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"Returned Without Action" CJs Tripled in Three Years

The percent of Commodity Jurisdiction (CJ) requests returned without action (RWA) by State's Directorate of Defense Trade Controls (DDTC) has tripled in the last three years, rising from 6% in 2007 to 18% in 2009, according to a State official. RWAs had dropped to 3% in 2008. The increased rate of RWA came as the number of CJs submitted to DDTC has more than doubled in three years, reaching 817 in 2009, Robert Copley, deputy director of DDTC's defense trade control policy division, told the Bureau of Industry and Security's (BIS) Export Control Forum in Newport Beach, Calif., Feb. 23.

> The increase in RWAs is due to several factors, including DDTC's adoption of a new form for submitting requests, a policy of returning submissions if the information on the form is incomplete and a new 60-day deadline for completing action on CJs under a directive that the White House National Security Council (NSC) issued in June 2009 (see **WTTL,** Sept. 14, page 3).

As RWAs have increased, the percentage of CJ determinations that placed items on the Commerce Control List administered by BIS has fallen. In 2009, of the 817 completed actions, 55% were classified on the CCL, 21% on the U.S. Munitions List (USML) and 5% having split jurisdiction. This compares to 2008 when 70% of CJ requests resulted in CCL classifications, 20% on the USML and 7% split, Copley reported.

The NSC directive also established an escalation process for resolving interagency disagreements over the classification of items. An initial DDTC decision is due within 30 days. If there is disagreement over that determination, the case is supposed to be escalated to officials at the deputy assistant secretary (DAS) level, who have to resolve the dispute before day 43. If these DAS-level officials can't settle the issue, the CJ is then referred to an Interagency Policy Committee (IPC) comprising assistant-secretary level officials and chaired by an NSC representative. According to sources, the resolution of cases at the DAS level has been working well, with officials meeting weekly and most disagreements settled. Hard cases that go to the IPC, however, are still getting bogged down for months despite the NSC directive.

Appellate Court Reverses ITC 337 Ruling on Crocs Patents

The maker of the popular Crocs vinyl footwear has finally won vindication against the flood of patent-violating imports, but its legal victory may have come too late to prevent the injury it suffered from the mass copying of its design. The Court of Appeals for the Federal Circuit

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(CAFC) Feb. 24 reversed a 2008 International Trade Commission (ITC) ruling, which had rejected a Section 337 complaint by Crocs, Inc., against patent-infringing imports. The CAFC said the ITC was wrong to reject the validity of two of the patents Crocs held for the footwear.

> "Because the Commission erred in finding that the prior art taught all of the claimed elements of the '858 patent and incorrectly weighed the secondary considerations, this court reverses the Commission's finding that the '858 patent would have been obvious," wrote Appellate Judge Randall Rader for the three-judge panel. "Because the Commission also erred in claim construction for the '789 patent, in applying the ordinary observer test for infringement, and in applying the technical prong of the section 337 domestic industry requirement, this court reverses the Commission's determination on the '789 patent," he continued.

"This court has cautioned, and continues to caution, trial courts about excessive reliance on a detailed verbal description in a design infringement case," Rader stated. "This case shows the dangers of reliance on a detailed verbal claim construction," he said. The opinion included three pages of diagrams and photos showing how the design elements of the imported footwear looked nearly exactly like diagrams in the Crocs patents. "These side-by-side comparisons of the '789 patent design and the accused products suggest that an ordinary observer, familiar with the prior art designs, would be deceived into believing the accused products are the same as the patented design," Rader wrote. "In the absence of a rebuttal, Crocs may add its commercial success to its proofs of non-obviousness," he also noted.

Authority to Use IEEPA to Enforce EAA Still Open Question

The president's authority to use the International Emergency Economic Powers Act (EAA) to enforce the expired provisions of the Export Administration Act (EAA) remains an unsettled issue – at least in the minds of the judges of the D.C. U.S. Court of Appeals – despite several past court ruling that said the president had that power. At Feb. 23 oral arguments in the appeal of Micei International against a BIS denial order, the three appellate judges hearing the suit pressed lawyers for Micei and the government to explain why their court had jurisdiction to hear the case since the EAA, which had given the court jurisdiction, has expired (see **WTTL**, Feb. 22, page 3).

