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OFAC Expanding Use of Subpoenas in Trade Sanctions Cases

Treasury's Office of Foreign Assets Control (OFAC) intends to increase the use and scope of administrative subpoenas to obtain information on trade-sanction violations as a prelude to increased enforcement actions, according to government and trade bar sources. The agency is also expanding its use of so-called "Section 602" inquiries to exporters and financial institutions in an effort to identify more parties to violations, these source report. OFAC wants to find out "what went wrong and why," one source said.

OFAC is also pressing industry to make more voluntary self-disclosures (VSD). Agency officials are emphasizing the mitigation provisions in the enforcement guidelines OFAC issued in September 2008, which offer a 50% reduction in potential fines when a firm makes a VSD of a violation. Industry lawyers, however, say their clients are still reluctant to file VSDs with OFAC because the agency has not established a track record on how it will treat these disclosures.

OFAC's increased focus on enforcement stems in part from its closer ties to other federal agencies as well as state and local law enforcement and regulatory bodies. In the last three years, it has signed more than two dozen memoranda of understanding with these agencies on the sharing of information about violations of banking laws and trade sanctions. The emphasis on enforcement is also being fed by U.S. attorneys around the country who have stepped up their prosecution of export control cases, particularly against illegal exports to Iran, using the International Economic Emergency Powers Act (IEEPA) and the Iranian Transaction Regulations (ITR). OFAC "wants to get involved more in criminal prosecutions," one attorney told WTTL.

Kirk Signals Moderate Trade Policy Goals

In a April 23 speech, which former U.S. Trade Representative (USTR) Susan Schwab could have delivered just as well, new USTR Ronald Kirk said the Obama administration would try to resolve outstanding issues in free trade agreements (FTA) with Panama and Colombia to win congressional approval for the pacts and also will press for conclusion of the Doha Round. But Kirk offered no timetable for achieving these goals. Kirk "has just kicked the can down the road," one former Bush administration official observed. While the FTA with Panama appears likely to move quickly, some trade observers don't expect the Colombia accord to be ready for submission to Congress until next year at the earliest and possibly not until after the 2010 mid-term elections (see story page 2). Kirk said President Obama has directed him to undertake a review the Colombia agreement to identify issues that need to be resolved. People have



stopped trying to predict when the Doha Round would finish. A key point in Kirk's speech was a pledge of more public transparency and more consultations with Congress in determining trade policies and negotiating agreements. "Addressing Americans' concerns, whether it's through Congress or by talking to the public directly, is what the United States Representative's office will be all about," Kirk said. That can be translated to mean the Democrats in the White House will talk with the Democrats in Congress.

Kirk repeated Obama's commitment to "rejecting protectionism and supporting the global rules-based trading system." The moderate tone of the speech, which the USTR's office billed as a "major address," pleased the business community which has feared a shift away from trade negotiations and free trade. "Now is not the time to turn inward. Now is not the time to be timid," Kirk declared. He also left open the door to negotiating new FTAs, but aiming for bigger countries than the Bush administration. "When it's time to strike new trade deals, we'll seek bigger ones that access major markets," he said.

Congress Likely to Pass Panama and Colombia FTAs, If Asked

The future of the FTAs with Panama, Colombia and South Korea will depend on President Obama's willingness to use his personal popularity and political capital on a debate that could divide the Democratic party and antagonize key constituents, particularly labor unions and environmentalists. Once the president makes that commitment, however, the three pacts are likely to get approved regardless of what changes are made in them to appease their critics.

Even Sen. Sherrod Brown (D-Ohio), a sharp critic of U.S. trade deals, admits Congress would approve the Panama and Colombia FTAs, if Obama sent them up. "I think they'll pass," Brown said April 22 after speaking to the Washington International Trade Association and George Washington University graduate students. "I don't image Panama or Colombia would be defeated, but I also think there will be strong opposition," he added.

Brown said he is asking the Government Accountability Office (GAO) to undertake a study of the existing FTAs to see if they are working as intended. He also said he intends in the next few weeks to reintroduce a bill he sponsored in the last Congress to make trade negotiating objectives on labor and the environment binding and to require consultations with Congress before any deal is completed. He said he spoke with USTR Ronald Kirk on April 21 and discussed the bill with him. Brown said Kirk made no commitment about the legislation but had indicated that "everything is on the table."

