed March 28 to pay \$275,000 civil fine to settle 23 BIS charges of engaging in prohibited conduct by exporting graphite electrodes controlled for nuclear nonproliferation under ECCN 1C298 and valued at \$6.8 million to Libya without required licenses in 2008 and exporting graphite electrodes worth \$1.15 million controlled for nuclear nonproliferation to Libya through Canada without required licenses in 2008. GrafTech neither admitted nor denied charges.

FREE TRADE: While their part in TPP talks remains under discussion, Canada and Japan announced March 25 that they will enter into free trade agreement negotiations.