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

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OFAC WILL HONOR PENDING SETTLEMENTS UNDER IEEPA GUIDELINES

Firms that have pending pre-penalty notices or settlement agreements with Treasury's Office of Foreign Assets Control (OFAC) or have signed statute of limitation (SOL) waivers can expect the agency to honor those offers, OFAC indicated in guidance it issued Nov. 27 to explain how it will apply the $250,000 fines available under the International Emergency Economic Powers Act (IEEPA) Enhancement Act. OFAC said it will apply the new fines to "all violations with respect to which enforcement action is pending or commenced on or after October 16, 2007."

> "OFAC interprets this provision to mean that the new civil penalty provisions apply to all violations with respect to which a Final Penalty Notice had not been issued as of October 16, 2007," it said. The agency said it will continue to use its existing its Economic Sanctions Enforcement Guidelines and will revise the advice later to clarify further its application of the new fines.

"As a practical matter, this means that pre-penalty notices will generally be issued at the transaction amount (which, as called for by the Enforcement Guidelines, is the lesser of the transaction amount or the statutory cap)," it said. "Aggravating and mitigating factors and percentages set forth in the current guidelines will also generally continue to apply," the notice added. OFAC identified three situations where its new policy will be applied:

(1) For all pre-penalty notices (PPN) mailed before October 16, 2007, "OFAC will not impose a penalty in excess of the amount set forth on the PPN" and will apply its Enforcement Guidelines in calculating the penalty. (2) When a tentative written settlement with a particular amount has been given a party and the party has made a written settlement offer to the agency, "OFAC will continue to process the settlement according to the terms of the communication from OFAC." Regular Treasury review and approval would still be needed. (3) In cases where a party has waived the SOL for an action where the statute of limitation would have expired before Oct. 16, "OFAC will calculate the penalty amount in accordance with the maximum penalty amounts applicable at the time the waiver was signed," it stated.

SPLIT NAFTA PANEL APPLIES CHARMING BETSY TO ZEROING CASE

In a divided 3-2 ruling, a binational NAFTA panel Nov. 27 ruled that the International Trade Administration (ITA) can't use "zeroing" in the administrative review of the antidumping order on steel wire rod from Canada, citing the Supreme Court's 1804 ruling *in Charming Betsy,* which obligates the U.S. government to interpret regulations to avoid conflicts with the laws of nations whenever possible. The panel remanded the case to ITA with instructions to recalculate

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the dumping margins on wire rod imports produced by Mittal Canada Inc. without zeroing and with the correction of other errors the panel found in the agency's final January 2006 order.

> U.S. panelists Charles L. Levin and Donald W. Morgan and Canadian member Ron W. Erdmann cited several World Trade Organization (WTO) Appellate Body rulings which have found the use of zeroing in antidumping cases to be inconsistent with the WTO Antidumping Agreement (ADA). "We accordingly conclude that this Panel's obligation to respect and apply the *Charming Betsy* canon of statutory construction precludes approval of the use of zeroing in calculating Mittal's margins," they ruled.

"Mandatory provisions of the ADA constitute international-law or 'law of nations' obligations of the United States," the three panelists stated. "It would be unseemly in the present circumstances to prefer discretion of an administrative agency over compliance with the law of nations, particularly the WTO Agreements into which the United States quite willingly entered a little over a decade ago," they continued. "Nor is there any reason to believe that the Supreme Court intended *Chevron* to overrule *Charming Betsy,*" they argued.

U.S. panelist Joseph Liebman and Canadian panelist Brian Barr dissented, citing Court of Appeals for the Federal Circuit (CAFC) rulings in *Corus* and *Timken*. "In order to succeed in this case, Mittal must overcome the fact that the CAFC in *Timken* and *Corus* reaffirmed the reasonableness of Commerce's use of zeroing in the face of many of the same AB decisions which Mittal puts forward in support of the proposition that zeroing as practiced by Commerce is a violation of the ADA," the two wrote in their dissenting opinion. "*Corus* was a *Charming Betsy* attack on U.S. zeroing practice in original investigations and was issued 12 months after *Timken,*" they noted. "The CAFC refused to apply *Charming Betsy* and affirmed Commerce's use of zeroing despite the WTO AB Softwood decision," they pointed out.

