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

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BIS Publishes Views on Crude Oil Exports

After numerous industry calls for the Bureau of Industry and Security (BIS) to clarify publicly its policy on crude oil exports, the agency posted extensive guidance Dec. 30 on its website in the form of answers to six Frequently Asked Questions (FAQs). Before publication of the advice, BIS had only given its views through private commodity classification rulings and in statements to reporters, including WTTL (see **WTTL**, Nov. 10, page 6). With posting of the FAQs, more companies are likely to self-classify their products for export without needing licenses.

> The FAQs start by restating language already in Section 754.2 of the Export Administration Regulations (EAR) and Export Control Classification Number (ECCN) 1C981. They then give a more detailed explanation of what processing is needed to convert crude oil into a petroleum product that can be exported without a license. BIS invites exporters to seek a commodity classification if they are uncertain about whether their product qualifies.

BIS states that under 754.2(a), lease condensate that has been processed through a crude oil distillation tower is not crude oil but a petroleum product. This leads to one of the key questions the FAQs address: What is required in order for liquid hydrocarbons to have been "processed through a crude oil distillation tower?" BIS provides six factors that it considers in reaching that answer.

"Distillation is the process of separating a mixture of components according to their differences in boiling points. In order for liquid hydrocarbons to be classified as petroleum products, there must be material processing through a crude oil distillation tower. If there is no processing in the distillation tower, or the processing is de minimis, the liquid hydrocarbons will not qualify as petroleum products," BIS advises. "Processes that utilize pressure reduction alone to separate vapors from liquid or pressure changes at a uniform temperature, such as flash drums with heater treaters or separators, do not constitute processing through a crude oil distillation tower," it states.

Less Hope for Russia's WTO Compliance, USTR Says

In the scheme of things, including its economic troubles and U.S. sanctions due to its continued intervention in Ukraine, Russia's commitment to its WTO obligations might

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not mean much. A U.S. Trade Representative's (USTR) office report, mandated by Congress and released Dec. 22 on Moscow's WTO compliance, summed up the situation in two sentences: "In the first year of Russia's WTO membership, there were encouraging signs that Russia would continue its integration into the global trading community and become a constructive WTO Member. However, into the second year of Russia's WTO membership, that hope diminished."

> Areas of concern include: sanitary and phytosanitary (SPS) measures; subsidies and price controls, especially on titanium and natural gas; domestic purchasing requirements; and protection and enforcement of intellectual property rights (IPR). On SPS measures, the USTR is concerned that "although Russia has issued guidelines for inspections of foreign meat processing and storage facilities, the process to approve facilities for export to Russia remains difficult if not impossible to complete," it said.

"Although Russia appears to have resolved national treatment concerns raised by its automotive 'recycling fee', its increasingly protectionist postures in other areas have raised a number of WTO concerns. For example, Russia's application of a levy on products that can be used to reproduce copyrighted material for personal use, as well as its value added tax regime on royalties for cinema products, have raised concerns about potentially discriminatory treatment," the report said.

"While Russia appears, for the most part, to be complying with its services commitments, protectionist tendencies are beginning to appear. Russia's introduction of the requirement that companies store personal data of Russian citizens on servers within Russia may implicate certain commitments allowing cross-border services. Similarly, the new legislation limiting foreign ownership of media in Russia may raise concerns about WTO consistency," the USTR added.

France's Alstom Pays Record $772 Million FCPA Fine

Alstom S.A., the French power and transportation company, pleaded guilty Dec. 22 to violating the Foreign Corrupt Practices Act (FCPA) and will pay a record $772,290,000 fine. At the same time, Alstom Network Schweiz AG, formerly Alstom Prom, its Swiss subsidiary, pleaded guilty to conspiracy to violate the FCPA, and Alstom Power Inc. and Alstom Grid Inc., two U.S. subsidiaries, entered deferred prosecution agreements with Justice, admitting that they conspired to violate the act. Alstom Power is headquartered in Windsor, Conn.; Alstom Grid, formerly Alstom T&D, is based in New Jersey.

