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Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301.570.4544 Fax: 301.570.4545

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Extra Muscle Is Helping Export Agencies Pursue Cases

The stronger multi-agency, government-wide focus in the last two years on counterespionage and nonproliferation has given a significant boost to the export enforcement efforts of the Bureau of Industry and Security (BIS) and State's Directorate of Defense Trade Controls (DDTC), the compliance chiefs of the two agencies indicate. The result has been an uptick in criminal cases, administrative settlements, voluntary self-disclosures (VSDs) and directed remedial actions, BIS Acting Assistant Secretary for Export Enforcement Kevin Delli-Colli and DDTC Compliance Director David Trimble told the American Conference Institute Jan. 29.

> With U.S. attorneys, the FBI, and Immigration and Customs Enforcement more involved in investigating and prosecuting export enforcement violations, "there are more opportunities for violations to be discovered," Delli-Colli warned. He said he recognizes the impact the economic crisis is having on export compliance budgets. "But it is dangerous to say compliance is a luxury I can't afford," he cautioned. "I want it to be something you can't afford not to have," he said.

Trimble reported that DDTC received 900 VSDs in 2008, a 30% increase over 2007. The increase in VSDs is the result of firms doing more internal audits, more due diligence as part of mergers and acquisitions and more outreach by DDTC. He said his office also issued 100 directed disclosures last year. "We're trying to be much more precise and laser-like when we go out," he said. In 2008, U.S. representatives conducted 718 Blue Lantern inspections overseas to determine whether export license conditions are being complied with. Of those visits, 87 had "derogatory" findings. "This gives us great cause for concern," Trimble said.

Trade Groups Aim to Kill "Buy America" Rules in Stimulus Bills

Opponents of the "Buy America" provisions in the stimulus package now rushing through Congress will have three more "at bats" in an attempt to kill the restrictions that are in both House and Senate versions of the package. A major business community lobbying effort – at lease by multinational companies – has been launched to get the language dropped, with industry representatives focusing on three opportunities to amend the measures. Those shots could come: (1) in the managers' consolidated bill that will be brought to the Senate floor probably the week of Feb. 2; (2) in a possible amendment on the Senate floor to strip the provision; and (3) in the House-Senate Conference Committee where differences between the bills passed by the two houses will be ironed out. The last option appears to be the most likely. While the House bill (H.R. 1), which was passed Jan. 28 strictly along party lines, includes wording barring the

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use of foreign steel in school construction projects funded by the package and an amendment to require the Transportation Security Agency to buy only U.S. made uniforms, the bill (S. 336) reported out by the Senate Appropriations Committee Jan. 27 expanded the "Buy America" provision to all "manufactured goods used in the project" (see **WTTL**, Jan. 19, page 4).

> Representatives of companies that belong to such groups as the Business Roundtable, the Chamber of Commerce and the Emergency Committee for American Trade, have been talking with both Obama administration officials and Senate Finance Committee members and staffers in an effort to muster opposition to the provisions. Administration officials "are very much looking at this," one industry source said, admitting that he had seen no sign of how the White House will react to the provision. Because the provision was put in Appropriations' portion of the stimulus package, business representatives say they hope members of the Finance Committee will object because the provision comes under Finance's jurisdiction and the committee was circumvented.

Supreme Court Backs Commerce on Antidumping Law

Government lawyers in the future are likely to cite the Supreme Court's Jan. 26 ruling in *U.S. v. Eurodif* to argue that the Commerce Department's interpretation of U.S. trade remedy laws should be given broad deference by U.S. courts. The unanimous ruling, written by Justice David Souter, did more than just overturn two lower court decisions on the application of the antidumping law to imports that might appear to be services and not goods. It acknowledged that Commerce is the expert on the law, and unless the statutes specifically addresses an issue, its interpretations should be accepted by the courts. The decision goes beyond the High Court's oft-cited *Chevron* doctrine, which gives general deference to government agencies to interpret their statutes, and directly blesses Commerce's expertise on trade law.

