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BIS ISSUES FINAL PENALTY GUIDANCE FOR ENFORCING EXPORT CONTROLS

The Bureau of Industry and Security (BIS) has refused to be bound by the final penalty guidance it issued in the Feb. 20 Federal Register. Industry comments on the original proposal asked the agency to follow the policy of other law enforcement agencies that have agreed to abide by their penalty and enforcement guidelines. In the final rule, BIS said the guidance "describes how BIS typically exercises its discretion" to decide what administrative sanction to apply in each case (see **WTTL**, Sept. 22, page 1). Language in the rule "make clear that BIS intends to consider cases in accordance with the Guidance," it said in the preamble to the rule.

> BIS also rejected comments that wanted a voluntary self-disclosure of an export violation to be treated as a "rebuttable presumption" that a case would be settled with only a warning letter and not fines. "BIS concluded that no single factor should carry a presumption that no penalty will be sought," the agency said.

Comments had complained that BIS was unclear about what it meant by violations "of a technical nature" that might get more lenient treatment. The agency, however, refused to be more clear. "Because BIS believes that it should retain considerable discretion regarding whether a particular case should be resolved by a warning letter, BIS does not believe that a more specific formulation of this criterion is useful," it said in the preamble.

The final penalty guidance spells out the factors BIS will consider in deciding whether to issue a warning letter for an export control violation, seek an administrative fine or denial of licensing privileges or refer a case to Justice for criminal prosecution. It identifies the mitigating and aggravating circumstances that could tilt BIS's judgment one way or the other.

BIS disagreed with comments seeking special treatment for large exporters who might have a higher incidence of violations than small exporters because of their high export volume. "BIS considered these comments and determined that, as a general matter, it would be inappropriate to adopt guidance suggesting that, other things being equal, a violation by a larger-volume exporter would be treated more leniently than an identical violation by a smaller business or a business that only occasionally engages in exporting," the agency responded.

OFAC CLARIFIES POLICY ON PATENT AND TRADEMARK FILING IN IRAQ

U.S. persons can apply for and pay fees for new patents and trademarks through the Trademark and Patent Office (TPO) of Iraq under the general license that Office of Foreign Assets Control (OFAC) issued last May unless the patented products and technology are on the Commerce

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Control List (CCL) and subject to continuing licensing requirements, OFAC stated in a just released interpretive ruling. Transactions, including renewals, for patents and trademarks issued before the May 23, 2003, general license are still prohibited, but "it is OFAC's policy to license all transactions" related to the renewal and maintenance of these patents, it ruled.

> Abandoned patents and trademarks are considered to be blocked property, the ruling stated. "However, if the TPO were to set up revival procedures, OFAC would consider authorizing the participation of U.S. persons in that process, with the caution that the blocked patents and trademarks remain subject to the prohibitions of Subpart B of the Regulations," OFAC stated in the ruling (040109-FARCL-IQ-02) which was dated Jan. 9, 2004. Any effort to obtain or assign patent and trademark rights in Iraq "would need specific authorization," it said.

BIS FIGHTS PENTAGON EFFORT TO TIGHTEN CONTROLS ON BALL BEARINGS

BIS is trying to beat back a Defense proposal to impose new export controls on certain ball bearings that could be used in ballistic missiles. The Pentagon wants to take a proposal to the Missile Technology Control Regime (MCTR) to add certain precision bearings to the MTCR control list. BIS staffers have objected to the proposal because some of the ball bearings under consideration are also used in such low-tech products as skateboards and in-line skates.

> Although some ball bearings are currently controlled under Export Control Classification Number (ECCN) 2A001 for antiterrorism and nuclear reason and others are controlled on the Munitions List (ML), these controls are "not tight enough to catch what DoD is concerned about," one BIS staffer told the agency's Transportation Technical Advisory Committee (TransTAC) Feb. 17

Pentagon representatives presented their ball bearing proposal to an interagency meeting the week of Feb. 9. Intelligence sources say some countries are trying to obtain these ball bearings for use in turbo pumps used in ballistic missiles. The Defense proposal identifies speed, temperature and corrosion limits that it wants added to control parameters for bearings.

The battle over ball bearings has arisen as a separate interagency dispute is being fought over the licensing jurisdiction for aviation items that are certified by the Federal Aviation Administration (FAA). Under Section 17 of the now-expired Export Administration Act (EAA), FAA-certified items are subject to Commerce jurisdiction and cannot be controlled under the Arms Export Control Act (AECA). But some State and Defense officials are arguing that the expiration of the EAA has made that provision void and the jurisdiction issue is open for debate.