EU Seeking to Broaden Anti-Counterfeiting Negotiations

Negotiations on an Anti-Counterfeiting Trade Agreement (ACTA) aimed at harmonizing international measures to enforce intellectual property rights (IPR) may gear up on a wider range of issues after pausing for the change in the U.S. administration. At the same time, the talks remain troubling to civil society and industry groups because of a lack of transparency and unanswered questions about the scope and enforcement of a potential deal, according to participants in public consultations the European Union (EU) held April 21 in Brussels.

The U.S. asked for the pause to allow the Obama administration to complete its transition, reported Pedro Velasco Martin, the European Commission's (EC) representative at the consultations. Comments that USTR Ronald Kirk made at his confirmation hearing on the ACTA "seemed positive," Velasco said. "It's a matter of when, not if," he said. "We can't believe that suddenly the U.S. would drop a project that they pushed so hard on, an issue that, from what we see from here, seems bipartisan," Velasco said. The U.S. is reviewing how to move forward on the ACTA talks, a USTR official told WTTL. Routine informal meetings or conference calls will continue as needed, the official said. In addition, ACTA partners met on

the margins of the WTO Trade-Related Aspects of Intellectual Property (TRIPS) Council meeting in March to take stock of the process, she reported (see **WTTL**, Sept. 29, page 2).

While the ACTA talks have focused on counterfeiting and piracy of copyrights and trademarks, the EU would like to broaden negotiations to deal with other IPR issues, Velasco indicated. Several countries only apply border measures to copyright and trademark infringements, but the EU does it for other infringements as well, he noted. The TRIPS accord requires a minimum obligatory level of IPR enforcement but allows countries to apply a higher optional level, Velasco said.

EU legislation is at the higher level, he said. TRIPs created an obligation for inspections on imports, but the EU chose to permit customs inspections on exports, transit and transshipment, Velasco said. "Whenever a good is under the control or under the framework of customs, they are allowed to inspect it for IP infringements," Velasco said. It's "very important for the European Union; very important also for other partners," he said.

The EU meeting was "quite disappointing" because the EC continued to be "very vague on the content of the agreement," said Anne-Catherine Lorrain of the Trans-Atlantic Consumer Dialogue. The EC and USTR's office have released the same six-page summary of a potential ACTA. Releasing the summary is "beginning to improve transparency," said Lorrain, who noted unofficial reports that the U.S. may release more documents on the negotiations.

Section 421 Case on Tires to Test Obama's Enforcement Policies

The Obama administration's pledges to get tough on China and to step up enforcement of trade agreements will be put to the test by a petition the United Steelworkers of America (USW) filed April 20 at the International Trade Commission (ITC) seeking import relief under Section 421 against an alleged surge in imports of passenger-car tires from China. The Bush administration's refusal to invoke the safeguard provisions of Section 421 against Chinese imports was one of the major complaints against its trade policies.

The USW's petition targets tires used in cars, light trucks, buses, and trailers. It claims imports of these tires from China increased from 2004 to 2008 by 215% in volume and 295% by value. During that time, domestic production declined by more than 25%, it states. In 2008, China exported nearly 46 million consumer tires with a value of more than \$1.7 billion to the U.S., making it the largest source of consumer tire imports, the petition claims. "Section 421 is a tool to redress Chinese import surges that gets us through the current economic crisis and preserves a part of America's industrial base," said USW President Leo Gerard.

There have been six previous attempts to use Section 421, which was enacted as part of China's accession to the WTO. The ITC rejected two because they lacked sufficient supporting evidence. For the four where the ITC found injury, President Bush refused to provide relief, claiming restrictions against China would not help the domestic firms because other foreign sources would replace the Chinese goods. The U.S. tire industry has won separate antidumping and countervailing duty cases against pneumatic off-the-road tires from China. Beijing on Dec. 9, 2008, asked for a WTO dispute-settlement panel to review those cases, claiming, in part, that the U.S. acted inconsistent with WTO rules that apply to non-market economies.

