Washington Tariff & Trade Letter®

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

Editor & Publisher: Samuel M. Gilston ● P.O. Box 5325, Rockville, MD 20848-5325 ● Phone: 301-570-4544 Fax 301-570-4545

Vol. 24, No. 15 April 12, 2004

DEEMED EXPORT VIOLATIONS WERE PART OF $200,000 SETTLEMENT DEAL

New Focus, Inc., of San Jose, Calif., has agreed to pay a $200,000 civil fine to settle Bureau of Industry and Security (BIS) charges that it committed eight violations of the Export Administration Regulations (EAR), including three "deemed export" violations. The BIS charging letter to the firm claimed it transferred controlled technology to two Iranians and one Chinese without a license on at least three occasions. "The settlement in this case sends the strong message that violations of the 'deemed export' provisions will be vigorously pursued," said a statement by BIS Assistant Secretary for Export Enforcement Julie Myers.

Four other charges were related to the alleged unlicensed export of microwave solid state amplifiers to the Czech Republic, Chile and Singapore. The firm had voluntarily self-disclosed the alleged violations.

The case demonstrates how successor liability will hit the last surviving corporate entity in mergers and acquisitions. The charges against New Focus actually involved actions by JCA Technology, Inc., of Camarillo, Calif., which New Focus acquired on Jan. 16, 2001. The BIS charging letter cited actions occurring at JCA from Oct. 15, 1997 to Jan. 9, 2001, and some after New Focus completed its acquisition. New Focus itself was acquired by Bookham Technology of Milton, United Kingdom, on March 8, 2004, less than a month before BIS announced settlement of the case. Bookham apparently will now pay the fine.

The deemed export charges against the firm involved the release in the U.S. of data for microwave solid state amplifiers to one Iranian and one Chinese. Another Iranian was given access to technology for photoreceivers and telecommunications components, BIS charged. These foreign nationals were not permanent residents in the U.S. nor protected individuals. Because the alleged violations took place while the Export Administration Act (EAA) had been temporarily renewed, they each were subject to a potential fine of $120,000.

COMMERCE LETS CUSTOMS USE EXPORT DATA TO SCREEN MEXICAN IMPORTS

Commerce Secretary Don Evans has circumvented Census opposition to the release and sharing of export data with foreign governments by issuing an order delegating to Customs and Border Protection (CBP) the authority to decide whether to share such data indirectly with Mexico. A separate memorandum of understanding (MOU) between Commerce and CBP limits how CBP can use that authority but allows it to help Mexico screen imports to make sure information on import documentation matches information on export documentation. Although Customs has refused to release the text of the MOU, it said the agreement will allow it to validate Mexican

Copyright © 2004 Gilston-Kalin Communications, LLC. All rights reserved. Reproduction, copying, electronic retransmission or entry to database without written permission of the publisher is prohibited by law.

Published weekly 50 times a year except last week in August and December. Subscription in printed or electronic form is $597 a year in U.S., Canada & Mexico; $627 Overseas. Additional copies with full price subscription are $75 each.
Circulation Manager: Elayne F. Gilston

import data "for the purpose of mutual border protection, export control and the detection and deterrence of revenue fraud." Under a separate agreement with Mexico, CBP will receive reports from Mexican Customs on imports from the U.S. and will run that data through its computer system to see if the information matches what was reported by U.S. exporters on Shipper's Export Declarations (SEDs) filed through the Automated Export System (AES). Only data filed through AES is covered by the deal.

> "This information will be limited in content and scope, under strict controls, and access to the information within the respective customs authorities will be limited," Customs said in its announcement of the new process. "No company-specific data is involved," it added. "No raw data will be exchanged by Mexico Customs and CBP, only an indicator that the data matched or did not match what CBP has on file," CBP noted. The MOU is limited to release of information to Mexico.

Under the arrangement, Mexico will send its import data to CBP, which will match them by their Internal Transaction Number (ITN), the number assigned to each export by AES. Customs will check these records to see whether there is a match between declared export and import values, quantities, and country of origin. CBP will notify Mexico Customs when there is an anomaly, and it will be up to the Mexicans to decide what steps to take after such reports.

The standard for determining whether there is an anomaly in export and import values will vary depending on the total value of the shipment. Government sources admit there may be justified reasons for discrepancies in export and import values, such as when goods are dropped shipped or part of routed transactions where the value declared by the U.S. principle party in interest may differ from the price a third-country buyer is charging its customer in Mexico.

