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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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BIS ENFORCEMENT POLICY ON IEEPA LIKELY TO CHILL SELF-DISCLOSURES

A Bureau of Industry and Security (BIS) announcement Nov. 1 has calmed one major concern exporters have about the retroactive application of higher penalties under the newly enacted International Emergency Economic Powers (IEEPA) Enhancement Act, but the agency's advice could seriously retard the future willingness of companies to submit voluntary self-disclosures (VSDs) for old violations. A BIS fact sheet explained how it will apply a provision in the new IEEPA law which says the higher penalties "apply to all pending enforcement actions." The statute, which was signed into law Oct. 16, doesn't define the meaning of a pending enforcement action and leaves it up to federal agencies to define (see **WTTL**, Oct. 29, page 4).

> BIS said it "generally" won't apply the new $250,000 maximum penalty per violation to VSDs that were submitted before Oct. 16. Nor will it apply it to cases that have already gone to an administrative law judge (ALJ) for adjudication; where a settlement offer is pending; where BIS has issued a proposed Charging Letter; or where a statute of limitation waiver has been reached.

Where offers and settlements are pending or a Charging Letter has been issued, BIS won't apply the higher penalties as long as a settlement is reached before the case is presented to an ALJ. Once a case goes to an ALJ for action, BIS will seek the highest penalty and all potential charges. One compliance expert said this policy statement appears to be intended as a threat to pressure firms to reach a settlement or face significantly higher sanctions.

The safe harbor given to VSDs already submitted eases the fears of firms that have made prior disclosures but have not yet reached a settlement with BIS for old actions that occurred before March 9, 2006, when the highest IEEPA penalty was $11,000. That was before the PATRIOT Act was amended, raising the maximum IEEPA penalty to $50,000. The new policy doesn't offer any succor to new VSDs about pre-2006 violations. BIS said it will still give at least a 50% reduction on fines resulting from a VSD. This reduction will be applied after considering mitigating and aggravating factors in the case. BIS doesn't explain the method or formula used to arrive at the mitigated/aggravated penalty amount. As a result, firms may have no way of predicting what penalty they will face for voluntarily disclosed violations from here on out.

CONTROLS CAUSE DECLINE IN NIGHT VISION LICENSES, INDUSTRY CLAIMS

U.S. makers of thermal imaging devices say export controls are driving foreign customers to buy their night vision equipment from non-U.S. sources, including China and France. They say the proof of their complaint is the 7% drop in export applications BIS handled in fiscal year

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2007,which ended Sept. 30. In 2007, BIS processed 2,642 applications with a value of $160 million for products classified in Export Control Classification Number (ECCN) 6A003(b)(4). It approved about 2200, returned without action some 200 and rejected only three, Bernie Kritzer, director of the BIS Office of National Security and Technology Transfer Controls told the BIS Sensors and Instrumentation Technical Advisory Committee (SITAC) on Oct. 30

> These numbers compare to the 2,840 applications, with a value of $115 million, handled in fiscal 2006. BIS rejected eight applications in that period, Kritzer noted. The decline in applications in fiscal 2007 came as the global market for night vision products is growing five-to-ten percent a year, Kritzer conceded.

Meanwhile, BIS appears closer to easing controls on night vision exports subject to Regional Stability (RS) restrictions. In an Oct. 30 Federal Register notice it said it "is preparing to remove the export licensing requirement for certain thermal imaging cameras to certain destinations." Along with the eased controls will come new biannual reporting requirements for exporters. "A new biannual reporting requirement will be imposed to allow the USG to verify that the cameras are continuing to be sold to appropriate end-users and that the relaxation in controls is not jeopardizing U.S. national security or foreign policy interests," the notice stated.

Without providing details on what the reporting requirements would entail, the agency asked for public comment on the burden that would come with the reporting requirement. Based on its own analysis, BIS estimated that the new rules would affect only 30 firms and the new report would take just one hour to complete at no extra cost.

