

# Washington Tariff & Trade Letter®

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

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## BIS IMPOSES FIRST HIGHER CIVIL FINE UNDER PATRIOT ACT AUTHORITY

The Bureau of Industry and Security (BIS) has imposed a \$36,000 civil fine on Ace Systems, Inc., of Gainesville, Ga., for an alleged single violation of a General Order barring trade with the Mayrow General Trading Company in Dubai, using for the first time the higher fines authorized by the International Emergency Economic Powers Act (IEEPA) as amended by the renewal of the USA Patriot Act in 2006 (see **WTTL**, April 2, page 1). The legislation raised the maximum fine for each IEEPA violation to \$50,000 from \$11,000. Ace is to pay the fine in three \$12,000 payments over 90 days.

BIS claimed the company had attempted to export a Dialogic voice card, which was classified as EAR99, to Mayrow in July 2006 without an approved export license. This was just a month after the agency had issued General Order No. 3 barring exports to Mayrow because of its alleged role in exporting to Iraq components that could be used in improvised explosive devices (IEDs).

“Ace tendered 10 cards to its freight forwarder with instructions to export them to Mayrow,” a BIS statement explained. “The BIS special agent intervened and the cards never reached their destination,” it added. Ace neither admitted nor denied the BIS charge. BIS did not say the voice cards were to be used in IEDs or for any other terrorist activity.

## SEPTEMBER SONG MAY BE SWAN SONG FOR DOHA ROUND

“Oh, the days dwindle down to a precious few...” The haunting words and music of Maxwell Anderson and Kurt Weill reflect the anxiety World Trade Organization (WTO) negotiators face as they return to work in September to make another do-or-die stab at moving the Doha Round toward a deal by the end of the year. Starting Sept. 3, negotiators plan a full set of large- and small-group meetings through the month aimed at making significant progress in talks on the agriculture and non-agriculture market access (NAMA) legs of the round. Ahead of those talks, diplomats in Geneva have expressed mixed estimates on their chances for success.

Besides the difficult substantive issues that have blocked progress to date, another cloud looms over the talks: can the lame-duck Bush administration reach a deal and get it approved by the U.S. Congress. “It defies belief that we could conclude this in the next few months and then have this go through Congress next year,” one Latin American diplomat told WTTL. “I think this will slip into the initial year of the next administration,” he added. WTO spokesman Keith Rockwell sees more good news, however, in the coming talks. The multilateral process is finding traction and moving forward on the texts for the first time since the round was launched, he

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said. Agriculture and NAMA texts were revised in July just before the summer recess. "These texts...will be discussed and debated intensively in the coming weeks," Rockwell added (see **WTTL**, July 30, page 3). The September negotiating schedule, which is subject to change week to week, will begin with three days of meetings starting Sept. 3 of the Agriculture Negotiations Committee and then will take a two-day break for a local Swiss holiday.

Informal meetings are expected even during the holiday, diplomats say. Farm talks will start with an open meeting Monday and Tuesday for all WTO members, followed by a smaller group of about 30 representative member countries in what Geneva-talk calls a "Room E" format on Wednesday, Agriculture Committee Chairman Crawford Falconer told **WTTL**. The 30-country group will meet again for three days starting September 10; then talks will alternate between the 30-country group and the open format through the following week, Falconer said.

NAMA negotiators will pick up Sept. 10 where they left off at the end of July with meetings of small groups of countries. A larger group of countries will meet the week of Sept. 17. While agriculture talks have a long list of unresolved issues, the NAMA negotiations are focused on just three or four issues, one diplomat said. The main NAMA dispute is over setting the coefficients for cutting tariffs in developed and developing countries.

Services negotiators meet Sept. 17-28. From these meetings could emerge proposals on domestic regulations and a new deadline for services offers, a diplomat involved in the talks advised. "Haggling on services will likely to go on bilaterally right up until the deadline," he opined. Services talks likely won't progress much before there's more clarity on NAMA and agriculture, a diplomat from one Mercosur country said.

Everything is on the table in the agriculture talks, but fleshing out details on sensitive products, special products, special safeguard mechanism, tropical products, tariff escalation and preferences will likely take priority in the near term, Falconer told **WTTL**. "We need to bring more precision to those areas," said the New Zealand ambassador to the WTO.

In a best-case scenario, from these meetings, revised NAMA and agriculture texts could emerge in October, one official close to the talks suggested. If that happens, it "will start a domino effect," he said. Texts on rules and trade facilitation are expected to follow, he added.