> At issue in the case was whether imports from France of low enriched uranium (LEU) that are enriched under a contract through which U.S. nuclear plants provide the uranium feedstock to the French processor and pay a fee for enrichment services known as a separate work units (SWU) are a service not covered by the antidumping law or merchandise that is covered. Although importers and Eurodif called these transactions services, Commerce treated them as sales of foreign merchandise subject to the act.

The Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit sided with the importers on the issue, but the Supreme Court reversed those lower courts (see **WTTL**, Nov. 10, page 2). "The issue is whether the Commerce Department's way of seeing the transactions as sales of goods rather than services reflects a permissible interpretation and application of Section1673. We hold that it does," Souter wrote. The Justice recognized that the LEU transaction was not as clear as other service deals. "This is the very situation in which we look to an authoritative agency for a decision about the statute's scope, which is defined in cases at the statutory margin by the agency's application of it, and once the choice is made we ask only whether the Department's application was reasonable," he stated.

WTO Rules Against China's IPR Practices

When Obama administration trade officials meet for the first time with their Chinese counterparts, they will bring leverage in the form of World Trade Organization (WTO) rulings against Chinese trade practices. In the latest ruling Jan. 26, a WTO dispute-settlement panel agreed with a U.S. complaint that China's intellectual property protection (IPR) policies and practices are inconsistent with Beijing's obligations under the Trade-Related Intellectual Property agreement (TRIPS). Under WTO rules "where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment," the panel ruled. "China did not succeed in rebutting that

presumption. Accordingly, the Panel concludes that, to the extent that the Copyright Law and the Customs measures as such are inconsistent with the TRIPS Agreement, they nullify or impair benefits accruing to the United States under that Agreement," it concluded.

> "These findings are an important victory, because they confirm the importance of IPR protection and enforcement, and clarify key enforcement provisions of the TRIPS Agreement," said Acting U.S. Trade Representative (USTR) Peter Allgeier. "Having achieved this significant legal ruling, we will engage vigorously with China on appropriate corrective actions to ensure that U.S. rights holders obtain the benefits of this decision," he said in a statement. The panel, however, did not agree with the U.S. that the low level of fines imposed by China for IPR violations and the high threshold for criminal prosecution also violate TRIPS.

Halliburton to Pay $559 Million to Settle FCPA Charges

Halliburton, the global construction and oil service company, revealed Jan. 26 that it has agreed to pay $559 million in penalties as part of agreements it has reached with Justice and the Securities and Exchange Commission (SEC) to settle charges that its former KBR, Inc., subsidiary paid foreign government officials bribes in violation of the Foreign Corrupt Practices Act (FCPA). A company statement said it was still awaiting final approval of the settlement from Justice and the SEC. "The Company will not further comment or take questions regarding the prospective settlements, given that there can be no assurance that they will become effective in accordance with their respective terms," a company spokesperson said in a statement.

> The proposed settlement appears to be the result of a wide-ranging investigation dating back to 2004 and involving the activities of KBR, formerly known as Kellogg, Brown & Root, and at least one former KBR executive, Albert Jackson Stanley. In September, Stanley agreed to pay back $10.8 million in restitution to Halliburton in a criminal plea agreement with Justice for illegal payments he made to Nigerian officials to obtain contracts for the Bonny Island gas production facility in Nigeria (see **WTTL**, Sept. 8, page 3).

KBR was formed when Halliburton's Brown and Root was merged with M.W. Kellogg Company after Halliburton acquired Kellogg's parent, Dresser Industries, Inc. When KBR separated from Halliburton and became a publicly traded company in 2006, Halliburton agreed to indemnify KBR from any FCPA fines or penalties caused by actions before Nov. 20, 2006. "As a result of the indemnity and the terms of the prospective settlement with the DOJ, Halliburton would agree to pay $382 million on behalf of KBR in eight installments over the next two years," Halliburton explained. "Pursuant to the terms of the prospective settlement with the SEC, Hallibuton would agree to be jointly and severally liable with KBR for and, as a result of the indemnity, to pay to the SEC $177 million in disgorgement," it said.

