From Here to There: U.S. Export Reform

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WELCOME

Welcome to the ABA International Trade Committee quarterly newsletter. The newsletter is intended to assist Committee members stay up-to-date on current international trade issues and Committee activities. The newsletter also provides a forum to discuss international trade ideas and opinions.1 In this issue are three different and interesting articles related to topics of interest in international trade law.

This issue also contains information on working groups and recent and upcoming events, beginning on page two. Members of the Committee are encouraged to become involved, and we look forward to hearing from you.

The Committee’s website contains additional information about and resources from the activities of the Committee, like notices of upcoming events, past publications, and materials from previous programs. These materials are updated regularly. To visit the Trade Committee’s website, click here.

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1 Please note that the views and opinions expressed in the newsletter are those of the authors and may not represent the views and opinions of the ABA or the Trade Committee.
**ABA INTERNATIONAL TRADE COMMITTEE NEWS**

**Working Groups**

The International Trade Committee has several ongoing working groups. Members of the Committee are encouraged to join and participate in any of these working groups, and we look forward to hearing from you.

The CITBA Bill Working Group is monitoring the drafting of this legislation to ensure it appropriately addresses issues of concern to the Committee, such as the process and timing of the U.S. Department of Commerce’s (DOC) liquidation instructions after completion of an administrative review. Current DOC practice is to issue these instructions before the statutory period has lapsed to file a summons and complaint, which we believe is bad policy, inconsistent with Congressional intent, and contrary to many U.S. Court of International Trade decisions. The statutory timeframe for appeal is necessary to provide parties sufficient time to decide whether to pursue an appeal and obtain the necessary injunction before the appeal is mooted by liquidation. Contact Matt Nicely (matthew.nicely@thompsonhine.com) or Victor Mroczka (vmroczka@yahoo.com) for additional information regarding the current status of the legislation.

The Ethics in Trade Remedy Law Practice Working Group is raising awareness and monitoring enforcement of ethical obligations among members of the trade bar, particularly in the aftermath of reports of fraudulent behavior in antidumping cases. This includes ongoing discussions with Commerce Department officials concerning agency proposals to regulate those who practice before the International Trade Administration. For more information on this working group, contact Matt Nicely or Ken Pierce (piercek@hugheshubbard.com).

The Trade Adjustment Assistance Working Group invites attorneys to participate in providing pro bono legal services to applicants before the Department of Labor and at other stages of the application process. If you are interested in learning more about this project, please send questions via email to Valentin A. Povarchuk at povarchuk.valentin@arentfox.com.

The Sunshine Act and the U.S. International Trade Commission Working Group continues to monitor the ITC’s implementation of the ABA’s resolution to change its Sunshine Act procedures, both to ensure more interaction among the commissioners prior to their votes and to present more detail to the public concerning their decision making when they meet in public. For more information, contact Matt Nicely or Amy Stanley Hariani (ahariani@kslaw.com).

The Liquidation of AD/CVD Entries Working Group plans to meet with DOC officials to discuss DOC’s policy of issuing liquidation instructions within 15 days of publication of the final results of an administrative review. However, the meeting is delayed until the President’s nominee for Assistant Secretary for Import Administration is confirmed. If you are interested in getting involved, please email Matt Nicely or Diane MacDonald (diane.macdonald@bakermckenzie.com) with any questions about this project.

The International Trade Oral History Working Group has compiled an extensive list of individuals to interview who have been involved in various significant developments in international trade law. The Working Group pairs law students with trade practitioners to conduct the interviews, and interviews are underway. For more information, contact Robert DeFrancesco (rdefrancesco@wileyrein.com) or Michelle (Xuan) Luo (xluo@law.gwu.edu).