A higher-level meeting of ministers is possible, but is dependent on how negotiations proceed, another diplomat said. A "Green Room" ministerial meeting in early October is possible, he said. "It would depend on some indication of progress in NAMA and ag," he added. But other officials said a ministerial meeting before November is unlikely. A decision to hold a ministerial before the Christmas break will depend on how things emerge after the first couple of weeks of the discussion in September, one source said. Such conclaves usually happen in July and December, but not much has been getting accomplished by throwing ministers at the negotiating difficulties, he commented.

## **DISAGREEMENT OVER SELECTION OF SURROGATES IN NME CASES**

There seems to be some agreement that there are problems with the current way the International Trade Administration (ITA) selects surrogate countries to set export prices in non-market economy (NME) antidumping cases, but comments received by the agency on the problems differ over the best solution. Among those responding to the ITA's request for comments on the issue was the Chinese Ministry of Commerce (MOFCOM). The Chinese urged ITA to rely on broad and representative data rather than on a single producer or region in selecting surrogates.

MOFCOM objected to the common reliance on India as a surrogate for China. While India may be an appropriate surrogate for some commodities, it may provide an unfair advantage to petitioners for others, the Chinese argued. "This problem of over-reliance on Indian data is exacerbated for products in which Indian and Chinese exporters are direct competitors; in these

instances, sophisticated Indian companies may be able to skew the results by deciding that unnaturally high surrogate values are available to the public (e.g., published on the Internet), while more appropriate lower surrogate values are not disseminated to the public,” MOFCOM wrote. “The surrogate values which the department ultimately selects cannot produce less accurate results than the potential surrogate values the department did not select,” it said.

Attorneys at Sidley Austin urged ITA to eliminate its current practice of identifying an initial list of potential surrogate countries. “Instead, the department should consider beginning the surrogate country selection process by requesting interested parties submit recommendations for potential surrogate countries within thirty days of initiation of an antidumping investigation or review,” they wrote. Parties would have to provide evidence to support their proposals and the burden would be on interested parties to support their recommendations.

Comments from the Dewey Ballantine law firm also suggested changes. “To ensure that the list is inclusive, the department should not limit the initial list to five countries, but should instead broaden the list by allowing a larger number of countries, as the facts warrant,” they wrote. “To ensure that the initial list is balanced, the department should include on the initial list countries whose per capita GDI is both above and the below the per capita GDI of the NME country,” they wrote.

The current practice was defended by attorneys from the Kelley Drye Collier Shannon firm. The firm said it “believes the department’s current approach to identification of potential surrogate countries, memorialized in Policy Bulletin 04.1, provides an appropriate and necessary amount of administrative discretion and flexibility.” They said the current method is “appropriate and administratively reasonable.”

## COMMENTS SEEK MORE INFORMATION ON CHANGES TO ENTITY LIST

BIS needs to provide more information and guidance on the bad behavior that can get a foreign firm or organization placed on its Entity List under its proposed expansion of the list, according to comments submitted to the agency on the proposal (see **WTTL**, June 18, page 2). The proposal would allow the agency to go beyond the current criterion, which limits the list to parties that are linked to the proliferation of weapons of mass destruction (WMD), to include those acting contrary to the national security or foreign policy interests of the United States.

Even the Wisconsin Project on Nuclear Arms Control, which usually supports tougher export controls and applauded the expansion of Entity List eligibility criteria, told BIS that it needs to provide more information on listed entities. “BIS should institutionalize the practice of supplying as much information as possible in entries on the Entity List,” the project wrote. Even though BIS has said it can’t include the name of foreign entities in their original foreign language, particularly Chinese, in its Federal Register notices, the agency should be able to include the names in their original alphabets on its website, it suggested.

The Industry Coalition on Technology Transfers (ICOTT) said it supports the idea of targeting tougher controls at individual entities rather than using broad new licensing requirements. But it also said BIS needs to provide more information on how entities are selected for the list and should allow entities to appeal their listing to a senior agency official. ICOTT said it was also concerned that the behavior that can get an entity on the list, such as “engaging in conduct that pose a risk of violating the EAR,” are too broad and should be more specific.

A harsher view of the proposal was offered by attorneys Carol Kalinoski and Donald Weadon who said elements of the proposal should be withdrawn and reconsidered. They complained that the five types of conducted cited in the proposal as triggering listing are too vague and broad. The proposal is a “back-door maneuver BIS is seeking to use to penalize activities or conduct comparable to those wisely removed from the final China rule,” they wrote.

