

Suit Claims BIS Lacks Legal Power to Impose Denial Orders

Since the expiration of the Export Administration Act (EAA), the Bureau of Industry and Security (BIS) has lacked authority to impose denial orders as a civil penalty for violations of U.S. export controls, contends a brief filed Nov. 16 in a suit seeking to overturn the BIS denial order issued against Micei International of Skopje, Macedonia. The brief claims the International Emergency Economic Powers Act (IEEPA), under which BIS now enforces the Export Administration Regulations (EAR), does not include a denial order penalty nor does it permit BIS to take action against a foreign party (see **WTTL**, Aug. 3, page 3). If successful, the suit could eviscerate one of the strongest weapons BIS has in its enforcement armamentarium.

BIS had imposed a \$126,000 civil fine and a denial order on Micei after an administrative law judge ruled the firm had violated the EAR by exporting EAR99 items from the U.S. to Macedonia for Yuri Montgomery, a man who was the subject of separate denial order issued in 2000. The Montgomery denial order had barred him from exporting items from the U.S. and also prevented anyone else from aiding or abetting him in exporting.

“BIS requires explicit statutory authority to impose punitive orders,” stated the brief filed in the D.C. U.S. Court of Appeals by Mecei’s attorneys from the law firm of Bryan Cave. “Such authority, although contained in the EAA, lapsed when the EAA itself lapsed. BIS’s power to impose penalties such as this punitive order must now be considered under IEEPA, the statute used by the President to ‘extend’ the EAA. Civil penalties available under IEEPA are limited to monetary fines and do not include orders of the sort entered here by BIS against Mr. Montgomery and against Micei,” the brief argued.

Moreover, IEEPA did not include a prohibition against aiding and abetting at the time of Mecei’s exports in 2003. “That Congress did not originally intend to give authority to BIS to prosecute aiding and abetting is underscored by Congress’s subsequent amendment of the statute in 2007, which permitted civil penalties only for causing violations and restricted liability for aiding and abetting to criminal prosecutions,” the brief noted.

Allgeier Offers “Three-Zeros” Proposal for Reaching Doha Deal

Former Deputy U.S. Trade Representative Peter Allgeier Nov. 19 proposed a plan for reaching an agreement in the Doha Round in 2010 based on political but not commercial concessions by the United States, European Union, Brazil, China and India. Allgeier says he developed the



plan, which he calls the “zero-for-zero-for-zero package,” after leaving the USTR’s office in August and becoming president of the C&M International consulting firm. The proposal would require very difficult political decisions by these countries, but “would yield a more ambitious trade liberalizing result than the current prospective deal,” he claims.

The first zero would require Brazil, China and India to give up the right to use the “flexibilities” provisions of a non-agriculture market access (NAMA) deal to exempt themselves from full formula cuts in industrial tariffs and to forego the option of making zero cuts in any farm products under an agriculture agreement. They could still take less-than-formula cuts in agriculture, but “they would have to take a cut somewhere to some degree in every product in agriculture,” Allgeier told the Washington International Trade Association (WITA).

For the U.S., the zero would be “zero for zeroing,” he suggested. The U.S. would have to give up its call for sectoral deals that would call for “zero-for-zero” tariffs in each sector by all participating countries. This has been a major demand by some U.S. industrial groups and especially the National Association of Manufacturers, but the idea has drawn opposition from several World Trade Organization (WTO) members, particularly China.

The zero for the EU would be zero extension of geographic indication (GI) protections beyond the wine and spirits registry already part of the negotiations. The EU has wanted to extend GI rules to bar anyone from using such location-based names as Parmesan cheese, except cheese-makers in Parma, Italy, or Dijon mustard, except mustard coming from Dijon, France.

In addition to these three zeros, Allgeier said the final Doha package would still need to include new commitments on market access for services, transparency in domestic regulations, trade facilitation provisions, new disciplines on fishery subsidies, an environmental goods and services agreement, the Hong Kong Ministerial’s mandate on cotton, the Hong Kong Ministerial’s mandate of duty-free-quota-free for least developed countries and a resolution of the application of the special safeguard mechanism. Ahead of the WTO Ministerial Conference schedule to begin Nov. 29 in Geneva, Allgeier said that “like it or not, the whole world is looking for the U.S. to bailout the negotiations.” Even though the ministerial is not supposed to be a negotiating session, “it inevitably will be an occasion for very heavy arm-twisting, primarily aimed at the U.S.,” he said.

