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Deal with UAE May Ease Antiboycott Barriers

An agreement between the Bureau of Industry and Security (BIS) and the United Arab Emirates (UAE) could help eliminate boycott restrictions that have hurt U.S. exports to that country. Under the deal negotiated Feb. 12 by Edward Weant, director of the BIS Office of Antiboycott Compliance (OAC), and the UAE Ministry of the Economy, U.S. firms that receive tenders or contracts containing anti-Israel boycott language can come to BIS and ask the agency to contact the UAE ministry to have the language removed from the documents. The UAE is the biggest source of boycott-related requests reported to BIS, accounting for about one-third of all requests that U.S. firms report to the agency annually.

> "We have worked out a mechanism whereby they have agreed that if a U.S. business receives language, [the business] can come to us at OAC and we in turn will contact them through our embassy in Abu Dhabi and have the prohibited language removed from the contract documents," Weant told the BIS Export Control Forum in Irvine, Calif., Feb. 27. "To be successful at this, it requires your help," he added, urging firms to contact his office when they get requests.

Weant noted that the nature of the Israel boycott has changed, with the central boycott office of the Arab League in Damascus playing less of a role in its implementation and each country applying it for its own political purposes. He said this is one reason BIS has failed so far to get Iraq to change its boycott requirements on patent applications.

China CVD Bills May Solve Only Half of Problem

Identical legislation introduced in the House and Senate Feb. 29 to overturn a federal appellate court ruling and give Commerce authority to impose countervailing duties (CVDs) on imports from nonmarket economies (NMEs) may solve only half the problems created by court rulings and the World Trade Organization (WTO). Nonetheless, the measures have drawn praise from attorneys that represent petitioners in trade cases and administration officials, while sparking anger among lawyers representing respondents in these cases.

With bipartisan backing in both houses, the measure is likely to move quickly through Congress unless opponents can block it in the Senate. The legislation would undo a ruling by the Court of Appeals for the Federal Circuit, which said Commerce cannot reverse its original policy of not applying CVDs to NMEs – based on the 1986 ruling in *Georgetown Steel* – because Congress had endorsed that previous position (see **WTTL**, Jan. 2, page 1). The bills would

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show that the intent of Congress has changed and it now supports applying antidumping and CVDs remedies. The provision would change the law retroactively back to 2006, keeping existing CVD orders in 24 cases against Chinese imports. It is this retroactive application of the law that could face a constitutional challenge. As the bill is written, respondents in past China CVD cases would be unlikely to get any money back under the *GPX v. United States* rulings.

> The legislation (H.R. 4105) would give the International Trade Administration (ITA) authority to solve a problem it has been unable or unwilling to solve since Court of International Trade (CIT) Judge Jane Restani ruled against the agency's imposition of both antidumping (AD) and CVD orders on the same product in the *GPX* case in 2009. Restani said applying both ADs and CVDs to the same product amounted to "double counting" the same activity, violated the law and was "unreasonable." The WTO said double counting also violated its rules.

Under the bills, ITA could apply both remedies if it finds a subsidy and the subsidy has led to a lower import price in the U.S., and if it "can reasonably estimate the extent to which the countervailable subsidy" has "increased the weighted average dumping margin for the class or kind of merchandise" under investigation. Then it would have authority to "reduce the antidumping duty by the amount of the increase in the weighted average dumping margin estimated by the administering authority." This provision would apply from the date of enactment.

The legal question that still might continue is how the courts will interpret the instructions to ITA to "reasonably estimate" the level of double counting and offset it in future cases. In the original *GPX* case the agency said could not come up with a methodology to do that. "If this goes forward, there will still be lots of litigation at the WTO and in the courts," said Daniel Porter of Curtis, Mallet-Prevost, Colt & Mosle, which represents GPX in the case.