Liebman and Barr also noted that ITA has amended its zeroing policies to address the WTO rulings. "We do not see the *Charming Betsy* doctrine as requiring the relevant statutes to be interpreted to require immediate compliance with international obligations given that a working compliance mechanism is in place," the pair argued.

CHINA BOWS TO U.S. COMPLAINT AGAINST ILLEGAL EXPORT SUBSIDIES

Two weeks before high-level bilateral talks between U.S. and Chinese officials, Beijing agreed Nov. 29 to eliminate export subsidies the U.S. claimed were illegal in a complaint it had brought to the WTO in February. The memorandum of understanding signed in Geneva takes at least one topic off the agendas of the Joint Commission on Commerce and Trade (JCCT) and the Strategic Economic Dialogue (SED). China's unexplained decision to drop 12 programs that were the target of the complaint appears to reflect its new policy of dampening economic expansion without changing its currency exchange-rate policy (see **WTTL,** Oct. 29, page 3).

> China has agreed to eliminate all but one export subsidy and import substitution policy – mostly in the form of tax incentives – by Jan. 1, 2008 and the one remaining regulation by Jan. 1, 2009. The U.S. will suspend its WTO complaint and monitor Chinese implementation of the MOU and only withdraw the case fully when it is satisfied that Beijing has met its commitments.

U.S. and Chinese officials tried to negotiate a settlement of the dispute starting six months before Washington filed its WTO complaint in February. Talks have continued throughout the year even as the WTO process went forward. U.S. Trade Representative (USTR) Susan Schwab declined to explain China's motivation to drop the subsidies, but USTR lawyers claimed they had a very strong legal case showing the subsidies to be illegal under WTO rules.

Many of the subsidies China is eliminating have been cited in countervailing duty cases filed this a year against imports from China. U.S. officials say Commerce will continue to apply the

CVD law against remaining domestic subsidies not included in the WTO case. In addition, the residual benefits of eliminated subsidies are also likely to be targeted in future CVD petitions.

TAIWAN PLAYS ADVANCE PAYBACK TO CHINA IN WTO DELIBERATIONS

Taiwan's decision to block and then unblock the appointment of a Chinese lawyer to the WTO Appellate Body (AB) may have been its way of showing China that keeping Taiwan out of international organizations, including the United Nations, is a two-way street. The WTO is one of the few international venues where Taipei has equal standing with China and the ability to stand up to the Chinese. Taiwan likely raised its concerns about the impartiality of the Chinese lawyer to point to later in case China tries to block future Taiwanese appointments to WTO committees or groups, one Latin American diplomat in Geneva told WTTL.

> Under pressure from other WTO members, Taiwan Nov. 27 lifted its objections to the appointment of Chinese lawyer Zhang Yuejiao to the AB (see **WTTL,** Nov. 26, page 1). Once Taiwan dropped its objections, the WTO Dispute-Settlement Body (DSB) named her to the AB position starting June 1, 2008.

Also approved for an AB post starting next June was Shotaro Oshima of Japan. The DSB also named former International Trade Commissioner Jennifer Hillman and Lilia Bautista of the Philippines to four-year AB terms starting on Dec. 11. "An amicable solution has been found," said a Taiwanese press statement. Australian Ambassador Bruce Gosper who chairs the DSB, tried to explain Taipei's change of heart as being the result of assurances that DSB rules assure the impartiality of AB members. "We've been able to address [Taiwan's] concerns," he said. But the Latin American diplomat said there is really no way to make sure a judge is impartial. It's more like a suspension of disbelief, he said.

DRAFT DOHA RULES TEXT AIMS TO SATISFY CONGRESS, DOMESTIC INDUSTRIES

The draft Doha Round negotiating text on rules governing antidumping and countervailing duty laws, released Nov. 30 by Uruguay's WTO Ambassador Guillermo Valles Galmes, who chairs the Negotiating Group on Rules, responds to congressional demands for changes in the WTO rules to reverse dispute-settlement panel and court rulings that have overturned U.S. interpretations of these rules. In particular, the draft would partially restore the International Trade Administration's (ITA) ability to use "zeroing" in dumping cases and would relieve the International Trade Commission (ITC), based on the *Bratsk* case, from having to conduct a detailed review of non-subject imports in injury investigations.