> The corporate pleas follow several years during which key executives of the company have also pleaded guilty to FCPA violations and one faces a trial on FCPA charges (see **WTTL**, July 21, page 11). The long-running case, which has also involved settlements with the World Bank, focused on bribery schemes in countries around the world, including Indonesia, Saudi Arabia, Egypt, the Bahamas and Taiwan.

Alstom pleaded guilty to a two-count criminal information in the New Haven, Conn., U.S. District Court, admitting it falsified its books and records and failed to implement adequate internal controls. Its sentencing is scheduled for June 23, 2015. Alstom Network Schweiz pleaded guilty to a criminal information charging it with conspiracy to

violate the act. The charges against Alstom, its subsidiaries and the executives involved bribery related to power, grid and transportation projects for state-owned entities. In total, Alstom paid more than $75 million to secure $4 billion in projects around the world, with a profit to the company of approximately $300 million, the government claimed. "Alstom's corruption scheme was sustained over more than a decade and across several continents," said Deputy Attorney General James M. Cole in a statement. "It was astounding in its breadth, its brazenness and its worldwide consequences," he added.

> "There were a number of problems in the past and we deeply regret that," said Alstom CEO Patrick Kron in a company statement. "However, this resolution with the DOJ allows Alstom to put this issue behind us and to continue our efforts to ensure that business is conducted in a responsible way, consistent with the highest ethical standards," he said.

Alstom claimed it "has made significant progress in the area of compliance over the last several years." It noted that as part of its previous settlement with the World Bank in February 2012 that it had hired a monitor to oversee its efforts.

"As indicated during the recent shareholders' meeting where the transaction with General Electric on Alstom's energy businesses was approved, the combination of the positive adjustments arising from commercial discussions with General Electric on various deal points and of the resolution of the DOJ investigation will not have a material impact on the overall economics of this transaction," it stated. "The DOJ has also stipulated that no part of the fine can be passed on to General Electric as part of the projected sale of Alstom's energy businesses," it added.

ITC Report Cites Restrictions, Opportunities in India

As the U.S. seeks a new relationship with India under Prime Minister Narendra Modi, a report from the International Trade Commission (ITC) Dec. 22 provides a litany of the Indian trade and investment restrictions that have inhibited U.S. business in India and a roadmap for reforms that could change the situation. The Section 332 report requested by Congress shows that U.S. trade and investment with India has grown substantially in the last dozen years but represents less than 2% of total U.S. exports, foreign affiliate sales, and investment (see **WTTL**, Dec. 22, page 8).

> The report concedes that improving India's trade and investment policies is likely to have a small impact on U.S. business, despite the strong push by American companies for reforms in India, particularly for intellectual property (IP) protection. "Because India accounts for a rather small share of U.S. global trade, however, the effect of completely removing barriers on the broader U.S. economy and U.S. jobs would be quite limited; most of the economic gains would accrue to U.S. companies with affiliates in India in the form of increased profits abroad," the ITC report says (Pub. No. 4501).

The report acknowledges that Indian economic policies have undergone major reforms in the last two decades, which has opened the country to foreign trade, investment and increased reliance on private markets. Nonetheless, "Indian policies became more burdensome between 2007 and 2013, with the average effect on U.S. trade and investment rising from 'minor' to 'moderate.' The change affected all policy areas," the report

states. As a result of this mixed picture, some U.S. industries have been hurt more than others, while some have benefited. "Companies providing agricultural products and food, financial services, and certain manufacturing products, including pharmaceuticals, were the most affected, with Indian policies having a substantial (i.e., prohibitive, severe, or moderate) effect on the operations of between 34 and 44 percent of U.S. companies in these sectors."