Industry Hits Australia's Stand on Investment Rules in TPP

Of all the countries involved in Trans-Pacific Partnership (TPP) talks, Australia should have been the easiest to deal with because it already has a free trade agreement (FTA) with the U.S. But a letter to President Obama Feb. 27 from 31 trade associations complains that Australia's opposition to strong investor-state dispute-settlement provisions in a TPP could undermine the goal of making the pact a 21st-century model for future trade agreements.

> "Australia's rejection of investor-state dispute settlement is not only thwarting the ability of the TPP negotiations to produce strong enforcement outcomes, it is also having a corrosive effect on the level of ambition and other key aspects of the TPP negotiations," the letter declared. "If Australia were able to extract such a major exemption, other countries would press forward to seek their own major exemptions from core commitments, which would ultimately unravel the ability to achieve a comprehensive, 21st-century TPP agreement," it added.

New FTZ Regulations Streamline Approval Process

In final revisions to its regulations published in the Federal Register Feb. 28, the Foreign-Trade Zones (FTZ) Board agreed with many of the changes requested in public comments on its original proposal and adopted procedures that should speed up the process for getting board approval for changes in zone operations. "The revised procedures balance the need expressed by many commenters for generally shorter timeframes for action on requests for production authority and the perspective emphasized by other commenters that potentially affected parties must be able to provide comments to the Board regarding the impact of proposed production activity," the board noted (see **WTTL**, July 4, 2011, page 3).

The board, however, rejected recommendations to impose stricter requirements on zones involving products subject to antidumping and countervailing duty orders. "We have determined that

the standard procedures applicable to any material/component for which authorization is requested will allow the Board to address concerns about negative impacts from the proposed activity," the board said. The final rule also clarified the liability of zone grantees. "A grant of authority, per se, shall not be construed to make the zone grantee liable for violations by zone participants," it said. "It would not be in the public interest to discourage public entities from zone sponsorship because of concern about liability without fault," it added.

> This clarification is a "positive development," Daniel Griswold, president, National Association of Foreign-Trade Zones (NAFTZ), told WTTL. In general, Griswold praised the final rule. "Almost everything the NAFTZ requested was considered," he said. It was a "clear victory all the way around," he said.

The revisions did not affect the process for brand new FTZ applications. In its notice, the FTZ Board noted the significant number of entirely unused FTZ sites nationwide. "Such sites appear to constitute a large majority of all FTZ sites," it said. The final rule adds a filter for production change applications that will reduce the paperwork burden on applicants and only require additional information if issues or complaints are raised. This filtering process will generally reduce review times for production changes to 120 days from 12 months, the board claims.

Order "Encourages" Agencies to Staff Enforcement Center

President Obama's Feb. 28 executive order establishing the Interagency Trade Enforcement Center (ITEC) calls for federal departments to cooperate with the U.S. Trade Representative's (USTR) office and Commerce in building cases against foreign unfair trade practices, but it only "encourages" them "to detail or assign their employees to the Center without reimbursement." The center will become part of the USTR's office, but most of its money and staff will come from Commerce. Its director will be a USTR employee and the deputy director will be assigned from Commerce (see **WTTL**, Feb. 20, page 2).

> Support for the center is supposed to come from State, Treasury, Justice, Agriculture, Homeland Security and the office of the Director of National Intelligence. "Our focus is on wherever around the world American businesses are having problems with markets, or where our unions are identifying problems for us, as in the auto parts case," USTR General Counsel Tim Reif told reporters.

Reif said the standard for bringing complaints to the WTO will still be the same the USTR has used in the past. The center's work will "complement that standard," he said. "We need to be certain that when we file, we believe that we will prevail; that what we have discovered is a violation that we can demonstrate through law and through the development of facts," he said. The center will have a more formal structure and more funding than the Trade Strike Force that the Reagan administration created in 1985, but it's still unclear whether it will accomplish more than existing staff in Commerce's office of market access and compliance achieves. The idea of an enforcement post in the USTR's office was previously proposed in legislation (S. 1919) that Sens. Max Baucus (D-Mont.) and Orrin Hatch (R-Utah) introduced in 2007.