HIGH-LEVEL G-20 MEETING TO SEEK UNIFIED STAND ON AGRICULTURE

Ministers from the Group of 20, which may actually be 28, developing countries known as the G-20 have been invited to Geneva for a Nov. 15 meeting to deliver a unified political message before a revised draft Doha Round negotiating text on agriculture is circulated later this month. Brazilian Minister of Foreign Affairs Celso Amorim called for the meeting. The gathering is intended to put pressure on the chairmen of the agriculture negotiating committee to recognize the views of advanced developing countries before he issues his next draft. If many ministers attend the meeting and put their demands in a paper, "that has a bearing on the negotiations," Amorim told reporters in Geneva Oct. 31.

> The G-20 wants more clarity on what is on the table in agriculture, "what was accepted, what was not accepted," Amorim said. Because other less developed county groups may also attend, "we may also issue a statement on a more general level in relation to the development character of the round," Amorim said. He urged Agriculture Negotiations Committee Chairman Crawford Falconer to wait until after the Nov. 15 meeting to issue his revised draft

The high-level meeting is a way of trying to influence the agriculture negotiations, "putting pressure on the chairman, putting some pressure on [Pascal] Lamy," a high-ranking Latin American diplomat told WTTL. The number of countries attending is also one of the messages, he added. "It's a way of telling the U.S. and the EC, 'Listen, you're not going to push us around because it's not just the G-20, we got some understanding with the others'," he explained.

Amorim said he expects Indian Commerce Minister Kamal Nath to attend. "Hopefully, our voice can be heard by the chairman of the group and that we can move to a - hopefully - last phase of negotiations with more balanced texts," Amorim said. Meanwhile, the group will be working on concrete numbers and proposals, Amorim added. "I think the political message probably will have an input" into the chairman's revision, he stated. Amorim, who has masterfullly used the G-20 to counterbalance the U.S. and European Union (EU) in the farm talks, said it was difficult not to reject Falconer's last text after it was initially presented. "We tried to work in a way that would not exclude further progress, but we have to recognize that there was an inherent imbalance." Amorim argued.

RANGLE MAKES CLEAR HIS OPPOSITION TO COLOMBIA FTA

House Ways and Means Committee Chairman Charles Rangel (D-N.Y.) doesn't want anyone to think he is neutral about the U.S.-Colombia Free Trade Agreement (FTA). Statements he made after Ways and Means approved the U.S.-Peru FTA Oct. 31 and quoted in some news accounts suggested he was sympathetic to the Colombia pact and it was just a matter of scheduling a vote. Rangel, however, moved quickly the next day to issue a statement clarifying his view.

> "Contrary to recent press reports, I do not support passage of the Colombia FTA -- there simply are not enough votes to take up this agreement," he said in his statement. "As I have previously stated, it is up to those who do support the Colombia FTA to convince members of Congress and round up the votes for the bill. The same applies to the pending agreement with Korea," he added.

With the Peru vote, Rangel showed that he knows how to corral votes when he wants to. The committee approved the deal by a unanimous 39-0 vote, with even staunch FTA opponents as Reps. Bill Pascrell Jr. (D-N.J.) and John Lewis (D-Ga.) voting in favor of the measure. The House is expected to vote on the accord the week of Nov. 5 (see **WTTL**, Oct. 8, page 4).

The Bush administration's push for the Colombia FTA continued Nov. 3-4, with U.S. Trade Representative (USTR) leading another congressional delegation to Bogota and Medellin to see progress being made in the country. Scheduled to travel with her were: Sens. Maria Cantwell (D-Wash.), Lindsey Graham (R-S.C.) and. Blanche Lincoln (D-Ark.) and Reps. Dennis Cardoza (D-Calif.), Bob Goodlatte (R-Va.), John Tanner (D-Tenn.) and Roger Wicker (R-Miss.).