> "On the other hand, in some sectors, the share of companies affected was lower; for example, 7.7 percent of U.S. retail companies doing business in India experienced such effects. Overall, the policies had substantial effects on the operations of about one-quarter of U.S. companies that have affiliates in, or export to, India," the ITC finds.

While current and past policies have hindered trade, an ITC survey of U.S. industry suggests the trade and investment relationship could improve significantly if India undertakes additional reforms. The commission used an economic model to predict the consequences of new reforms. "If tariff and investment restrictions were fully eliminated and standards of IP protection were made comparable to U.S. and Western European levels, U.S. exports to India would rise by two thirds, and U.S. investment in India would roughly double," it predicts.

BIS Ends Fiber Materials Export Denial Order Early

A long-running export saga, which has been at the heart of a 12-year debate over the meaning of "specially designed," ended Dec. 19 when BIS waved the last year of an eight-year denial order against Fiber Materials, Inc. (FMI) of Biddeford, Maine, citing new ownership and its compliance program. In March 2007, BIS placed FMI, its principal owner Walter Lachman, and former executive Maurice Subilia on the denied parties list until Nov. 18, 2015, after FMI was convicted of violating the Export Administration Act by exporting a hot isostatic press (HIP) to India without having a license.

> A central legal issue in the case was whether the HIP was "specially designed" for a controlled use. The legal fight took several turns over the years and went all the way up to the First Circuit Court, which sustained Commerce's interpretation of the term. Lachman lost his last legal fight to get his conviction overturned in March 2008 when the appellate court rejected his appeal. He died in 2009 (see **WTTL**, April 14, 2008, page 4).

"Subsequent to the issuance of the March 12, 2007 Order, ownership and management control of FMI changed. Ultimately, by letter dated February 10, 2014, GrafTech International Ltd. (GrafTech) submitted a request on behalf of FMI, GrafTech's wholly-owned subsidiary, seeking to terminate the denial order," BIS said in lifting the denial order. GrafTech told BIS that it had instituted a strong compliance program. "BIS has reviewed the compliance program, including through an Office of Export Enforcement site visit at FMI," the agency noted.

GrafTech of Parma, Ohio, acquired FMI for $14 million in October 2011. It has had its own run-in with BIS export enforcement. After making a voluntary disclosure, it agreed in October 2013 to pay $300,000 to settle 12 BIS charges of exporting CGW grade graphite to China and India without BIS licenses (see **WTTL**, Nov. 4, 2013, page 7).

China Has Work to Do to Comply with WTO Obligations

In its latest report on China's compliance with its World Trade Organization (WTO) obligations Dec. 30, the U.S. Trade Representative's (USTR) office sings a familiar song: despite some reforms in 2014, China's policies "continued to generate significant concerns among U.S. stakeholders." The report identifies more problems than reforms.

> Areas of continued concern include: intellectual property rights (IPR) enforcement, including for trade secrets; indigenous innovation policies; technology transfer initiatives; export restraints; government subsidization; development of unique national standards; investment restrictions; troubling agricultural policies directly blocking U.S. market access; inappropriate use of anti-monopoly and trade remedy laws; transparency; and slow movement toward accession to the WTO Government Procurement Agreement (GPA).

"China continues to deploy a combination of export restraints, including export quotas, export licensing, minimum export prices, export duties and other restrictions, on a number of raw material inputs where it holds the leverage of being among the world's leading producers," the USTR noted. The report cited two WTO cases that found Chinese restraints on raw material inputs violate Beijing's WTO obligations.

On the GPA, stakeholders have called China's negotiating offers "highly disappointing in scope and coverage." In addition, IPR holders "face not only a complex and uncertain enforcement environment, but also pressure to transfer intellectual property rights to enterprises in China through a number of government policies and practices," the report said. It cited ongoing negotiations toward a Bilateral Investment Treaty (BIT) as a hopeful next step. The U.S. "looks forward to intensified negotiations with China in order to reach agreement on a BIT that embraces the principles of openness, non-discrimination and transparency, provides pre-establishment national treatment and employs a negative list approach in identifying exceptions," it said.

