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A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Trade Laws and Export Controls

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## Sirchie Hit with $12.6 Million Penalty for Violating Denial Order

Less than a week after the government imposed the largest fine ever for a violation of the Export Administration Regulations (EAR), the Bureau of Industry and Security (BIS) and Justice Department have imposed another multimillion dollar penalty on a firm for violating a BIS Denial Order. Sirchie Acquisition Company, LLC, of Youngsville, N.C., has agreed to pay a $12.6 million fine as part of a settlement agreement with BIS and a deferred prosecution agreement with Justice, BIS announced Feb. 12 (see **WTTL,** Oct. 10, 2005, page 3).

Sirchie was charged as successor in liability to Sirchie Finger Print Laboratories (SFPL), also of Youngsville, which it acquired in January 2008. SFPL and its former president, John Carrington, were the subject of BIS denial orders in September 2005 for the alleged export of fingerprinting equipment subject to EAR crime controls without licenses. In the 2005 settlement with BIS, SFPL paid a $400,000 fine. Carrington later pled guilty to criminal charges and paid a $850,000 crim-inal fine and was sentenced to 12 months probation.

In the newest charges, the government claimed SFPL employees continued to do export business with Carrington despite the denial order barring such activities. An investigation by the BIS Office of Export Enforcement found that SFPL employees and Carrington had arranged a scheme to export $1.25 million in fingerprint detection equipment to Hong Kong and China through Italy. Carrington "had this diversion scheme put in place specifically to evade U.S. export control laws," according to a statement of facts annexed to the deferred prosecution.

Under the BIS deal, Sirchie will pay a $2.5 million fine for 10 charges of aiding and abetting – the maximum fine permitted – and will be subject to a five-year denial order which BIS will suspend and then waive if Sirchie remains in compliance with export controls and meets other conditions in the deferred prosecution agreement. One of those conditions is the hiring of an independent compliance monitor and implementation of an export compliance program. Justice will let Sirchie apply $1.5 million of the fine to compliance efforts it has or will take. Of the remaining $8.6 million, $3.6 million will be paid within 30 days; $1 million on the first anniversary of the deal; $1 million on the second anniversary; and $3 million by Feb. 1, 2012.

## WTO Talks Seek Transparency for Technical Barriers to Trade

Doha Round talks aimed at addressing market access for industrial goods are grappling with how to strengthen existing rules on technical barriers to trade (TBT) to increase transparency

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when countries impose new standards and conformity assessment requirements. A Feb. 2-5 meeting of negotiators at the World Trade Organization (WTO) focused on proposals from the U.S. and European Union (EU) to improve transparency for TBTs in such areas as autos, electronic products and textile labeling. The proposals are being called TBT-Plus.

> As tariffs have fallen, non-tariff barriers (NTBs) have increasingly been used to protect domestic industries, trade officials say. Participant in the talks still refer to a 2005 U.N. report that found a more stringent trade environment has emerged since the Uruguay Round, with more NTBs being applied to high-technology products, consumer electronics, food and agricultural goods.

At the most recent session, Canada offered a "non-paper" intended to help focus the U.S.-EU proposal on new requirements that won't duplicated existing TBT rules. The proposals appear to mimic requirements now set out in U.S. law under the Administrative Procedure Act to other countries. Everyone agreed to improve transparency, said Swiss Ambassador Luzius Wasescha, who chairs the talks, "but there are still different approaches with regard to...international standards, with certification, [and] type approval." The paper doesn't address which conformity assessment procedure is used, he said, only the transparency around the method used.

The Canadian proposal would amend TBT rules to require countries to notify the WTO of proposed technical regulations and conformity assessment requirements whether or not they are in accordance with international standards as long as they would have a significant effect on trade. It also would require WTO members to offer a meaningful opportunity to other countries and interested parties to comment on proposals. Countries would have to make these comments public and offer a response to any significant issues raised.

Separately, in a speech in Detroit Feb. 19, U.S. Trade Representative (USTR) Ron Kirk said the Obama administration "is taking a hard look at restrictive or unfair standards for American agricultural and manufacturing exports known as sanitary and phytosanitary barriers and technical barriers to trade." He said his office this spring will release a new comprehensive report examining the affect of those barriers. "As we move forward, we will leverage the results of that report to better represent American exporters and defend their rights in the international marketplace," he said.