CUSTOMS UNIONS SEEK FLEXIBILITY IN DOHA NAMA AGREEMENT

South American countries that belong to the trade group known as Mercosur and the South African Customs Union (SACU) floated papers in Geneva the week of Oct. 29 calling for special treat-ment in the Doha Round's non-agriculture market access (NAMA) talks for cus-toms unions that have a common external tariff (CET). The Mercosur proposal says members of custom unions should be allowed to protect 16% of their industrial tariff lines by having to cut tariffs by only half – called a "half-formula cut" – of what would be required under any final tariff-cutting deal in a final NAMA deal. The NAMA paper drafted by NAMA Chairman Don Stephenson in July offered a maximum of 10% of tariff lines for this half-formula cut.

> The Southern Cone trade group, known by its Spanish acronym Mercosur, comprises Argentina, Brazil, Paraguay and Uruguay. SACU's members are Botswana, Lesotho, Nambia, South Africa and Swaziland. The two groups argue that more flexibility is needed for customs unions in a NAMA deal because their individual members may have different tariff commitments and tariff bindings than their CET and current tariff-cutting formulas could disrupt their CET.

The need for flexibility is not Brazil asking for 16% for itself, said Celso Amorim, Brazil's Minister of Foreign Affairs during an Oct. 31 press briefing. When countries like Brazil and Argentina accepted a ceiling binding in the Uruguay Round, "the countries had different tariff structures, different bound structures for other products," he explained. Mercosur's external tariff is harmonized, but the bound tariffs of members are not harmonized very often, he noted.

Amorim claimed the sensitivities of developed countries are being taken into account in the agriculture negotiations, so the sensitivities of developing countries need to be considered in the NAMA talks. He said the tariff-cutting formulas in NAMA are too restrictive for develop-ing countries. "The formula for market access in agriculture in rich countries is extremely obscure, extremely obscure," Amorim said. "I don't know how much I'll get in terms of beef, or how much I'll get in terms of poultry," he added. With 4% of tariff lines for food products potentially exempted from market access commitments, "practically all the products of our interest" could be excluded, Amorim complained. "I'll see if others are prepared to negotiate,"

he declared. Mercosur floated its proposal now because "we didn't know what coefficients would be put on the table," Amorim said. "We never accepted the 10%" [in the Nama text], he said, contending the additional flexibility amounts to very little in terms of trade. It "is much less obstructive than the exceptions that are being sought by rich countries in the case of market access in agriculture," Amorim contended.

> "We are prepared to negotiate, but not only negotiate with ourselves. We are prepared to negotiate, if the United States says it accepts the range, for instance, for OTDS [Overall Trade Distorting Subsidies]. But the range is 16.5 to 13 [billion dollars]. What is the movement between 17, which was being said in Potsdam to 16.5? It's no movement at all. It has to come down very close to 13," Amorim argued. The way the formulae are calculated in the case of the European Union means "we don't know what we'll get ... I know what I won't get," Amorim said. "I won't get opening because the tariff cuts will still be very limited," he said.

* * * BRIEFS * * *

EXPORT ENFORCEMENT: Abraham Trujillo, 61, and David Waye, 22, are scheduled to be arraigned in Salt Lake City U.S. District Court on Nov. 7 on felony information that charges them with three counts of attempting to export items on U.S. Munitions List without license in violation of Arms Export Control Act. Pair was caught in ICE sting operation after federal agents searched Internet and found Ogden, Utah, firm NSN Specialists, was offering to sell parts for F-14 and F-14 jet fighters. Trujillo owns NSN.

MORE EXPORT ENFORCEMENT: Bing Xu, 37, of Nanjing, China, was taken into custody Oct. 29 by ICE and DCIS agents and N.J. State Police on criminal complaint that he attempted to export USML night-vision technology to China without license from DDTC. He was also charged with immigration violations for allegedly making false statements on his visa application. Complaint claims he attempted to arrange purchase of equipment through his employer, Everbright Science & Technology Co., Ltd., of Nanjing.