EU CHALLENGES U.S. "ZEROING" POLICY IN ANTIDUMPING CASES

The European Union (EU), supported by Japan, Korea, Mexico and India, asked the World Trade Organization (WTO) Feb. 18 to establish a dispute-settlement panel to hear its complaint that U.S. antidumping law and regulations, which require the "zeroing" of dumping margins, violate the WTO Antidumping Agreement. The U.S. used its one-time prerogative to block a panel's creation, but the Dispute Settlement Body likely will form one at its next meeting.

More than a dozen original antidumping rulings and administrative reviews, mostly covering steel products from the EU, are at issue in the complaint. The U.S. and EU held consultations last year on the complaint. "Despite the effort to solve this matter amicably, the U.S. failed to solve this issue," said EU Trade Commissioner Pascal Lamy in a statement. "In these circumstances, we have no choice but to request a panel," he added.

The EU complaint targets the International Trade Administration's (ITA) practice of assigning a "zero" margin for products in an "averaging group" when a negative margin is found during an investigation. By raising negative margins to zero in calculating weighted-average margins,

"the United States calculates a margin and amount of dumping in excess of the actual dumping practiced by the companies concerned," the EU's complaint asserted. The EU had once used the same zeroing policy in its antidumping cases, but a WTO panel in EC Bed Linen, a case brought by India, ruled the EU policy violated WTO rules. "The current U.S. practice in antidumping investigations is identical to that condemned in Bed-Linen," the EU claimed.

The U.S. Court of Appeals for the Federal Circuit in January upheld ITA's zeroing practice in *Timken v. U.S.* In that case, Japan's Koyo Seiko cited the WTO rulling in *EC Bed Linen* to support overturning the ITA policy. Koyo Seiko noted the 1804 Supreme Court ruling in *Charming Betsy* as a precedent requiring U.S. courts to interpret U.S. laws whenever possible in a manner consistent with international obligations. The court disagreed, saying ITA's practice was a reasonable interpretation of the statute and even if it were not, "we would nonetheless find Commerce's continued practice of zeroing reasonable in light of EC Bed Linen." Moreover, the WTO decision "is not binding on the United States, much less this court," it said. "We refuse to overturn the zeroing practice based on EC Bed Linen," the court ruled.

BANK CONSOLIDATION REDUCING FINANCING SOURCES FOR SMALL EXPORTERS

The continuing trend toward consolidation of the banking industry in the U.S. is hurting the ability of small and medium-size exporters to find financing for export sales, members of the Export-Import Bank's advisory committee reported at their Feb. 18 meeting. This trend has aggravated a long-running problem Ex-Im has had getting local banks to participate in export financing. As banks have consolidated and become bigger, "small and medium exporters are not their market," one member noted. In addition, these larger banks are trying to reduce their exposure in foreign markets, another member pointed out.

> Ex-Im has been trying to deal with this problem through new line-of-credit programs, especially in sub-Sahara Africa, and by reaching out to banks overseas. It recently reached financing agreements with banks in Russia to finance three deals, Ex-Im President Philip Merrill reported.

Banks in emerging markets often have limited ability to finance trade because they can't get dollars either because of capital controls in their country or because international investors are overly cautious, as occurred during the Asian Financial Crisis. In other cases, the banks are unaware of Ex-Im programs. As a result, many customers overseas rely on the exporter to provide or find financing. Big companies often are able to self-finance their exports but smaller companies rely increasing on Ex-Im, committee members stated.

ITA LIMITS RESPONDENTS IN CHINA FURNITURE CASE

The legal battle over the antidumping case against imports of wooden bedroom furniture from China is getting more bitter, with parties now debating whether the investigation of imports should characterize each piece of furniture by its height, width and depth or by the number of draws in a piece. There is still disagreement over whether the case should examine full bedroom suites or individual pieces of furniture. The sparring over the control numbers (CONNUM) to be used in questionnaires that are being sent to respondents follows a similar fusillade that was fired over which Chinese firms should be selected as mandatory respondents (see **WTTL**, Jan. 26, page 1).

