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Defense Issues Final DFAR Rule on Export Controls

Nearly two years after issuing a controversial interim final rule adding export control requirements to the Defense Federal Acquisition Regulations (DFAR), the Defense Department (DoD) April 8 issued a final rule that eliminates more of the troubling provisions that had riled academic researchers and defense contractors about three previous versions (see **WTTL**, July 28, 2008, page 3). DoD's first proposal in 2005 drew 145 negative comments mostly from universities and researchers. An August 2006 revision attracted 167 adverse comments. The interim final rule in July 2008 brought in only 12 comments criticizing the new policy.

> Under the final rule, DFAR will require all defense contracts to include a clause requiring contractors and subcontractors to comply with any applicable requirements of the International Traffic in Arms Regulations (ITAR) or Export Administration Act (EAA) and Export Administration Regulations (EAR). In response to comments it received on the interim final rule, DoD narrowed the new requirements significantly. In particular, it dropped wording that appeared to restrict the "fundamental research" exception to controls and made it clear the new rules don't make any change to U.S. policy on research controls.

Now, the rules say "It is in the interest of both the Government and the contractor to be aware of export controls as they apply to the performance of DoD contracts." It also declares that "It is the contractor's responsibility to comply with all applicable laws and regulations regarding export-controlled items. This responsibility exists independent of, and is not established or limited by, this subpart."

DFARS will require defense contracts to include a clause saying the contractor shall comply with all applicable export control laws and regulations. The clause will say contractors "shall consult with the Department of State regarding any questions relating to compliance with the ITAR and shall consult with the Department of Commerce regarding any questions relating to compliance with the EAR."

Commerce Places Limits on ThyssenKrupp's FTZ Approval

Commerce in the April 7 Federal Register announced a preliminary staff recommendation to approve a Foreign Trade Zone (FTZ) subzone for ThyssenKrupp's (TK) new steel mill in Alabama but with restrictions that will limit FTZ benefits only to steel produced for export. In its application, TK said it intended to use the duty-free benefits of FTZ subzone status to import certain ferroalloy raw materials for the production of carbon and stainless steel at the

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plant. U.S. steel competitors vigorously opposed granting of the subzone, claiming it would give TK a competitive edge (see **WTTL**, Sept. 14, page 3). Commerce agreed with the subzone opponents and cited the potential injury to raw material producers.

> "Analysis of the application record indicates that full approval of the Thyssen-Krupp application could have a negative impact on domestic raw material suppliers as well as other domestic steel producers," Commerce said. "Unrestricted use of FTZ procedures in the steel industry could harm certain domestic raw material producers if cost savings are provided for imported materials used in ThyssenKrupp's production for the U.S. market," Commerce explained.

"As to impact on other domestic steel producers, while ordinarily all companies in an industry would have an equal opportunity to use FTZ procedures for their operations, the structure of many existing U.S. steel plants could make those companies' use of FTZ procedures overly complicated and costly," the department stated. "In addition, ThyssenKrupp will be sourcing the 'slab' for its carbon steel operations from Brazil, and will be shipping some stainless steel production to Mexico for certain cold-rolling operations," it noted. "Other domestic producers conduct such operations in the United States, creating higher levels of U.S. activity and employment," Commerce said. A TK spokesperson declined to comment on the Commerce notice, but said carbon steel production at the plant is schedule to begin this summer and stainless steel production in the fall.

U.S. Aims to Manage Relations with China

The Obama administration is making a concerted effort to calm the waters in U.S.-China relations over China's currency policies. That appeared to be the aim of a short, unscheduled visit that Treasury Secretary Tim Geithner made to Beiing April 8 and also the goal of visits to China that Deputy U.S. Trade Representative (USTR) Demetrios Marantis will make the week of April 12 and Commerce Under Secretary Francisco Sanchez will make in May.

> In the wake of Geithner's trip and his April 3 decision to postpone issuing Treasury's annual report on foreign currency manipulation, speculation has increased that China intends to resume allowing its currency, the renminbi, to appreciate at the slow pace it did from 2005 to 2008. Such a policy shift might appease China critics for a while, but many economists say a return to the previous rate of appreciation would not significantly change the bilateral trade balance.