## GAO Says "Buy American" Slows Some Recovery Act Projects

The "Buy American" provisions in the 2009 Recovery Act contributed to or will contribute to delays in the spending of the stimulus money for projects funded by eight federal agencies, the Government Accountability Office (GAO) said in a Feb. 10 report that looked at how several federal regulations and policies have hampering the act's implementation. The provisions "affected their ability, or their grantees' ability, to select or start some Recovery Act projects," the GAO said in a report requested by Senate Republican Leader Mitch McConnell (R-Ky.). The report offered only a couple of examples but didn't quantify the impact of the rules.

> Delays have occurred in projects backed by the departments of Commerce, Education, Homeland Security, Housing and Urban Development and the Environmental Protection Agency (EPA), the GAO found. The agency also found delays reported by two states and one local entity due to the Buy American provisions.

"In some cases, federal agencies had to develop guidance for compliance with Buy American provisions, including issuing guidance on waivers to recipients that were unable to comply," the GAO stated. It said EPA officials had reported that developing guidance was particularly challenging because of the need to establish a waiver process for projects. "Likewise, Homeland Security officials told us that a project under the Transportation Security Administration's Electronic Baggage Screening Program was slowed as officials awaited a Buy American waiver to allow contractors to use foreign-made components," the agency reported. Another example came from the Chicago Housing Authority which said the only security cameras that are com-

patible with its existing system and City of Chicago police systems are not made in the U.S. "Moreover, an industry representative told us that the Buy American provisions could interrupt contractors' supply chains, requiring them to find alternate suppliers and sometimes change the design of their projects, which could delay project starts," the GAO said.

## Kirk Asks Apparel Industry to Source One Percent From Haiti

USTR Ron Kirk asked the U.S. apparel industry Feb. 16 to source 1% of its production from Haiti as part of an initiative called "Plus 1 for Haiti" and aimed at helping the country recover from its devastating earthquake in January. The program apparently would make some amends for the years of U.S. trade policies, often driven by U.S. unions, textile manufacturers and conservative lawmakers, that drove apparel production from Haiti and blocked efforts to expand trade preferences for the country.

> Plus 1 for Haiti will rely on the duty-free benefits given Haitian-produced apparel under the Haitian Hemispheric Opportunity Partnership Encouragement Act (HOPE II). The USTR's role in the program will be to "work with American companies, Haitian business leaders, and interagency officials to address existing roadblocks to Haitian apparel exports," said a USTR press release.

The American Apparel & Footwear Association (AAFA), which represents the apparel industry, has already created a Haiti-AAFA Recovery and Reconstruction Team (HARRT) to help increase apparel production in Haiti following the earthquake. "To achieve success, we must ensure a trade policy conducive to overcoming several key concerns, including guaranteeing sufficient financial resources for rebuilding, addressing critical infrastructure gaps, and providing worker training," said AAFA President Kevin Burke.

One of the companies that has stayed in Haiti over the years is Hanesbrands. "Hanesbrands, Inc, has stayed the course over the years with partnerships in Haiti and has provided over $2 million in near-term aid," said its government relations vice president Jerry Cook. "We remain very hopeful that the combined effort will encourage others to invest in the opportunities and development of critical infrastructure badly needed for sustained development," he said.

## Appeals Court Questions Jurisdiction Under Expired EAA

The D.C. U.S. Court of Appeals has asked parties in an export enforcement case to present oral arguments Feb. 23 on whether the court has jurisdiction to hear appeals brought under the now-expired Export Administration Act (EAA). In the case, Micei International is appealing a BIS denial order, claiming the agency doesn't have authority to impose a denial order as a penalty under the International Emergency Economic Powers Act (IEEPA). The EAA gives the D.C. Circuit jurisdiction over EAA cases, but with the law's expiration, the court wants to hear whether IEEPA can be used to give it jurisdiction. If the appellate court can't hear the case, Micei probably would have to refile it in the D.C. District Court (see **WTTL,** Nov. 30, page 4).