BIS, DDTC Issue Last-Minute Revisions to Electronics Rules

As they promised, BIS and State's Directorate of Defense Trade Controls (DDTC) issued last-minute changes to new rules that went into effect Dec. 30 for electronic products on the U.S. Munitions List (USML) and Commerce Control List (CCL) 600-series. In the BIS rule published Dec. 23, the agency conceded that it has been unable to set a bright line between civil and military uses of monolithic microwave integrated circuits (MMICs), as industry wanted (see **WTTL**, Sept. 15, page 4).

> As a result, BIS will control MMIC power amplifiers and discrete microwave transistors on the CCL for civil telecommunications uses to the same extent as MMIC power transistors and discrete microwave transistors controlled in Export Control Classification Number (ECCN) 3A001. "For all other uses, BIS will impose a license requirement for all destinations other than Canada and will eliminate eligibility for most license exceptions," it added.

DDTC in the Federal Register Dec. 29 made "minor" text changes to various parts of Category XI and the International Traffic in Arms Regulations (ITAR) to harmonize with

BIS changes. For example, DDTC revised ITAR Section 126.6 to replace the obsolete term, "Shippers Export Declaration" with the correct term, "Electronic Export Information;" and deleted an obsolete reference to "Direct Shipment Verification Program."

> In comments to BIS, industry had raised concerns about new controls imposed on MMICs in the final transition regulation moving them to the CCL from the USML. BIS said that it "did not adopt changes to the control based on fractional bandwidth, peak saturated power output, and/or power added efficiency because the agency found that attempting to designate some MMIC power amplifiers and discrete microwave transistors as civil and others as military based on those characteristics is impractical, and any resulting classification would not accurately reflect real world applications for those devices," the agency explained.

"MMIC power amplifiers and discrete microwave transistors, regardless of whether they meet the performance levels of ECCN 3A001 or the published, but not yet effective ECCN 3A611, are able to enhance the performance of certain military electronic systems in ways that can confer a military advantage and thus, the U.S. government needs to review not only proposed exports and reexports for use in military applications, but also those that are for use in applications that pose significant risk of diversion to a military application or enhancement of a potential adversary's military capability," BIS said.

In a separate Federal Register notice also on Dec. 23, BIS removed references to MMIC power amplifiers and discrete microwave transistors from ECCN 3E611 "because, upon publication of this rule, MMIC power amplifiers and discrete microwave transistors will not be controlled in ECCN 3A611, and it is not necessary to control technology for their development or production in ECCN 3E611. Such technology will be controlled in ECCN 3E001 and will require a license to all destinations other than Canada," it wrote.

* * * Briefs * * *

NORTH KOREA: Treasury Jan. 2 added three North Korean entities and 10 individuals to its list of Specially Designated Nationals, including Reconnaissance General Bureau, North Korea's primary intelligence organization; Korea Mining Development Trading Corporation, country's primary arms dealer; and Korea Tangun Trading Corporation. President Obama signed Executive Order same day authorizing sanctions in response to "ongoing provocative, destabilizing, and repressive actions and policies," including cyber-attack on Sony Pictures, White House spokesperson said. Named individuals are officials of North Korea government, holding defense and intelligence posts.

FURNITURE: CIT Chief Judge Timothy Stanceu Dec. 31 brought to end three legal challenges to Byrd Amendment, including constitutionality claim that Supreme Court declined to review (see **WTTL**, Dec. 22, page 14). In addition to constitutional issues, plaintiffs had complained about improper procedures that denied them share of duties collected from antidumping order on bedroom furniture from China. In response to government motion, Stanceu dismissed suits by Standard Furniture (slip op. 14-163), Ashley Furniture (14-162) and Ethan Allen (14-161).