House Members Echo Baucus on Extension of Trade Preferences

As two key trade preference programs are set to expire in December, the prevailing focus in Congress is not on if they will be renewed, but how and when. At a House Ways and Means trade subcommittee hearing Nov. 17 on the Generalized System of Preferences (GSP) and the Andean Trade Preference Act (ATPA), lawmakers said they would work on an extension of the programs, if they cannot agree on changes in the two laws. This echoes view of Senate Finance Committee Chairman Max Baucus (D-Mont.) (see **WTTL**, Nov. 16, page 2).

If Congress does not renew GSP by the end of the year, “it has to be extended,” hopefully for two years, subcommittee chairman Sander Levin (D-Mich.) told reporters during a hearing recess. Key questions must be answered before that happens, Levin said. “How do you expand [relations with] Bangladesh without hurting Africa? We’re determined to wrestle with this,” he said, “to speed the benefits of [free] trade.”

USTR General Counsel Tim Reif testified at the hearing, but gave little indication about what changes the Obama administration wants to see in new preference laws or how long current programs should be extended while that decision is made. “Expanding trade with the world’s developing countries is critical to boosting their growth, reducing income inequality and providing people living in these countries with greater hope and confidence for their economic future,” Reif said. Ultimately, the success of such programs will rest in the willingness to be

flexible. “The most effective form of trade-related development assistance ... is likely to vary widely” among different nations, Reif said. “One size does not fit all,” he added

The hearing highlighted the complexities in renewing the ATPA for Bolivia, Colombia, Ecuador, and Peru. Questions were raised about how Peru, which now has a free trade agreement (FTA) with the U.S., will transition from ATPA to the FTA benefits and also about the timing of approval of the proposed FTA with Colombia. The U.S. has suspended ATPA benefits for Bolivia and threatened to suspend Ecuador. Levin told reporters that while Colombia and Peru pose no major problems, he suggested that the situations in Bolivia and Ecuador could hinder passage of legislation to extend ATPA. A new bill will require close work among lawmakers on both sides of the aisle and the White House, Levin said.

During the hearing, Levin said he supports the U.S. commitment under GSP and ATPA, as well as programs that benefit Africa and Haiti. He also stressed the position of congressional Democrats that any new trade agreements must include safeguards on labor and environment. “For people to pull themselves up the economic ladder, countries have to have the right policies in place so that the benefits of increased trade achieve the goal of development,” Levin said. Those policies would include rule of law, labor rights, rules to encourage and protect innovation and rules against corruption, he said.

Panel Warns about Chinese Control of “Rare Earth” Materials

Among the many concerns raised about China’s economic and military policies in the 2009 annual report of the U.S.-China Economic and Security Review Commission released Nov. 19 is Chinese control of 93% of rare-earth minerals production in the world and Beijing’s plans for restricting exports of these materials. Rare-earth materials have become vital components of many high-tech products, including flat-screen TVs, cell phones, hybrid-car batteries and magnets. They are also need in many military products, such as smart bombs. “China appears to be tightening its control over the supply of rare-earth elements,” the report states. It quotes a Chinese officials who said the export restrictions are intended to attract manufacturing investment in Inner Mongolia where much of this material is mined.

While the Chinese claim these export restrictions are aimed at limiting environmental damage often associated with the mining of these materials, “tighter limits on exports of rare earth place foreign manufacturers at a disadvantage compared to the domestic producers whose access will not be so restricted,” the report warns. “There has been no official U.S. government response so far,” it states.

The commission also cited fears that Hong Kong is becoming a transshipment point for controlled dual-use products to China. It cites recent prosecutions of individuals who shipped goods and technology to China through Hong Kong. Hong Kong long prided itself on its strong export control system and its cooperation with U.S. authorities. As a result, it has enjoyed more liberal export treatment than China. This situation may be changing as Beijing asserts greater control over the Special Administrative Region. “The commission recommends that Congress examine and assess the adequacy of U.S. export control policy for dual-use technology as it relates to the treatment of Hong Kong and the PRC as separate customs entities,” the report states. “The commission further recommends that Congress urge the administration to consider ways to collaborate more closely with authorities in Hong Kong in order to prevent the transshipment of controlled technology from Hong Kong into the PRC,” it adds.