NAMA Chairman Not Waiting for Ministers to Start Talks

The chairman of the Doha Round negotiating committee on non-agriculture market access (NAMA), Swiss Ambassador Luzius Wasescha, isn't waiting for trade ministers to decide on the future of the round. At a Jan. 28 meeting, he laid out plans for continued technical work aimed at scheduling tariff commitments, cracking the sectorals problem, dealing with non-tariff barriers to trade (NTBs) and addressing country- specific issues. Specifics of his plans will be floated in late February (see **WTTL,** Jan. 12, page 1).

Wasescha told the NAMA group that for the immediate future work would concentrate on technical aspects, while leaving political decisions for later. He said some guidance from trade ministers may emerge from the World Economic Forum meeting in Davos, Switzerland, which was to end Jan, 31. The NAMA chairman said he will propose studies and simulations to help WTO members better understand the actual impact certain proposed tariff reductions will have,

including the products the country wants to protect. The tariff-scheduling exercise, which could take a year, "is an attempt to make good use of the time gained and allow member countries to have fuller awareness of the actual impact of the formula and flex and focus of any further discussion on actual rather than imagined sensitivities or problems," said a developing country ambassador to the WTO.

> The technical work will also focus on sectorals, which is still a major sticking point in the NAMA talks. China has rejected attempts to change the mandate which it claims makes participation in sectorals voluntary. One possible way that is being discussed to overcome the deadlock is for members to agree on a different approach for a large sector, such as chemicals. The idea would allow a country to protect part of a sector where its interests lie, while liberalizing other sub-sectors. A proposed framework would contemplate various scenarios of different classifications for different products in a sector, trade diplomats report.

ITC Revokes Exclusion Order on Qualcomm Chips

The International Trade Commission (ITC) Jan. 22 complied with a court order and revoked the limited exclusion orders (LEO) it had issued against chips and cellphones containing communications chips that infringed a patent held by Broadcom (see **WTTL,** Dec. 22, page 4). "The Commission has determined to rescind the outstanding remedial orders issued by the Commission on June 7, 2007, and remand the investigation to the presiding ALJ [administrative law judge] for proceedings consistent with *Kyocera Wireless Corp. v International Trade Commission*," it said. It asked the ALJ to propose a new determination on violation and remedy.

> The Court of Appeals for the Federal Circuit in October had reversed and remanded ITC orders aimed at phones using chips made by Qualcomm, the target of Broadcom's Section 337 complaint. The CAFC ruling has spurred considerable debate over what tactics complainants should use to win effective exclusion orders on patent-infringing products when the products are widely used. The ITC had tried to tailor its order to do that, but the CAFC had rejected its approach.

"Broadcom is in a bind. Their patent does not have much more life, and it is probably too late for a new case," David Hollander Jr., a former lawyer in ITC's unfair import investigations office, told WTTL. The appellate court decision "was a surprise to Broadcom, though now the ruling seems logical based on the wording of the statute as codified," he said. The court had rejected applying the LEO to parties that were not named specifically in the 337 petition. "We are going to see more parties named because it is easier to get a LEO," he said.

At an American Conference Institute forum on 337 litigation Jan. 27, Joanna Ritcey-Donohue, with White & Case in Washington, said companies will have to "live with what you ask for as a remedy." She said Broadcom could have expected the LEO to work because the ITC had used that approach in at least five earlier LEOs targeting unnamed, non-respondents. "Post-Kyocera complaints should not assume any non-respondent entity even affiliates of respondents will be subject to the LEO," she added. Kathryn Clune, with Crowell & Moring, noted that, Broadcom had wanted third parties to pressure Qualcomm, "but the third parties supported Qualcomm."

* * * Briefs * * *

BIS: Senate stimulus bill (S. 336) includes $20 million for BIS to "to ensure BIS has necessary resources for secure information technology systems."

EXPORT ENFORCEMENT: Hassan Saied Keshari and his corporation, Kesh Air International, pleaded guilty Jan. 26 in Miami U.S. District Court to conspiracy to export military and commercial aircraft parts to Iran. Charges are still pending against two remaining defendants charged in indictment, Traian Bujduveanu and his corporation, Orion Aviation Corp. (See **WTTL**, July 7, 2008, page 4).