> One source who has closely followed the negotiations claims U.S. negotiators have supported the changes to satisfy congressional and U.S. domestic industry complaints about WTO rulings. "They put in the text to make Congress happy and to be able to give more on agriculture and NAMA," the source argued.

The draft text would continue to bar zeroing in investigations when "authorities aggregate the results of multiple comparisons of a weighted average normal value with a weighted average of prices of all comparable export transactions." In investigations, however, where authorities "aggregate the results of multiple comparisons of normal value and export prices on a transaction-to-transaction basis or of multiple comparisons of individual export transactions to a weighted average normal value, they may disregard the amount by which the export price exceeds the normal value for any of the comparisons," the draft states. In administrative reviews, non-dumped prices may also be disregard, it allows.

The draft also would eliminate language in the injury portion of WTO rules which led the Court of Appeals for the Federal Circuit in *Bratsk Aluminum* to require the ITC to provide detailed analysis of the impact of non-subject imports in causation determinations. In its place new wording would allow it to base its determinations on "a qualitative analysis of evidence

concerning, *inter alia*, the nature, extent, geographic concentration, and timing of such injurious effects." The draft includes a whole new section prohibiting subsidization of fisheries, a goal established at the Hong Kong Ministerial in 2006. It also would require greater transparency in dumping and CVD investigations. While this has been a U.S. goal from the start of the round, one attorney claimed these changes will increase the costs U.S. exporters face in foreign markets when they have to defend themselves against dumping and CVD complaints. New provisions also call for periodic reviews of trade law practices of WTO members. Also added are new anti-circumvention rules. In addition, the draft calls for the "sunsetting" of all cases after 10 years even if a five-year sunset review leads to continuation of an order.

HISTORY OF GATT CARRIES MESSAGE FOR DOHA ROUND TALKS

The origins of the General Agreement on Tariffs & Trade (GATT), the foundation of current WTO rules, may have implications for the Doha Round negotiations now struggling toward their seventh year, according to a group of international trade experts who are writing a book on the birth of the multilateral trading system in 1947. From the records, cables and memoranda the researchers have uncovered, it becomes clear that peace, freedom and world trade were more important political forces behind final U.S. support for the GATT than economic advantages.

> When talks on the GATT reached an impasse in 1947, President Harry Truman made the decision to accept concessions that assured the adoption of the pact despite its failure to address U.S. tariff-cutting goals and its inclusion of provisions the U.S. opposed, including the United Kingdom's demand to be allowed to maintain imperial trade preferences, according to Douglas Irwin of Dartmouth College and Petros Mavroidis of Colombia University Law School, who are writing the book along with several colleagues.

The roots of the GATT were planted in the Atlantic Charter that President Roosevelt and British Prime Minister Winston Churchill signed in 1941, they noted in a Nov. 29 presentation to the American Enterprise Institute. The Charter includes specific language that Roosevelt insisted on, setting "the elimination of all forms of discriminatory treatment in international commerce and to the reduction of tariffs and other trade barriers" as post-war goals for the alliance. Although the U.S. and UK were the primary negotiators of the GATT, India and Brazil, just as today, were at the table seeking protection for infant industries.

* * * BRIEFS * * *

EXPORT ENFORCEMENT: After making voluntary self-disclosures that it provided controlled technology to one Russian and one Chinese employee without deemed export licenses, Lam Research Corporation of Fremont, Calif., agreed to pay $27,500 civil fine in settlement with BIS.

ANTIBOYCOTT: Colorcon Limited of Kent, England, subsidiary of Pennsylvania-based Colorcon, Inc., has agreed to pay $39,000 civil fine to settle BIS charges that it violated Antiboycott regulations on 21 occasions by providing boycott-related information, refusing to do business with Israel and failing to file required reports of requests for boycott information.

