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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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RESIGNATION OF MYERS LEAVES VOID IN BIS ENFORCEMENT LEADERSHIP

In the last six months, the Bureau of Industry and Security (BIS) has lost all its top law enforcement staff, with the latest departure coming Nov. 12 when Assistant Secretary for Export Enforcement Julie Myers left to move to the White House. Myers, who has been at BIS just one year, reportedly is going to help to pick appointees for the second Bush administration.

Myers has had a tough time as top cop at BIS. Sources say there has been friction between her and BIS Under Secretary Kenneth Juster. She also faced criticism from the trade bar over BIS policies on voluntary self-disclosures. While Myers encouraged self-disclosures, trade lawyers complained about the high civil fines imposed on firms that did report their own export violations.

Myers' exit follows those earlier this year of Deputy Assistant Secretary Lisa Prager, Export Enforcement Office Director Mark Menefee and Antiboycott Compliance Office Director Dexter Price. All those posts are now being held by BIS staffers on an acting basis.

CIT JUDGE CALLS FOR END TO DUAL JUDICIAL REVIEW

Court of International Trade Judge Thomas Aquilino Jr., who has never shied away from controversy, has taken on the Court of Appeals for the Federal Circuit (CAFC), suggesting that its jurisdiction to review CIT decisions should be eliminated. The dual jurisdiction of the CIT and the CAFC, which reviews appeals of CIT decisions, has contributed to the increase in remands and re-remands of antidumping and countervailing duty cases, Aquilino contends.

The question has to be raised "whether or not it is now time to discontinue the Federal Circuit's jurisdiction in trade cases, leaving jurisdiction for review of them, such as they are, to three-judge panels of the Court of International Trade," Aquilino told the CIT's Judicial Conference Nov. 8. The dual-jurisdiction problem has existed since enactment of the Trade Agreements Act and the Customs Courts Act, he told the meeting (see story page 2).

A natural professional jealousy exists between the CIT and CAFC because of the higher court's role in reviewing and sometimes reversing CIT opinions. The most recent fray was caused by the CAFC's reversal of the CIT in *Nippon Steel*, a case that has bounced around the courts for four years. CIT Chief Judge Jane Restani issued a third remand to the International Trade Commission a month ago (see **WTTL**, Oct. 18, page 2). "If we are interested in expediting these matters, it would seem to me that the dual judicial review, given the same standard of

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review given to both courts, is an area where we could seriously consider advancing these matters, which presumably is the goal of almost everyone in this room,” Aquilino said.

AGENCIES TAKING STEPS TO AVOID REPEATED REMANDS

The International Trade Administration (ITA) and International Trade Commission (ITC) are taking steps to avoid the repeated cycle of rulings, remands, rulings and re-remands that have come to resemble a “ping-pong” game, officials of the two agencies contend. The agencies are reopening records and getting comments from parties before issuing final remand decisions.

The number of repeated cycles of remands has increased because the agencies are trying to interpret changes in the trade laws and new requirements imposed by the Uruguay Round Agreements Act (URAA). Disputes over the “sunset review” requirements created in the round have been a prime source of repeated remands, according to speakers at the CIT’s Judicial Conference Nov. 8.

The ITC staff has studied the remands it has gotten from the CIT since 2001 and found the rate of remands is not greater than the historical average. Nor have ITC interpretations changed, reported James Lyons, acting ITC general counsel. “It is fairly clear, at least from the track record of the last four years, that we do have a disproportionate number of remands coming from a fairly small group of judges,” he said without naming them. While not saying these judges give less deference to ITC judgments than their colleagues, Lyons said that “in two or three cases, where we’ve seen repeated remands, there is a real question as to whether the role that’s being played by the court is one that goes beyond the bounds of the standard of review.”

STATE APPROVED LICENSES BASED ON FORGED DOCUMENTS

On three occasions, State licensed exports of helicopter engines for the Malaysian and South Korean armies based on forged documents and without checking to see if the orders for the equipment were bonafide. They weren’t. Two engines were actually shipped to Malaysia under license but then diverted to China. Four others weren’t shipped only because of suspicions raised by a Customs agent and executives at General Electric, the engines’ manufacturer, and United Technologies’ Helicopter Support International, the engines’ supplier.