Late in 2003, the Department of Homeland Security (DHS) asked Commerce for authority to share SED data with foreign governments as part of a plan to tighten cargo security. The trade community objected to the release of SED data unless strict limits were placed on what would be shared (see **WTTL**, Jan. 26, page 4). DHS apparently dropped that request but continued to press for the exchange with Mexico. Census rejected a separate request from Costa Rica to get access to SED data for imports from the U.S.

IT'S GETTING HARDER TO FIND SURROGATES IN CHINA TRADE CASES

China's expanding industrial production, its growing market share in key product areas and its accelerating economic development are making it more difficult for the International Trade Administration (ITA) to find a "surrogate country" to compare it with in antidumping cases. The growing disparity between China and the countries traditionally used as surrogates could increase the distortion in the dumping margins ITA calculates in these cases.

> In the current antidumping case against Chinese wooden bedroom furniture, ITA has selected India as the surrogate for China. An ITA staff memorandum said India, a commonly selected surrogate for China, is at a comparable level of economic development, is a significant producer of comparable merchandise and provides the best publicly available data for calculating the value of production.

Before selecting India, ITAers considered four other candidates – Pakistan, Indonesia, Sri Lanka and the Philippines. They found all five countries to be comparable but chose India because it is a significant producer of comparable merchandise and has more data available than Indonesia, which was the surrogate proposed by respondents. Lawyers from Wilmer Cutler Pickering, which represents several Chinese respondents, filed briefs contesting the ITA decision, while attorneys for the petitioners, King & Spalding, supported the choice.

A recent ITA policy bulletin attempted to clarify the thinking process the agency uses in selecting surrogates in cases involving nonmarket economies (NMEs) (see **WTTL**, March 15, page 1). The bulletin includes comparable production as one criterion for selecting a surrogate. But it

also says ITA will consider "the characteristics of world production of, and trade in, comparable merchandise." In a growing number of sectors that may mean there will be fewer countries that can match China's level of production and share of world trade. Moreover, the ITA staff memo also shows China's per capita GNP of $890 in 2001 and GDP annual growth rate of 6.5% are leaving many of the usual surrogates behind. In comparison, per capital GNP in India was $460, in Pakistan $420, and in Indonesia $680. In the Philippines, it was $1,050.

> Recently introduced legislation (H.R. 3716 and S. 2212) would revise U.S. trade law to apply countervailing duty (CVD) sanctions to NMEs, a practice barred by policy and court decisions. CVD laws have not been applied to communist states because their entire economies have been considered to be subsidized. Trade lawyers also note that it would be difficult to find "specificity" in the subsidies given to particular industries. Sponsors of these bills say they will try to get their proposal attached to pending international tax legislation.

OFAC REVERSES STAND ON EDITING OF IRANIAN SCIENTIFIC ARTICLES

Bowing to public pressure and some press ridicule, Treasury's Office of Foreign Assets Control (OFAC) has reversed its interpretation of the Iran Transaction Regulation (ITR) and now will allow U.S. scientific journals to conduct peer review and edit articles written by Iranian authors without requiring a license. The new opinion, issued April 2, may make it difficult for the agency to defend its objection to similar editing or modification of other works of nonfiction and fiction by Iranian authors (see **WTTL**, Oct. 20, page 2).

> Last September, OFAC issued an interpretive ruling to the Institute of Electrical and Electronics Engineers (IEEE), interpreting the so-called Berman Amendment, which exempts from trade sanctions "information and informational materials." As it had in other rulings, OFAC applied the exemption narrowly, applying it only to work that was fully created and in existence before publication.

IEEE contested that interpretation and provided OFAC with additional information on how the peer review process works for articles submitted for publication in its journal. This includes the questioning of an article's logic and content, as well as suggested changes to meet the journal's editorial standards. Based on this explanation, OFAC sent IEEE a new ruling and said it now concludes "that [U.S. person's] publication of articles or studies does not entail the prohibited exportation of services to Iran or another Sanctioned Country resulting in substantive alterations or enhancements of informational material by U.S. persons prior to its final importation into the United States for publication."

ITA WON'T SUBTRACT 201 DUTIES IN ANTIDUMPING CASES

Looking back over 80 years of U.S. trade law, ITA has found no support for the argument that Section 201 duties should be deducted from U.S. prices in calculating antidumping margins. Although the agency, at the instigation of some members of Congress and petitioners, had requested comments on the idea, it concluded that 201 duties are not normal customs duties and deducting them from the sales prices "would effectively collect the 201 duties twice," it said in an administrative review ruling on stainless steel wire rod from South Korea released April 6.