Court Accepts Commerce Reasons for Differences in Zeroing

In a decision likely to face further appeal, CIT Judge Jane Restani issued a ruling Feb. 27 accepting Commerce arguments for why it had a separate policy on not using "zeroing" in antidumping investigations but using it in administrative reviews (slip op. 12-24). While Commerce has changed that policy in response to adverse WTO rulings, the case, *Dongbu Steel v. U.S.*, was seen by some lawyers as a potential path toward getting money back on past review decisions (see **WTTL**, Feb. 20, page 2). Restani's decision upheld a remand decision ITA issued following Court of Appeals for the Federal Circuit (CAFCA) rulings in *Dongbu* and *JTEKT Corp. v. U.S.,* in which the appellate court said the agency couldn't apply different policies unless it could explain why it took the different approaches. In her order, Restani

went to great lengths to examine the different results that can come from zeroing or not zeroing, attaching to the decision a set of charts showing the different calculations involved. "Commerce did not abuse its discretion in changing its investigation methodology, but not its review methodology," she wrote. "Commerce acted reasonably in applying the antidumping statute to conform to the different purposes of investigations and reviews. Commerce's practices are not arbitrary in this regard," Restani added. Her decision is likely to get appealed to the CAFC, which will have another chance to weigh in on weighted averages.

BIS Considers New License Exception for 600 Series

BIS plans to create a new license exception to allow exporters of parts and components transferred from the U.S. Munitions List (USML) to the Commerce Control List (CCL) to export those items license-free to countries that are not already eligible under License Exception Strategic Trade Authorization (STA). According to BIS Under Secretary Eric Hirschhorn, the planned license exception would be available when the end-item in which the parts would be used already has a license issued by State's Directorate of Defense Trade Controls (DDTC).

> "There is going to be a new license exception [for example] where you are an aircraft company and you are going to send a military aircraft to a non-STA country, and you get a State Department license for the end-use, you will have a license exception that allows you under certain circumstances to send the now-Commerce controlled smaller, less significant parts and components along with that State-licensed end-item without getting a separate license from Commerce," Hirschhorn told reporters March 1.

U.S. Doesn't Want Services to Follow GPA or ITA Models

In WTO talks on a possible plurilateral agreement on services, the U.S. doesn't want an accord modeled on the Government Procurement Agreement (GPA) or Information Technology Agreement (ITA), Deputy USTR Michael Punke told reporters March 2. A GPA approach would require a waiver to WTO rules, which advanced developing countries aren't likely to support, while an ITA-model would allow free-riders to take advantage of the pact without opening their own markets, Punke explained. Ministerial and expert-level talks have already been held and the experts will meet again in Geneva the week of March 18 (see **WTTL**, Feb. 20, page 4).

> "We are highly skeptical of any outcome that would allow major players to be free-riders in a services context," Punke said. "What that means is that we could not do, for example, an ITA-style agreement on services, because the way the ITA is structured is that the participants in that gave concessions that they embraced on an MFN [most-favored-nation] basis. We would not do that in a services context," he added. Another alternative would be a services free trade agreement, which would require substantially all services of participants to be covered. Even though many services in the U.S. are regulated by states or local governments, Punke said the U.S. could make such an offer. "Our lawyers are very confident of our ability to put substantially all services on the table," he stated.

* * * Briefs * * *

EXPORT ENFORCEMENT: David Levick, Australian national, and his company, ICM Components Inc., in Thorleigh, Australia, were indicted Feb. 29 in D.C. U.S. District Court on one count of conspiracy to defraud U.S. and to violate International Emergency Economic Powers Act and Arms Export Control Act and four counts of illegally exporting goods, including light assemblies, transducers and emergency flotation system kit, to Iran. Levick, general manager of ICM Components, remains at large.

STAINLESS STEEL SINKS: Elkay Manufacturing Company filed antidumping and countervailing duty complaints at ITC and ITA March 1 against drawn stainless steel sinks from China.