The duping of State was revealed in court papers released after a South Korean national, Kwonhwan Park, who is also known as Howard Park, pled guilty Nov. 9 in New Haven U.S. District Court to two counts of a four-count indictment charging him with violating the Arms Export Control Act. One count was based on his attempt to carry military night vision goggles out of the country in his luggage.

According to an affidavit by Immigration and Customs Enforcement (ICE) Special Agent Peter Ross, Park forged the signature of a Malaysian general on nontransfer and end-use certificates filed with State for two licenses for engines used in Sikorsky S70 Black Hawk helicopters. Park also filed false documents that State used to approve four engines for sale supposedly to the South Korean Army. GE executives contacted ICE about their suspicions, because Malaysia’s army has only two Black Hawk helicopters. [**Editor’s Note:** Copies of the plea agreement, indictment and affidavit will be sent to WTTL subscribers on request.]

LONGER INJUNCTIONS AGAINST LIQUIDATION EXPECTED

More petitioners in antidumping and countervailing duty cases may seek longer Court of International Trade (CIT) injunctions against the liquidation of targeted imports due to the erroneous liquidations that have occurred in the last couple of years, suggested speakers at the CIT’s Judicial Conference Nov. 8. Although liquidation errors are few given the large volume of liquidations that Customs makes, inappropriate liquidation can deny benefits to petitioners,

who don't have the same right to appeal liquidations as importers. CIT judges appear inclined to grant longer injunctions, including until final adjudication before all courts and administrative reviews, due to an increasing number of remands.

CIT Chief Judge Jane Restani, who recently issues such an injunction, told the conference that each case has to be viewed separately (see **WTTL**, Oct. 29, page 2). "One of the things you have to keep in mind reading any of these cases is what kind of injunction the person was asking for," she said.

One problem with the whole process of liquidation and protest of liquidation is that "it doesn't really suit petitioners' needs very well," she said. Because of this and the workings of the Byrd Amendment, which distributes dumping and CVD duties to petitioners after liquidation, "petitioners need to take steps to protect themselves," she added. Petitioners may "need to go out there and get the statute fixed so that they have a little more protection," she suggested.

She noted three factors that guide her decisions on injunction motions. "One, I am interested in preserving jurisdiction so that the court's decision is meaningful and the parties get the relief they are entitled to if they actually win the case," she said. "Two, I am interested that the court is an institution and I want the court's orders to be obeyed, so I want to make them clear. Three, I don't want, because of my own inadvertence or lack of thought on something, to make an occasion for more litigation," Restani explained. These issues are more important to her than the traditional questions of likelihood of success and irreparable harm, she said.

WTO PANEL RULING ON GAMBLING COULD DELAY DOHA TALKS

World Trade Organization (WTO) members may be more cautious in making commitments to open their services sectors in Doha Round negotiations following a WTO dispute-settlement panel ruling Nov. 10 that said the U.S. had to open its market to international Internet gambling operators because it inadvertently included the sector in its schedule of commitments in the Uruguay Round. U.S. trade officials disagree with the panel's opinion and say they will appeal it to the WTO Appellate Body and seek to withdraw this sector from its commitments.

The panel's preliminary ruling in the complaint brought by Antigua was leaked in March (see **WTTL**, March 29, page 3). The panel sided with Antigua's argument that the U.S. commitment to open "other recreational services" using the UN's Central Product Classification system failed to exclude "gambling and betting services" specifically. The U.S. did exclude sporting services.

In its final report, the panel said it recognized the sensitive nature of gambling and emphasized that it's ruling didn't mean countries can't regulate or prohibit gambling and betting activities. "We note in this regard that the United States may well have inadvertently undertaken specific commitment on gambling and betting services," panel wrote.

EXPORT LAWYERS OBJECT TO CHANGED KNOWLEDGE STANDARD

BIS has extended the period for public comment on its proposed changes to the definition of "knowledge" in the Export Administration Regulations (EAR) in response to strong objections from large exporters and trade lawyers. Exporters also complain that the revised "red flags" guidance in the proposal will lower the threshold for raising suspicions about proposed sales and increase the number of cases that need increased inquiries (see **WTTL**, Nov. 8, page 4).