> After BIS fined Macedonia-based Micei $126,000 and imposed a five-year denial order on the firm for allegedly aiding and abetting the violation of an earlier denial order against Yuri Montgomery, the company filed suit in the circuit court, claiming IEEPA doesn't give BIS authority to impose a denial order against all exporting as a civil penalty. The appellate court had asked lawyers for both sides to address the issue of the court's jurisdiction, but questions raised by the judges hearing the case also appeared to reopen the broader question of using IEEPA to maintain EAA controls and penalties.

At one point during the hearing, Judge Douglas H. Ginsburg told Justice Department attorneys, "The jurisdictional point was just wrong." The judges also expressed particular interest in a separation-of-powers issue raised by Judge Thomas B. Griffith, who questioned whether Congress intended or had the authority to grant the executive branch the authority to extend EAA provisions. Judge Stephen F. Williams asked Robert Clifton Burns of the Bryan Cave law firm, which represents Micei, "Why is there a structural problem here, if Congress and the president [both] agreed to that intent?" Burns replied that "Congress can't delegate to the president to choose which jurisdiction" will hear a case.

While much of the discussion focused on the jurisdiction question, the judges also addressed some merits of the case. Burns argued that BIS wrongly contended that Micei defaulted in the case by inadequately responding to charges expressed in the charging letter the agency had sent the company. "Our client did file extensive factual pleadings denying" the allegations, he told the panel. Judge Williams called the BIS charging letter a "strange narrative," telling Justice

attorney Anisha Dasgupta, "It's still unclear what you're looking for." Dasgupta stated that if the D.C. Circuit concludes it has jurisdiction to consider the case, the judges should ultimately decide that "there is no question the agency had the authority to charge Micei with acting with the knowledge" that dealing with Montgomery amounted to an illegal act. She said Micei's responses to the BIS complaints demonstrated a "conscious disregard" and "willful avoidance of the facts" the agency presented. A ruling is likely sometime before the court's summer recess.

Doha Talks Not Ready for Ministerial Meeting, Lamy Says

World Trade Organization (WTO) Director General Pascal Lamy has set March 29-30 for the promised "stocktaking" meeting on the status of the Doha Round, but because of the lack of progress since the Ministerial Conference in December, the stocktaking session will involve only senior-level officials and not trade ministers. The stocktaking meeting was intended to determine whether the Doha Round could be completed in 2010, which world leaders have claimed was their goal. "In my view, the 2010 question has two components — a solid technical preparation and a political determination," Lamy told the WTO General Council Feb. 22.

> "On the state of play in the bilateral and multilateral processes, my sense is that, although some progress is taking place, gaps remain," Lamy reported. "At this stage we do not yet have a clear sense of the size of these gaps and we would certainly need to have a better sense by the stocktaking at the end of March," he added. "On the latter point, the political decision about 2010, I believe this is a judgment that belongs to ministers and that, on this specific issue, engagement will be needed. Given where we are right now, it is also clear, however, that the end of March is too early for that," Lamy said.

"At the stocktaking we would therefore have a better sense of where the gaps remain, the size of these gaps, as well as the dynamic to address them," he said. "This would enable you to report to your ministers and decide after further consultations on how best to address the next steps post-stocktaking, which will need political guidance." he added. Lamy also gave an overview of the progress in each of the difference groups conducting negotiations. In each one, discussions have been held and some small progress made, but all will need many more meetings and more negotiations, Lamy suggested.

Kirk Changes Tone on Trade in Front of Retailers

Perhaps it was just an attempt to appease an audience of retailers who import most of the goods they sell, but U.S. Trade Representative (USTR) Ron Kirk played down his tough, trade-enforcement rhetoric and acknowledged Feb. 24 that the U.S. economy is more than just manufacturing and farming. Those workers are important to U.S. trade, "but they are hardly the only ones," Kirk told a conference of the Retail Industry Leaders Association, which represents large chain retailers.

> "American managers, marketers and designers at firms like yours are working hard to establish American brands around the world," he said in his prepared remarks. "They are reaching out to billions of potential customers, opening stores in foreign countries and advertising American products in foreign tongues. And American retail workers are sourcing global products and selling global goods to American customers in every state," he added. "The global supply chain does more than just create jobs. Trade also helps working Americans of every kind to stretch the family budget further," Kirk said.