CIT Bars ITA from Issuing Liquidation Orders in 15 Days

Court of International Trade (CIT) Judge Timothy C. Stanceu April 17 ordered Commerce's International Trade Administration (ITA) to stop issuing liquidation orders to Customs on final administrative reviews of antidumping orders just 15 days after publishing the final rulings (slip op. 09-32). ITA began the policy in 2002. "The fifteen day policy, as practiced by Commerce, induces an absurd, and unnecessary, 'race to the courthouse' that burdens imper-

missibly the right of a prospective plaintiff to seek the injunction that Congress contemplated in enacting section 1516a(c)(2) and frustrates the purpose of that provision,” Stanceu ruled. He said ITA’s interpretation of the trade law is not entitled to deference in this case, which involved a suit by SKF USA regarding the administrative review of ballbearing imports from several countries. Stanceu said ITA had provide no reasoning for adopting the policy of notifying Customs within 15 days or why it applied the policy to the ballbearing review.

“And even were the fifteen-day policy to fall within the class of agency decisions that is accorded deference under *Chevron*, the court still could not conclude that a policy that conflicts with congressional intent is based on a reasonable construction of Section 1516a(c)(2),” he wrote.

Court Requires Stronger Employee Notice in Internal Audits

When law firms have represented both employees and their companies in legal cases, they must obtain written consent from the employee waiving the client-attorney privilege before interviewing him or her, a federal judge has ruled. Los Angeles U.S. District Court Judge Cormac Carney’s April 1 ruling is particularly important when law firms are hired to conduct internal audits or investigations as part of consent agreements with federal agencies. The requirement to hire outside lawyers to conduct these reviews has become an increasingly common provision in settlements of cases involving trade and antibribery laws.

Carney ordered the statements of the employee suppressed because he had a reasonable expectation that what he said to the law firm, Irell & Manella, was privileged communication. The law firm later provided the information to government investigators, leading to the employee’s prosecution. The need for a written waiver goes beyond the so-called *Upjohn* warning lawyers are required to give company employees during interviews to clarify that they represent the company and not the employee.

“An oral warning, as opposed to a written waiver of the clear conflict presented by Irell’s representation of both Broadcom and Mr. Ruehle, is simply not sufficient to suspend or dissolve an existing attorney-client relationship and to waive the privilege,” Carney wrote. “An oral warning to a current client that no attorney-client relationship exists is nonsensical at best – and unethical at worst,” he declared. (**Editor’s Note:** Copy of Carney’s ruling will be sent to subscribers on request.)

* * * Briefs * * *

TRADE PREFERENCES: Strange bedfellows, from Oxfam America and Business Roundtable to Bread for the World and National Foreign Trade Council, sent joint letters along with 25 other organizations to President Obama and Congress urging review, reform and early extension of U.S. trade preference programs. “We ask you to pursue policies that will benefit as many of the world’s poorest countries as possible, without giving an advantage to one country or region at an expense to another,” letter stated.

BEEF: U.S. and EU April 22 agree to another extension of deadline for U.S. to impose new trade sanctions on EU exports due to continue dispute over EU ban on imports of certain hormone-treated beef from U.S. “The United States will delay the trade action until May 9 to provide a little more time to negotiate a settlement with the EU,” said USTR Ronald Kirk (see **WTTL**, March 23, page 1).

STEEL PIPE: ITC, on 6-0 vote, made final determination that imports of dumped circular welded carbon quality steel line pipe from China are injuring U.S. industry.

JUNK CARS: EU Ambassador to U.S. John Bruton wrote House members April 21 urged them to amend pending legislation (H.R. 1550), which would provide payments for scrapping old cars and buying new ones, to eliminate price and origin limits that would discriminate against European cars. “It is therefore of concern to Europe that H.R. 1550, as currently drafted, provides benefits only for replacement vehicles assembled in the U.S. or North America, a distinction that would harm car manufacturers from other parts of the world, including Europe,” he wrote. “Such discrimination is a clear violation of GATT provisions which guarantee national treatment and most-favored nation treatment to all signatories,” Bruton argued.