As public attention and debate have focused on China's currency, U.S. officials say that friction has not prevented working-level negotiations from continuing to address other trade problems in the context of the bilateral Strategic and Economic Dialogue (SAED), which will meet May 19-25, and the Joint Commission on Commerce and Trade (JCCT), which will meet in the fall. Sanchez told reporters April 7 that the public debate has not hurt working-level efforts. "I think it hasn't because both China and the United States recognize that it's in neither of our interests to escalate trade tensions," he said.

Sanchez and Marantis will be addressing similar issues during their visits to China, including growing concern about China's indigenous innovation initiative and continuing complaints about the protection of intellectual property rights. "China is a vey important trading partner for the United States," Sanchez said. "We and the Chinese need to manage our commercial and trade relationship very carefully," he stated; adding that he won't be bashful about raising issues that need to be dealt with.

A Treasury statement after Geithner's talks with Chinese Vice Premier Wang Qishan has been parsed more a carefully by trade pundits that the words of the Delphic Oracle. "The two sides exchanged views on U.S.-China economic relations, the global economic situation and issues relating to the upcoming economic track dialogue of the second U.S.-China Strategic and Economic Dialogue, to be held in Beijing in late May," the department reported. Geithner's

April 3 statement on the delay of the currency report also has drawn intense interpretation as to whether or not it means the U.S. will declare China to be a currency manipulator. "China's inflexible exchange rate has made it difficult for other emerging market economies to let their currencies appreciate. A move by China to a more market-oriented exchange rate will make an essential contribution to global rebalancing," he said. He also said the U.S. will use the G-20 and SAED meetings with China "to make material progress in the coming months."

Appellate Court Upholds ITC Discretion in Cumulation

The Court of Appeals for the Federal Circuit (CAFC) ruled April 7 that the International Trade Commission's (ITC) has discretion to apply the cumulation provisions of the antidumping law based on differing conditions of competition and to fit market and pricing conditions. In *Nucor v. U.S.* (case 2009-1234, -1235), the appellate court upheld a Court of International Trade (CIT) opinion that sustained an ITC decision to divide the "sunset" review of imports of corrosion-resistant steel into two groups of countries and to find the likelihood of continued injury to U.S. industry from one group but not the other.

> "As the ITC explained in its thorough 187-page report, the subject imports' recent volume, pricing, and market trends as well as the presence of U.S. affiliates indicate the extent to which certain industries would likely focus on the U.S. market in the absence of the duty orders," Circuit Judge Randall Rader wrote for the three-judge CAFC panel. "The ITC reasonably relied on these likely differing conditions of competition in prospectively analyzing the future likelihood of material injury," he wrote.

The ITC had grouped together imports from Australia, France, and Japan and found no likelihood of continuing injury; thus terminating their antidumping orders. It cumulated imports from Germany and Korea and found the likelihood of continued injury. It also found no injury from imports from Canada. "The statutory language endows the Commission with discretion to determine cumulative impacts," Rader said. "The statutory language alone suggests that the Act does not intend the same application and the same justifications to apply in both mandatory and discretionary settings. Moreover, nothing in the legislative history suggests that the mandatory and discretionary cumulation provisions share the same, single rationale," he added.

Brazil Wants Further Concessions on U.S. Cotton Subsidies

Brazil wants to hear additional proposals from the U.S. on how Washington intends to change its cotton subsidy program as a condition for continuing to postpone retaliation against U.S. exports, Brazilian officials indicate. Brazil is looking for serious engagement on the programs by the administration on what changes it might propose to Congress in the next review of the Farm Bill, one Brazilian official told WTTL. A willing U.S. negotiator at the table is a prerequisite in the process, he said (see **WTTL**, March 22, page 1). Talks that Deputy USTR Miriam Sapiro and Agriculture Under Secretary James Miller held with Brazilian officials led to an April 5 decision by Brazil to put off sanctions until April 22.