As Kirk was reaching out to retailers, President Obama the same day was trying to calm business concerns about his economic and trade policies in a speech to the Business Roundtable. "I know that trade policy has been one of those longstanding divides between business and labor, between Democrats and Republicans," he said. "To those who would reflexively support every

and any trade deal, I would say that our competitors have to play fair and our agreements have to be enforced. We can't simply cede more jobs or markets to unfair trade practices," Obama said. "At the same time, to those who would reflexively oppose every trade agreement, they need to know that if America sits on the sidelines while other nations sign trade deals, we will lose the chance to create jobs on our shores," he stated. "In other countries, whether China or Germany or Brazil, they've been able to align the interests of business, workers and government around trade agreements that open up new markets for them and create new jobs for them. We must do the same. And I'm committed to making that happen," Obama declared.

> "That's why we will work to resolve outstanding issues so that we can move forward on trade agreements with key partners like South Korea and Panama and Colombia. And that's why we will try to conclude a Doha trade agreement –- not just any agreement, but one that creates real access to key global markets," he said. The president also touted his National Export Initiative and his agreement to enter talks on the Trans-Pacific Partnership (see **WTTL**, Feb. 8, page 3).

But critics of the Colombia and Korea deals will find ammunition to use against them in a working paper issued Feb. 25 by the Economic Policy Institute (EPI), a Washington think-tank backed by organized labor. The paper by EPI economist Robert Scott claims the two pacts are likely to increase the trade deficit by $16.8 billion and eliminate or displace 214,000 U.S. jobs. "Other projections, which claim that these deals will create jobs in the United States, including those from the U.S. International Trade Commission and one published by the U.S. Chamber of Commerce, ignore factors such as the impact of trade deals on foreign direct investment (FDI) and the role played by non-tariff barriers and exchange rate manipulation, thereby underestimating the impact of these deals on U.S. imports and job losses," the paper asserts.

* * * Briefs * * *

BIS: Tom Madigan, director of BIS Office of Export Enforcement retired from government service Feb. 19. John Sonderman will serve as acting director.

ITT: State Department in Feb. 22 Federal Register announced early termination of defense export licensing ineligibility and statutory debarment of ITT-Night Vision Division effective Feb. 4. Sanctions were imposed on company after ITT Corporation pleaded guilty in March 2007 to violating Arms Export Control Act. State said it took action "after a thorough review of the circumstances surrounding the conviction, and a finding that appropriate steps have been taken to mitigate any law enforcement concerns."

AES: Census in February 22 Federal Register issued final rule barring use of Social Security Numbers as identification number in AES filings. Separately, bureau sources say plans for proposing revisions to Foreign Trade Regulations, including new policy on Option 4 post-departure filing authority, has been delayed again as talks continue with Customs on possible changes in policy (see **WTTL**, Dec. 14, page 4).

SAUDI ARABIA: Week after reaching agreement with Israel to remove it from Special 301 Watch List, office announced Feb. 24 that it was removing Saudi Arabia from Watch List after out-of-cycle review determined that kingdom had made significant progress in last year to improve IPR protections through stronger laws and stepped up enforcement (see **WTTL**, Feb. 22, page 4).

SHRIMP: USTR's office in Feb. 23 Federal Register asked for public comment on Vietnam's Feb. 1 request for WTO dispute-settlement consultations with U.S. over Hanoi's complaint against ITA's administrative reviews and new shipper decisions for antidumping orders on frozen shrimp from Vietnam.

EX-IM BANK: Federal agents Feb. 17 arrested Oswaldo Kuchle-Lopez following his indictment in El Paso U.S. District Court on charges of defrauding Ex-Im Bank of $3,307,146 as part of alleged scheme to obtain Ex-Im guarantees for bogus sales in Mexico of various heavy machinery, including dump trucks, farm equipment and cement mixers. Kuchle-Lopez allegedly never delivered equipment to Mexico and defaulted on loans Ex-Im had guaranteed, causing bank to pay claims to lending institutions that made loans.

EXPORT ENFORCEMENT: Four individuals and three freight-forwards in Miami were indicted Feb. 19 on charges of exporting such items as Playstation 2 games and cameras to office mall building in Paraguay known as Galeria Page in Ciudad del Este, which OFAC in December 2006 designated as Specially Designated Global Terrorist entity.