"Nothing in the legislative history of Section 201 or the AD law indicates that Congress intended such results," ITA wrote (see **WTTL**, Oct. 27, page 2). . Tracing these provisions back to the Antidumping Act of 1921, the agency said Congress since then had the opportunity to provide for the deduction but didn't. Responding to comments that 201 duties need to be deducted to restore dumping margins that would exist absent the 201 duties, ITA said this premise is in error. "Even to the extent that 201 duties may reduce dumping margins, this is not a distortion to the margin that must be eliminated but a partial elimination of dumping," it argued . Moreover, any overlap in AD and 201 duties can be adjusted by the president when he

sets the level of the 201 duties. "Once the president has struck this balance, it is not Commerce's place to upset that balance by subtracting the 201 duties from the U.S. price in calculating dumping margins, providing relief beyond what the president approved," it stated.

OFAC CLARIFIES RULES FOR TRAVEL TO LIBYA

Treasury April 2 issued a slightly amended General License covering newly opened travel to Libya to make it clear that U.S. travel agents can book travel to and from Libya as well as within Libya for U.S. persons. The original General License only allowed agents to provide travel-related services within Libya, a confusing and probably unintentional restriction.

The amendment to the General License comes as U.S. officials are predicting that further liberalization of export and investment rules for Libya will be coming quicker than originally expected because of the better than expected cooperation Tripoli has shown in giving up its chemical, biological, nuclear and missile proliferation activities (see **WTTL**, March 1, page 2). Some of these regulatory changes could come in the next few weeks.

* * * BRIEFS * * *

FSC/ETI: There appears to be deal to break Senate deadlock over FSC/ETI legislation when lawmakers return from spring recess week of April 19. Republicans have agreed to let Democrats get vote on Sen. Tom Harkin's (D-Iowa) amendment to block change in federal overtime rules and to reduce number of amendments that would get votes to about 10 from each side of aisle. Congressional sources, however, say there is no deal on which amendments would actually get votes (see **WTTL**, April 5, page 2). Meanwhile, effort to win votes by accepting numerous amendments as part of manager's substitute bills has raised price tag for new legislation to rougly $170 billion over 10 years. That is supposed to soften $55 billion tax increase from FSC/ETI repeal. But lawmakers claim cost is fully offset by tax increases.

ANTIBOYCOTT: BIS Division of Antiboycott Compliance Director Dexter Price retiring May 1. He has served on antiboycott staff since 1978.

CUSTOMS: Deborah Spero named acting deputy commissioner ahead of retirement of Douglas Browning May 1. Veteran Spero's latest post was assistant commissioner for Office of Strategic Trade.

CANADA: WTO dispute-settlement panel April 6 issued report finding Canada's grain handling system and rail transportation measures are inconsistent with its GATT obligations and requested that Ottawa bring practices into conformity with international trade rules. But panel gave Canada big victory by finding U.S. had failed to prove that export sales practices of Canadian Wheat Board are not in accordance with WTO rules. Separately, Canada April 8 initiated WTO dispute-settlement process against ITC injury ruling in antidumping and CVD cases on hard red spring wheat from Canada, asking U.S. for consultations.

EXPORT ENFORCEMENT: Voluntary self-disclosure didn't help Molecular Probes of Eugene, Ore., avoid $266,750 civil fine as part of agreement with BIS to resolve charges that it exported two reagents, conotoxin and tetrodotoxin, to dozen countries on 97 occasions without approved export licenses. Exports between January 1998 and October 2002 occurred before Molecular Probes was acquired by Invitrogen Corp. of Carlsbad, Calif., in August 2003. Invitrogen has taken responsibility for paying fine, BIS said.

STATE SANCTIONS: Nonproliferation Bureau in April 7 Federal Register imposed trade sanctions on 13 entities, some old and some new, that supplied Iran in violation of 2002 Nonproliferation Act. Order bars export licensing and government procurement for parties which come from such nations as China, Russia, Belarus, United Arab Emirates, North Korea, Macedonia and Taiwan.

IRAQ: State in April 9 Federal Register amended ITAR to implement legislation that allows president to make national interest determination to authorize export of lethal and non-lethal Munitions List items to Iraq for use by reconstituted military and police forces and for private security purposes.

TELECOMMUNICATIONS: USTR April 7 issued annual report on foreign compliance with telecommunications trade agreements, identifying countries that aren't living up to agreements, including China, Korea, Germany, India and Singapore, but it announced no new trade complaints against these practices.