Exporters don't object to BIS' proposed use of the "reasonable person" standard to determine when someone has "knowledge" that an end-use or end-user triggers a licensing requirement. They say their concern is over the proposal to define knowledge as knowing something is "more likely than not" to happen rather than the existing definition based on "a high probability" that something will happen. Trade lawyers contend "more likely than not" is not used in other

statutes and regulations or in court rulings. Exporters also say they would have to revise their export compliance programs and screening methodologies if BIS revises its red flag advice. The changes would require them to obtain information about business practices in other countries that they normally don't collect, they say. New flags also could require licenses for customers who trade legally under their national laws with countries subject to U.S. sanctions.

FURNITURE INDUSTRY SPLIT OVER CAUSE OF INJURY

While some trade attorneys say they expect the ITC to find U.S. industry being injured by bedroom furniture from China, opponents of the antidumping case against the imports still tried Nov. 9 to convince the commission that the Chinese goods are not the cause of the industry's problems. The ITC hearing on the final injury phase of the case came the same day the ITA issued its final dumping determination, cutting the duty margins on the majority of imports.

Lynn Chipperfield, VP of Furniture Brands International, which opposes the complaint, told the ITC that the bankruptcy of many older retailers and the rise of low-cost chains such as Wal-Mart and Costco have put greater pressure on the industry than imports from China. In addition, due to the restrictions, some Chinese firms have shifted production to Vietnam. "Because of this short-sighted tariff effort, we are now faced with more domestic plant closings to accommodate this additional Vietnamese capacity," she said in her prepared testimony.

ITA's final dumping ruling Nov. 9 reduced to 8.64% from 10.92% the margins for 115 firms that were given separate rates even though they were non-mandatory respondents. These firms represent 65% of the value of imports from China, ITA said. For seven major producers who account for 35% of imports, ITA dropped the rates for four and raised them for three

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MISSILE CONTROLS: BIS in Nov. 8 Federal Register revised missile technology controls to eliminate specific projects in China, Iran, India, North Korea and Pakistan that are subject to controls and to expand controls on all destinations if exporter knows or is informed of potential use of items for missile purposes.

TRADE FIGURES: U.S. merchandise exports for first nine months of 2004 are up 13.6% from same period year ago to \$597.6 billion. Services exports are 12% ahead of last year at \$253 billion. But goods imports reached \$1,079 billion, up 15.5% from first three quarters of 2003, as services imports gained 14.2% to \$215.7 billion.

MISCELLANEOUS TARIFFS: Congressional sources say they expect Senate will approve miscellaneous tariff bill (H.R. 1047) when lawmakers return Nov. 15 for lame-duck session (see **WTTL**, Oct. 18, page 4).

YUGOSLAVIA: BIS issued final rule in Nov. 12 Federal Register amending EAR to eliminate FRYM restrictions on certain designated nationals from Yugoslavia.

ARMS INDICTMENT: U.S. Attorney in Philadelphia has filed information against Nozzle Manufacturing Co., of Swedesboro, N.J., doing business as Monarch Nozzle, for allegedly attempting in 1999 to export oil burner nozzles to Iran via Germany without OFAC approval. Monarch brand name was later sold to firm not involved in case, Justice sources note.

HAND TRUCKS: ITC, in final determination, voted 6-0 Nov. 10 that dumped imports of hand trucks and parts from China threaten to injure U.S. industry.

ALUMINUM: On 4-2 vote Nov. 5, ITC made final determination that dumped aluminum plate from South Africa is not injuring or threatening to injure U.S. industry.

OFAC: Treasury imposed \$32,500 civil penalty on Daimler-Chrysler (formerly Mercedes-Benz of Mexico) for exporting goods to Cuba. It fined Fort Dodge Animal Health \$26,956 for exports to Yugoslavia.

CHINA: USTR Nov. 12 announced rejection of congressional request to launch Section 301 investigation of Beijing's alleged manipulation of yuan to keep currency undervalued (see **WTTL**, Oct. 4, page 2).