> In its brief defending BIS authority to issue the denial order, the Justice Department sited previous court rulings that have said IEEPA can be used to retain EAA regulations. It sidestepped Micei's complaint against the use of a denial order as a penalty for aiding and abetting a violation in an administrative case and its argument that IEEPA doesn't include such a civil penalty.

"The President's declaration of national emergency, and consequent authority to continue the Export Administration Regulations under IEEPA, were still in effect at the time of the transactions at issue," the Justice brief contended. "Micei's claim that the agency lacked statutory authority to issue denial orders against Micei and Montgomery is therefore without foundation," it stated. Justice also argued that BIS has authority to charge Micei with facilitating a

violation of a denial order. "Export Administration Regulations have, since 1954, permitted the Department to bring administrative enforcement proceedings against individuals who facilitate violations of export control laws and regulations," Justice said; noting that Congress in 1985 amended the EAA to confirm that "the criminal penalties provided for in the Act are available to punish attempts and conspiracies to violate the Act."

> Micei's attorneys at the Bryan Cave law firm rebutted the Justice arguments. "BIS is, in fact, absolutely wrong in its assertion that the EAA has always permitted it to punish causing, aiding, and abetting violations and fails to cite even a single provision of the EAA providing that explicit authority," they wrote. IEEPA, " as in force at the time of Micei's alleged violations, only permits punishment of violations. It makes no provision for punishing causing, aiding, or abetting violations," they argued. "The only penalties explicitly authorized are those set forth in Section 206 of IEEPA, 50 U.S.C. Section 1705, which include civil fines and criminal penalties, but not an order forbidding all exports of all items," their brief declared.

## Israel Promises to Improve Drug IPR Protections

The USTR's office intends to move Israel off the Special 301 Priority Watch List to the plain Watch List based on an agreement under which Israel has promised to improve intellectual property rights (IPR) protections for pharmaceuticals, the USTR's office reported Feb. 15. Israel has been the subject of an out-of-cycle review of its IPR rules since 2008. The change in Israel's status will occur once the appropriate legislation is submitted to the Knesset, Israel's parliament. "In addition, as soon as the legislation is fully implemented, Israel will be moved off the Special 301 list altogether," the USTR announcement said.

> "Israel has agreed to introduce legislation that would strengthen its laws on data protection and patent-term extension, as well as ensure that patent applications are published promptly 18 months after their filing date," a USTR spokesperson said in an e-mail. As part of its understanding with the U.S., "Israel confirmed that it has taken steps through its regulatory procedures to expedite approvals of new drugs by the Ministry of Health, which means that Israeli citizens will get access to both innovative and generic medicines sooner," it stated.

## * * * Briefs * * *

EXPORT ENFORCEMENT: BIS has imposed $11,000 civil fine on Robert Quinn as part of settlement for Quinn's alleged false statements to BIS enforcement officials during investigation of truck parts exports to Iran by Quinn's employer, Clark Material Handling Company. Quinn has gone through lengthy legal fight, during which he faced criminal charges, was convicted by a jury, but then had his conviction overturned when its was revealed government had withheld key information about witness in case. He was granted new trial and in August 2008 pled guilty to making material false statement to government. He was sentenced to 18-months probation and ordered to pay $100 court fee (see **WTTL**, March 17, 2008, page 3).

ANTIBOYCOTT: BIS has reached settlements with three firms for alleged violations of antiboycott regulations. Without admitting or denying BIS charges, J.P. Morgan Chase Bank of New York has agreed to pay $19,125 fine; Nectron International of Sugar Land, Texas, $8,000; and Fortessa Inc., of Sterling, Va., $8,000. Firms were charged with furnishing information about Israel to customers or not reporting receipt of request for boycott information.

TRADE CASES: ITA Feb. 12 issued notice saying it was tolling deadlines for all administrative cases – antidumping and countervailing duty – for seven days because of government shut down Feb. 8-11 due to blizzard that hit DC. "This action is essential because it would be impossible for the Import Administration to make up the lost time," it said.

DRILL PIPE: ITC on split 3-3 vote Feb. 19 made preliminary determination that imports of allegedly dumped and subsidized drill pipe and drill collars from China may be "threatening" injury to U.S. industry.