## \* \* \* BRIEFS \* \* \*

USTR: Deputy USTR Karan Bhatia, will leave his post in October to return to private sector. He has spent six years serving Bush administration, last two at USTR. Prior to that he was assistant secretary of Transportation for aviation and international affairs and BIS deputy under secretary.

BIS: Deputy Under Secretary Mark Foulon will move on detail in late September to Treasury to serve as Under Secretary David McCormick's chief of staff. Career civil servant, he is expected to return to BIS after year. Also at BIS, new OEE Director Kevin DelliColli will become acting deputy assistant secretary for export enforcement, filling post vacated by Wendy Wysong (see WTTL, Aug. 6, page 4).

FCPA: Textron Inc., Aug. 23 settled SEC and Justice complaints that two of its David Brown French subsidiaries authorized and made approximately \$650,539 in kickback payments in connection with sale of humanitarian goods to Iraq under U.N. Oil for Food Program from 2001 to 2003. Without admitting or denying charges that it violated FCPA, Textron agreed to be permanently enjoined from future violations of law; to disgorge \$2,284,579 in profits, plus \$450,461.68 in pre-judgment interest; and pay civil penalty of \$800,000. It also agreed to make certain improvements in its FCPA compliance program. Company will also pay \$1,150,000 fine as part of non-prosecution agreement with Justice.

EXPORT ENFORCEMENT: BIS imposed 25-year denial order on Spector International, which operates as Norsal Export Limited, and its president, Norman Spector, as part of settlement agreement to resolve agency charges that they committed 44 violations of EAR with exports or attempted exports of microwave amplifiers to China without licenses. They were also charged with making false statements on SEDs. BIS imposed \$462,000 civil fine on firm but suspended entire fine for one year, saying it would waive fine if company stays in compliance. It also fined Norman Spector \$462,000, but agreed to suspend and then waive \$440,000, if he stays in compliance. Norsal and Spector neither admitted nor denied BIS charges.

MORE EXPORT ENFORCEMENT: Aimil Limited of New Delhi, India, has agreed to pay \$8,800 civil fine to settle single BIS charge that it aided and abetted export of EAR99 Lasir-II 310A to India's Space Application Center, which was on BIS Entity List, without approved license. BIS Charging Letter claims firm ordered item from U.S. exporter but provided U.S. firm with incorrect end-user.

NAFTA STEEL: Commerce Aug. 21 launched website – NAFTA Steel Monitor – that will provide steel trade data from U.S., Canada and Mexico for North American Steel Trade Committee, tri-national steel coordination group. URL is [www.nastc.org](http://www.nastc.org).

CHINA: Specialty Steel Industry of North America issued updated report Aug. 23 claiming growth of Chinese stainless steel industry is result of Chinese government subsidies that were part of Ninth and Tenth Five-Year Plans produced by Beijing. China became world's largest producer of stainless steel in 2006 but still remains net importer of stainless and high-value steel, report notes. China's subsidies have come in form of debt-to-equity swaps, preferential access to government infrastructure projects such as Three Gorges Dam, and loan forgiveness. Some of these activities took place in 1999 or 2000, report indicates.

ZEROING: ITA Aug. 20 issued final Section 129 ruling aimed at bringing its antidumping ruling on stainless steel sheet and strip coils from Italy in line with WTO panel ruling against U.S. policy on "zeroing." Agency rejected request to correct clerical errors and also contention that it lacks authority to revise zeroing practice. Such arguments are outside scope of Section 129 review as were protests citing CIT remand determination, ITA staff memo concluded. Final Section 129 determination would set dumping duties at 2.11% on imports from Italy.

ELECTROLYTIC MANGANESE DIOXIDE: Tronox LLC, Aug. 22, filed antidumping complaints at ITC and ITA against electrolytic manganese dioxide from Australia and China.

OFAC SANCTIONS: Treasury in Federal Register Aug. 30 amended trade sanctions regulations for Cuba, Burma, Iran and Sudan to authorize "augmentation of written publications in electronic format through the addition of embedded software necessary for reading, browsing, navigating, or searching the written publications as well as the exportation of such embedded software provided certain conditions are met." Among other changes, it clarifies that term "written publications" in general licenses includes manuscripts, books, journals, and newspapers even if they are published solely in electronic format.

OFF-ROAD-TIRES: In preliminary ruling Aug. 20, ITC said U.S. industry may be suffering injury due to allegedly dumped and subsidized imports of off-the-road tires from China.

CORRECTION: Director of BIS information technology controls division is C. Randall (Randy) Pratt. We apologize for misspelling her name repeatedly in WTTL, Aug. 13, page 3.