Report Cites U.S. Industry Role In Chinese Defense Expansion

U.S. and European firms doing business with supposedly commercial Chinese companies are helping China’s People’s Liberation Army (PLA) gain access to advance technology and know-how for military purposes, according to report by the U.S.-China Economic and Security Review

Commission. The report, prepared under contract for the commission by Defense Group, Inc., claims the Chinese are exploiting commercial relationships as part of a Chinese doctrine known as *Yujun Yumin*, which means locating military potential in civilian capabilities. The report suggests that many Chinese commercial companies that were spun off from government-owned enterprises still have ties to the PLA. “The structure of the Chinese defense industry makes it difficult to restrict transfers of technology, know-how and capital to Chinese military entities without crippling U.S. business with commercial firms,” the report concedes.

“The line between state and private blurs, allowing commercial capital from round the globe to wind up with state defense enterprises in charge of China’s missile industry,” it contends. Such arrangements with Chinese companies are also helping the PLA’s expansion of its capabilities in shipbuilding, aviation, information technology and electronics, the report says. Some of the U.S. and Chinese firms named in the report recently participated in a BIS conference aimed at increasing U.S. high-tech exports to China (see **WTTL**, Oct. 6, page 1).

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FCPA: Justice Nov. 19 said it is terminating deferred prosecution agreement with Norway’s Statoil ASA under FCPA because firm has satisfied conditions it promised to fulfil as part of agreement in 2006 (see **WTTL**, Oct. 23, 2006, page 4). “Three years of diligent efforts by Statoil to address past misconduct and serious compliance failures have led to the dismissal of foreign bribery charges against the company,” said Assistant Attorney General Lanny A. Breuer in Justice statement. “This case shows that deferred prosecution agreements against corporations can work as an important middle ground between declining prosecution and obtaining the conviction of a corporation,” said U.S. Attorney Prett Bharara.

ANTIBOYCOTT: York International Corporation, which became part of Johnson Controls in December 2005, has agreed to pay \$140,850 civil fine to settle BIS charges that it violated antiboycott regulations 122 times, including 101 times that it allegedly failed to report boycott requests to BIS. York had made a voluntary self-disclosure and neither admitted nor denied the charges. In its Charging Letter, BIS claimed that Dubai branches of York Air Conditioning and Refrigeration, Inc., from 2002 to 2006, furnished boycott information or agreed to cooperate in boycott of Israel in documents submitted to parties in Egypt, India, Jordan, Kuwait, Lebanon, Libya, Oman, Pakistan, Qatar, Syria, Sudan, Turkey and United Arab Emirates.

STELA: BIS has launched online version of its System for Tracking Export License Applications (STELA). Rather than using current phone-based system, license applicants can go to <https://snapr.bis.doc.gov/stela> to check status of applications.

TRADE PEOPLE: President Obama Nov. 18 nominated Nicole Y. Lamb-Hale to be assistant secretary of Commerce for manufacturing and services. She is currently Commerce deputy general counsel and previously was with law firm of Foley & Lardner in Detroit. President Nov. 16 nominated Leocadia I. Zak to be director of U.S. Trade and Development Agency. She had been named deputy director in January and was USTDA general counsel from 2000 to 2006. Earlier, she was partner in Mintz, Levin, Cohn, Ferris, Glovsky and Popeo law firm. On Nov. 19, Obama said he intends to nominate Elizabeth Littlefield to be president of Overseas Private Investment Corporation. She is currently a director of World Bank.

ITAR EXPORTS: In annual Section 655 report to Congress, covering fiscal year 2008, which ended Sept. 30, 2008, DDTC said it approved export of approximately \$34.2 billion in defense articles and approximately \$71.3 billion in defense services.

MATCHBOOKS: ITC made final determination Nov. 17 on 6-0 vote that imports of subsidized and dumped commodity matchbooks from India are injuring U.S. industry.

ASIA: In Tokyo Nov. 14, President Obama said U.S. will engage with “Trans-Pacific Partnership countries with the goal of shaping a regional agreement that will have broad-based membership and the high standards worthy of a 21st century trade agreement.” He also said: “Together, with our South Korean friends, we will work through the issues necessary to move forward on a trade agreement with them.” But later in Seoul Nov. 19, he gave no specifics on when he would move Korean FTA. Initial TPP talks will involve Singapore, Chile, New Zealand, Brunei, Australia, Peru and Vietnam. U.S. already has FTAs with Singapore, Chile, Peru and Australia, so goal of TPP is still not clear. “Further engagement in the Trans-Pacific Partnership gives us the opportunity to address gaps in our current agreements and to set the standard for 21st-century trade agreements going forward,” said USTR Ron Kirk in Nov. 14 speech.