After obtaining information on 211 potential producers and narrowing the field to 137 firms, ITA selected only seven companies for the honor because they represent the largest volume exporters to the U.S. ITA staff said these seven account for nearly 41% of the subject exports. The fight also may be taking on political tones. One opponent of the case, Jim Kettle Jr., president of Kittle's Furniture, met with Commerce Under Secretary Grant Aldonas and Assistant Secretary James Jochum in January. Kittle made sure his thank you note to Jochum was written on the letterhead of the Indiana Republican Party, of which he is chairman. Trade officials from Beijing and the Chinese embassy in Washington, along with Chinese company representatives, have also

visited with ITA officials on at least two occasions to seek assurances that ITA would conduct a fair investigation and to discuss giving the Chinese firms market-oriented industry status.

WTO PLANS 'AGRICULTURE WEEK' IN MARCH TO RESTART DOHA ROUND

The new chairman of the World Trade Organization (WTO) negotiating committee on agriculture, New Zealand's ambassador to the WTO Tim Groser, has scheduled a whole week of talks starting March 22 to get Doha Round negotiations restarted. In a message to delegates, Groser reportedly called for the week of informal talks to aim at direct negotiations among members rather than a formal meeting where everyone would just restate positions that are already well known.

> As Groser was issuing his invitations, U.S. Trade Representative (USTR) Robert Zoellick was beginning the final leg of his around the world tour to build support for getting the Doha talks relaunched (see **WTTL**, Jan. 19, page 3). After stops in Tokyo, Singapore, Beijing, New Delhi, Cape Town, and Mombasa, Kenya, Zoellick was headed for a Feb. 23 meeting in Costa Rica with the Cairns Group of agriculture exporting countries. Throughout the trip, Zoellick told reporters in Mombasa, the top priority issue that was raised was agriculture.

In Mombasa, Zoellick met with Kenyan Trade Minister Kituyi, EU Trade Commissioner Pascal Lamy and WTO Director General Supachai. Emerging from their meeting appears to be the outline of a global deal on cotton, one of the main points of contention during the WTO Ministerial Meeting in Cancun. The elements of such an agreement might include economic aid to cotton producers in Africa from the World Bank and IMF, plus a trade package calling for the elimination or reduction of cotton export subsidies, domestic support and tariffs. Ironically, as the Multifiber Arrangement (MFA) is about to end, trading nations may go back to a multilateral cotton agreement. The 1961 Short-Term Arrangement on Cotton Textiles was the ancestor of the MFA.

* * * BRIEFS * * *

FOREIGN AFFILIATES: Senate Finance Committee Chairman Charles Grassley (R-Iowa) and Ranking Member Max Baucus (D-Mont.) Feb. 19 wrote to Treasury Secretary John Snow asking for information on how OFAC prevents U.S. companies, specifically GE, CononcoPhillips and Halliburton, from using foreign subsidiaries to conduct business with terrorist states in violation of U.S. sanctions. Letter was sparked by news stories claiming firms were using loophole in law to keep trading with Iran and Syria. Two lawmakers also wrote to three companies firms asking for their comments on charges.

BIS: Pending approval from Commerce managers, Office of Strategic Trade and Foreign Policy (OSTFP) is being reorganized along CCL categories, with its Foreign Policy Division, which is headed by Joan Roberts, moving to Office of Nonproliferation Controls and Treaty Compliance (ONCTC). New OSTFP divisions will be grouped by CCL categoris 1-3, 4-5 and 6-9. ONCTC will continue reviewing cases related to AG, CWC, MTCR and NSG regimes.

AUSTRALIA: President Bush wasted no time notifying Congress of his intent to sign FTA with Australia. After talks were completed Feb. 8, Bush sent notice to Congress Feb. 13. On Feb. 17, USTR's office asked ITC to conduct requisite study on impact of trade deal on U.S. economy (see **WTTL**, Feb. 16, page 1).

CONGO: State in Feb. 17 Federal Register revised ITAR rules to implement July 2003 UN Security Council resolution allowing exports of certain humanitarian and nonlethal military equipment to Democratic Republic of Congo (formerly Zaire). New policy will be case-by-case exception from policy of denial.

GSP: As part of 2004 review cycle, USTR's office Feb. 13 asked ITC to conduct review of goods proposed for addition or deletion from eligibility under GSP program and competitive need limits. Short list this year– only two additions, five removals and three waivers.

TISSUE PAPER: Six firms and Paper and Allied-Industrial Union filed antidumping complaints at ITA and ITC Feb. 17 against imports of tissue paper and crepe paper products from China.

STEEL: CIT Judge Gregory Carman Feb.19 upheld (Slip Op. 04-15) ITC's negative injury determinations in 2002 antidumping and countervailing duty cases against cold-rolled steel from 20 countries.