In return for the delay, the U.S. promised to pay Brazilian cotton growers $147.3 million in compensation for injury from the U.S. cotton program and to propose a rule by April 16 to recognize beef from Brazil's Santa Catarina state as free of diseases that have blocked that trade. The U.S. also agreed to modify the GSM-102 Export Credit Guarantee Program and hold technical discussions on further operation of the program. If these steps are taken, Brazil said it would extend the postponement for an additional 60 days and further into the future.

Congressional reaction to the deal suggests that U.S. negotiators had cleared the offer with lawmakers before heading to Brazil. "We are encouraged that both sides have agreed upon a framework for dialogue and a process to further discussion," said a joint statement from Senate Agriculture Committee Chairman Blanche Lincoln, (D-Ark.) and Ranking Member Saxby

Chambliss, (R-Ga.). The two senators also made it clear that any final agreement will require congressional approval and legislation, which might not come quickly. "Ultimately, Congress and the Senate and House Agriculture Committees in particular are responsible for crafting changes to these programs and we look forward working with Ambassador Kirk and Secretary Vilsack as both sides explore modifications for consideration during the 2012 farm bill process," Lincoln and Chambliss said.

U.S. Claims ITU Recommendation May Be WTO-Inconsistent

The U.S. is facing the challenge of trying to harmonize what it considers to be the conflicting policies of two international organizations. In its annual Section 1377 report April 5 on foreign barriers to U.S telecommunications providers, the USTR's office complained that a recommendation adopted by the Geneva-based International Telecommunications Union (ITU) may be inconsistent with World Trade Organization (WTO) rules. The USTR had complained about the ITU policy in last year's 1377 report, and now said it will "continue to work with its trading partners to urge them not to implement the ITU recommendation or similar policies."

> Adopted by the ITU in October 2008, Recommendation D.156 encourages developing countries to consider imposing a "network externality" fee on telephone calls originating in developed countries and terminating on developing country networks to fund the developing countries' networks. It is "premised on the idea that operators in developing countries should be compensated for building out networks and providing developed countries with greater calling opportunities in their markets," the USTR report said.

"The ITU recommendation appears to encourage potentially WTO-inconsistent action," it argued. "In particular, the recommendation appears to run counter to obligations set out in the GATS [General Agreement on Trade in Services] and various U.S. free trade agreements (FTAs) to afford MFN [most favored nation] treatment to foreign services suppliers." it added. "Practically all ITU Members are also WTO Members, and a number of ITU Members are also parties to FTAs with the United States. Thus, if a WTO Member or U.S. FTA partner were to implement the ITU recommendation, it would raise serious concerns about whether the country was affording MFN treatment to foreign telecommunication suppliers," the report stated.

* * * Briefs * * *

EXPORT ENFORCEMENT: BIS imposed $32,000 civil fine on Deepsouth Hardware Solutions, Inc., of Hammond, La., March 26 as part of agreement with firm to settle single charge of exporting to organization on BIS Entity List. BIS accused Deepsouth of exporting controlling instruments classified under ECCN 1B999 to Chashma Nuclear Power Plant in Pakistan in 2007 without approved license. Plant is operated by Pakistan Atomic Energy Commission, which is on BIS Entity List. Firm will be able to pay fine in two $16.000 installments. It neither admitted nor denied BIS charge.

SURINAME: USTR's office in April 5 Federal Register asked for public comment on whether or not to grant Suriname trade preferences under Caribbean Basin Initiative (CBI).

CHINA: Senate Finance Committee Chairman Max Baucus (D-Mont.) and Ranking Member Charles Grassley (R–Iowa) asked ITC April 1 to conduct fact-finding investigation into competitive factors affecting agricultural trade between China and United States in years since China's accession to WTO.

CHLOROPICRIN: ITC April 6 made "sunset" review determination that ending antidumping order on chloropicrin imports from China would likely lead to renewed injury to U.S. industry.

TSRA: During October-to-December-2009 period, OFAC took 97 business days to deny one application for export of medical device to Iran, agency said in its latest report on processing of licenses for Iran and Sudan under TSRA. OFAC issued 289 licenses or amendments for exports to Iran; 17 for exports to Sudan. Average approval took 85 days, it reported.