SUDAN: OFAC in Oct. 31 Federal Register amended Sudanese Sanctions Regulations to bring them up to date with executive orders and changes in sanctions policies in last year. New rules provides that all specific licenses and all nongovernmental organization registrations issued under E.O. 13067 or SSR prior to October 13, 2006, are authorized by E.O. 13412, which was issued in 2006, and remain in effect until the expiration date specified in the license or registration, or if no expiration date is specified, June 30, 2008. "OFAC urges all license and nongovernmental organization registration holders to take note of this potentially new expiration date, which applies to all licenses and registrations that do not otherwise contain an expiration date, regardless of when they were originally issued," OFAC stated
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FCPA: Ingersoll-Rand Oct. 31 agreed to pay $2.5 million penalty in deferred prosecution agreement with Justice on charges that several of its foreign subsidiaries made illegal payments to obtain business under Oil-for-Food program with Iraq. In separate agreement with SEC, it agreed to disgorge $1,710,034 in profits, plus $560,953 in pre-judgment interest, and to pay civil penalty of $1,950,000. Firm was also ordered to implement improvements in its FCPA compliance program.

KAZAKHSTAN: Census officials say Kazakhstan has said it will repeal law that requires importers to present copy of their export declarations on entry. Census rules prohibit release of SED and AES data (see **WTTL**, Sept. 17, page 1). U.S. officials say U.S. goods that had been held at ports are starting to move.

ZEROING: U.S. promise to comply with WTO ruling on zeroing is not sufficient grounds to extend preliminary injunction against liquidation of dumping duties on ball bearings from Japan, CIT Senior Judge Richard Goldberg ruled Nov. 2 on motion for extension by Japanese manufacturers (Slip Op. 07-161). He noted that Supreme Court denied their plea for certiorari in case Oct. 29.

SUNSET REVIEWS: CIT Judge Richard Eaton Oct. 31 agreed to grant Parkdale International, Inc., preliminary injunction barring liquidation of imports of corrosion-resistant carbon steel from Canada while court hears firm's argument that revocation notice following negative sunset review decision should be applied to imports starting at end of last five-year review not end of next period as ITA contends (Slip Op.07-159). "The court therefore finds that Commerce's conclusion that the revocation shall be effective as of the fifth anniversary of the publication of notice of continuation of the Order, rather than the fifth anniversary of publication of the original Order, is reviewable," he ruled.

TRADE PEOPLE: Dana Townsend, partner with MK Technology in Washington, DC, died Oct. 25 of heart attack. She would have been 49 in December

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About Our Speakers

Christopher R. Wall

Mr. Wall is the senior international trade partner at Pillsbury Winthrop Shaw Pittman LLP in Washington,DC. His practice focuses on export controls, foreign investment, international trade proceedings and policy. He advises clients on CFIUS reviews as well as commercial and military export licensing and enforcement; economic sanctions; anti-boycott compliance; the Foreign Corrupt Practices Act; antidumping, countervailing duty and other proceedings; Court of International Trade (CIT) appeals; Customs matters; bilateral investment treaties; and NAFTA and WTO dispute resolution. Mr. Wall is a member of the American Bar Association and has served as chair of the Special Advisory Committee on International Activities, vice chair of the Section of International Law and Practice, and Co-Chair of the International Litigation Committee. He received undergraduate degrees from Yale University and Oxford University and his J.D. from the University of Virginia Law School. He is a member of the bars of the District of Columbia and New York, the CIT and the Court of Appeals for the Federal Circuit.

Stephen J. Canner

Mr. Canner is vice president for international investment policy and financial services at the U.S. Council for International Business (USCIB). The USCIB is the American affiliated with the International Chamber of Commerce. In his capacity, Mr. Canner advocates on behalf of Council members on numerous investment and investment-related issues, including investment negotiations and disputes before the World Trade Organization, the Organization for Economic Cooperation and Development's (OECD) Principles on Corporate Governance and OECD Guidelines for Multinational Enterprises, as well as globalization and financial services. Before joining USCIB, Mr. Canner served for 28 years at the U.S. Treasury Department. From 1987 to 1992, he was director of the office of International investment. In that role, he served as staff director of the Committee on Foreign Investment in the United States (CFIUS). In 1991, he received the President's Meritorious Executive Award in the Senior Executive Service. He holds a Ph.D. in economics from Clark University.

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