THERMAL PAPER: CIT Chief Judge Timothy Stanceu Dec. 31 affirmed Commerce remand redetermination for first administrative review of antidumping case against lightweight thermal paper from Germany (slip op. 14-160). After receiving remand order, department followed Stanceu's decision, "correctly reasoning that its own regulations, as construed by the court, did not allow it to refuse to recognize the monthly rebates as downward price adjustments," judge

wrote. In remand redetermination, Commerce recognized downward adjustments to home market sales prices of Koehler AG, German paper manufacturer, to account for monthly rebates. As result, it recalculated Koehler's dumping margin from 3.77% of final results to 0.03%, which qualifies as de minimis margin (see brief below). In "sunset" review determination Dec. 19, ITC found terminating antidumping order on thermal paper from Germany would not lead to renewed injury to U.S. industry (see **WTTL**, Dec. 22, page 14).

ANTIDUMPING RULES: In response to CIT Chief Judge Timothy Stanceu's ruling in Koehler, ITA published proposed revisions to its antidumping regulations in Dec. 31 Federal Register to say it "generally will not consider a price adjustment that reduces or eliminates a dumping margin unless the party claiming such price adjustment demonstrates, to the satisfaction of the Department, through documentation that the terms and conditions of the adjustment were established and known to the customer at the time of sale" (see brief above). New policy would be effective for cases 30 days after final rule. "Department's treatment of price adjustments in general has been the subject of considerable confusion," notice admits. Despite Stanceu's rulings, ITA "continues to defend its regulatory interpretation of disallowing price adjustments," agency said. "However, the Department recognizes that the Court of International Trade in Koehler AG disagrees with its interpretation. Therefore, without prejudice to the United States Government's right to appeal Koehler AG, or to argue that the Department's current interpretation of its regulations is correct, the Department is issuing this proposed rule to modify the regulations at issue pursuant to Administrative Procedure Act," it states.

OCTG: Korea Dec. 22 requested consultations with U.S. at WTO over measures on oil country tubular goods (OCTG) imports from Korea and "investigation underlying such measures." ITC made final determination that U.S. industry is materially injured by dumped OCTG imports in August (see **WTTL**, Sept. 1, page 9).

MELAMINE: In preliminary 6-0 vote Dec. 29, ITC found U.S. industry may be injured by dumped and subsidized imports of melamine from China and Trinidad and Tobago.

EXPORT ENFORCEMENT: Wentong Cai, Chinese national in U.S. on student visa, pleaded guilty Dec. 16 in Albuquerque U.S. District Court to violating Arms Export Control Act in scheme to export ARS-14 MHD angular rate sensors to China without State licenses. Sentencing has not been scheduled. His cousin Bo Cai, Chinese national, pleaded guilty July 23 and remains in federal custody (see **WTTL**, July 28, page 8). Wentong was arrested in Iowa in January 2014. Both were charged in superseding indictment Jan. 22.

CRIMEA: Treasury Dec. 30 published Ukraine-related General License 5 authorizing certain activities necessary to wind down operations in Crimea through Feb. 1, 2015. These include: winding down or divestiture or transfer to foreign person of U.S. person's share of ownership, including equity interest, in pre-Dec. 20 investments in Crimea; and winding down of operations, contracts, or other agreements that were in effect prior to Dec. 20 involving export, reexport, sale or supply of goods, services or technology to Crimea or import of any goods, services or technology from Crimea to U.S. (see **WTTL**, Dec. 22, page 5).

HONG KONG: Citing reports of illegal exports of Wassenaar controlled items into Hong Kong, BIS Dec. 23 added national security (NS column 2) destination-based license requirement for Hong Kong. "A corresponding import license will be required from the Hong Kong government for these items, and this action will facilitate Hong Kong's ability to track their shipment and prevent diversion of these items," BIS said in Federal Register.