JAPAN: During sub-Cabinet talks in Tokyo week of Dec. 3, U.S. officials will press Japanese to eliminate practices that delay approval of foreign pharmaceuticals and cut reimbursement payments for successful medicines. Talks also will address beef imports, express delivery services and privatization of Japan's postal insurance program.

DOHA ROUND: U.S. and EU Nov. 30 made Doha Round proposal calling for two-tiered approach to eliminating tariffs and trade barriers to environmental goods and services, including at least 43 goods with clear environmental benefits such as solar panels and wind mill turbines, and the negotiation of Environmental Goods and Services Agreement (EGSA) to lower barriers further on green technologies.

URANIUM: ITC Nov. 29 by 5-0 vote made Sunset determination that U.S. industry would likely suffer renewed injury if antidumping order on low-enriched uranium from France were revoked.

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Speakers

Saul M. Pilchen
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About Our Speakers

Saul M. Pilchen

Saul Pilchen is a partner in the Skadden, Arps, Slate, Meagher & Flom LLP Litigation and Government Enforcement Group in Washington, D.C. A former federal prosecutor, he defends corporations, officers, directors and employees in a wide variety of administrative enforcement and criminal matters, including cases related to export control and the FCPA, as well as in civil and class action litigation. Mr. Pilchen also advises clients on the design and implementation of legal compliance programs and assists them in conducting sensitive internal investigations. He has been named one of Washington, D.C.'s "go-to" white collar criminal defense counsel in *Best Lawyers in America*, a peer-review compilation. Mr. Pilchen has been published widely in journals such as *The Export Practitioner* and *American Criminal Law Review.*

Gary DiBianco

Gary DiBianco is a partner in Skadden's Washington, D.C. Litigation and Government Enforcement Group where he specializes in white collar criminal defense, securities and consumer fraud class action cases. He represents U.S. and foreign companies, financial institutions, accounting firms and individuals in civil and criminal government investigations and complex civil litigation in matters involving federal and state securities laws and the FCPA. He has advised and represented audit committees, boards and special litigation committees in connection with government investigations and shareholder litigation. Mr. DiBianco has published numerous articles and lectures frequently on the FCPA. Prior to joining Skadden, Mr. DiBianco was a trial attorney in the Justice Department's Criminal Division and was detailed as a special assistant U.S. attorney to the U.S. Attorney's Office for the Eastern District of Virginia.

Neil Lombardo

Neil Lombardo is a senior associate in the Litigation and Government Enforcement Group of Skadden's Washington, D.C. office. His practice focuses primarily on conducting internal corporate investigations and representing clients in complex securities and accounting fraud cases. Mr. Lombardo also defends clients in FCPA cases investigated by the SEC and the Justice Department. He has significant experience conducting global FCPA investigations in countries such as Egypt, Morocco, India, Vietnam, Thailand, Indonesia, Brazil, Argentina, Singapore and Mexico. Mr. Lombardo has performed internal FCPA investigations, due diligence, and training for clients in the oil and gas, beverage and automotive industries.

Stephanie Fleischman Cherny

Stephanie Fleischman Cherny is an associate in Skadden's Washington, D.C. Litigation and Government Enforcement Group. She represents companies and individuals in a broad range of federal investigations conducted by the Justice Department, SEC, OFAC and the Commerce Department, including those involving export control and FCPA issues. She has assisted companies in conducting international internal investigations and in drafting compliance programs. In the August 2007 issue of *The Export Practitioner*, she co-authored with Mr. Pilchen an article entitled "Adding FCPA Compliance to Your Business Arsenal." Ms. Cherny also has extensive civil litigation experience in federal and state courts.

Elizabeth C. Billhimer

Elizabeth Billhimer is an associate in Skadden's Washington, D.C. Litigation and Government Enforcement Group, where she has assisted in conducting internal investigations and in defending companies in government enforcement actions. Ms. Billhimer has significant experience assisting in the management of FCPA investigations for large corporate clients with worldwide operations, involving countries such as China, Iraq, Brazil, Indonesia, Mexico, Kazakhstan, and Nigeria. She also has assisted companies in enhancing their compliance programs to address FCPA requirements.

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