ISRAEL: Legislation (S. 2673) that President Obama signed Dec. 19 declared sense of Congress that Israel is Major Strategic Partner and authorizes its eligibility for License Exception Strategic Trade Authorization (STA). Law says Congress finds Israel has "adopted high standards in the field of export controls" and has declared its unilateral adherence to Missile Technology Control Regime, Australia Group and Nuclear Suppliers Group as well as other arms control

conventions. "The President, consistent with the commitments of the United States under international arrangements, shall take steps so that Israel may be included in the list of countries eligible for the strategic trade authorization exception under section 740.20(c)(1) of title 15, Code of Federal Regulations, to the requirement for a license for the export, reexport, or in-country transfer of an item subject to controls under the Export Administration Regulations," law declares. It also says Israel may be eligible for U.S. Visa Waiver Program when it "satisfies, and as long as Israel continues to satisfy, the requirements for inclusion in such program."

EAR: As if it didn't have enough to do, BIS in Federal Register cleanup rule Dec. 29 made numerous editorial corrections to EAR to "ensure consistency and clarity." Agency fixed typographical errors made in last seven years of past rules. Corrections include: updating name of Category 9 in Section 738.2(a); removing word "not" in ECCN 0A617; replacing "transfer" with more specific and intended term "transfer (in-country)" in Section 744.21(e); fixing misspelled "flowing" with correct term "following" in ECCN 2B352; and removing UN control that was "inadvertently added back" into ECCN 8A992.

PLASTIC BAGS: Court of Appeals for Federal Circuit (CAFC) Dec. 24 upheld CIT decision that supported Commerce's sixth administrative review of antidumping duty order on polyethylene retail carrier bags from Thailand. Appellate court in *Thai Plastic Bags Industries v. U.S.* agreed with Commerce's ruling that Thai government's Blue Corner Rebate program "was export-conditional" and substantial evidence supported conclusion that it was not relevant to the cost of production.

ELECTRIC MOTORS: CAFC Dec. 19 in *Belimo Automation A.G. v. U.S.* affirmed CIT ruling upholding Customs classification of device imported by Belimo consisting of electric motor, gears, and two printed circuit boards and principally used in heating, ventilating and air conditioning systems within buildings as "electric motor" under HTSUS subheading 8501.10.40 and not "automatic regulating and controlling instruments and apparatus; parts and accessories thereof" under HTSUS 9032.89.60.

MAGNITSKY ACT: Treasury, acting on State report, added four more individuals to its list of Specially Designated Nationals Dec. 29 under Sergei Magnitsky Rule of Law Accountability Act or Magnitsky Act, including deputy minister of internal affairs and chief of staff of executive office of Chechen Republic (see **WTTL**, May 26, page 1). List now comprises 34 individuals who are alleged to have been involved in the death of Russian attorney Sergei Magnitsky or other suspicious deaths.

IRONING TABLES: CIT Judge Leo Gordon sustained Dec. 30 Commerce's third redetermination of fifth administrative review of antidumping duty order on floor-standing, metal-top ironing tables from China (slip op. 14-159). He dismissed objections of Since Hardware. "It is just not possible to read the B&H [brokerage and handling] section of Since Hardware's opening brief and understand what is being argued, challenged or contested. Since Hardware cites no statutes, regulations, or administrative or judicial precedents," Gordon wrote.

BALL BEARINGS: In decision Dec. 24 consolidating seven cases, CIT Chief Judge Timothy Stanceu upheld Commerce second remand determination on seventeenth administrative reviews of antidumping duty orders on ball bearings and parts thereof from France, Germany, Italy, Japan, Singapore and United Kingdom (slip op. 14-156).

FUNNY FARMER: CIT Senior Judge Richard Goldberg agreed Dec. 24 with Infantino, LLC that its Shop & Play Funny Farmer play mat, which is designed for use both as normal play mat and inside of shopping cart and depicts farm theme with brightly colored graphics, five removable activity toys, and one sewn-in activity toy, should be classified with toys and dolls under HTSUS subheading 9503.00.00 and duty free and not as bedding under 9404.90.20 which carries 6% duty, as Customs claimed (slip op. 14-155).