The Transfer Pricing Working Group is preparing a “Blanket Authority” with its counterpart in the Tax Committee to respond to a “1625 Notice” to be issued by U.S. Customs and Border Protection. The notice will propose to revoke or modify existing HQ rulings pertaining to the use of related party "transaction values" based on income tax transfer pricing formulas, and will specifically address the impact of post-importation price rebates or decreases. For more information, please contact Damon Pike (damon@thepikelawfirm.com).

The FTZ Regulations working group is preparing comments on the amended regulations proposed by the Foreign Trade Zones Board on December 30, 2010. The Foreign Trade Zones Board's current regulations were last revised in 1991. The proposed revision makes significant changes designed to streamline the applications process, provide discretionary interim approval authority, and accommodate production...
changes through a new retrospective notification process. The proposed regulations also add new provisions on uniform treatment for zone users and penalties. Comments are due on May 26. Contact Bill Methenitis (william.methenitis@ey.com) for more information.

Recent Events

On December 8, 2010, the ABA International Trade Committee in cooperation with the DC Bar International Law Section/International Trade Committee presented an Off the Record Luncheon program on “U.S./India Economic Relations.” The economic relationship between the U.S. and India is booming. Annual two-way trade is now over $50 billion. We were pleased to have two distinguished speakers give their views on U.S./India economic relations. Deputy U.S. Trade Representative Demetrios Marantis discussed the Administration’s trade policy objectives and goals for India, the challenges of the relationship, and the outcomes from the President’s November visit. Richard Rossow, Corporate Vice President, International Affairs for New York Life Insurance Company, gave a private-sector perspective on the challenges and opportunities of the Indian market. The Moderator was Stephen Claeys, President, Cadence Global Strategies, PLLC.

The Committee has hosted two Breakfast at the Bar events in the past few months. In these events, the Committee invites officials from Congress and federal agencies that impact trade in the United States to provide their insights on current events of interest to the trade bar.

On December 14, 2010, the Trade Committee, with the Sanctions and Export Controls Committee, hosted a Breakfast at the Bar with Kevin J. Wolf, U.S. Department of Commerce Assistant Secretary for Export Administration. Mr. Wolf discussed the significant amendments to the Export Administration Regulations made in 2010 and continuing reform efforts concerning U.S. export controls. Mr. Wolf graciously spoke again on December 21, 2010, for those who missed the first opportunity. You may also download a PDF of his comments on the subject, which Mr. Wolf delivered in London on November 9 of last year, from the U.S. Department of Commerce website by clicking here.

On March 23, 2011, the Committee hosted a Breakfast at the Bar with Valerie Hughes, Director of Legal Affairs, at the World Trade Organization. In her comments, Ms. Hughes looked back over the use of the WTO Dispute Settlement System since its inception over 15 years ago. Specifically, she directed her comments to answering the following questions: What are the subject areas being litigated? What have been the strengths and weaknesses of the system? What changes are Members seeking to make in the system, and what is the likelihood such changes will be made?

On January 19, 2011, the ABA International Law Sections’ International Trade and Intellectual Property Rights Committees and the ABA Section of Intellectual Property Rights’s International Trade Commission (ITC) Committee, in cooperation with the ITC Trial Lawyers Association, hosted the Third Annual “Live at the ITC” forum, discussing litigation before the ITC concerning Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), under which the ITC has the power to bar the importation of articles that infringe on U.S. patents and other intellectual property rights. The event included two roundtable discussions. The first discussed jurisprudence under the public interest prong of section 337 cases. The panel discussed the ITC’s current practice of requesting comments concerning the public interest before instituting an investigation, the ITC’s Notice of Proposed Rulemaking that, if implemented, would require Complainants to make certain allegations regarding the effect of an exclusion order on the public interest and Respondents to answer such allegations, and recent case developments addressing the public interest element. The second roundtable presented a question and answer session with the ITC Commissioners, during which they also touched on AD/CVD-related issues in their remarks. Materials from this program are available on the Committee’s website.

On April 5-8, 2011, the Spring Meeting of the Section of International Law took place in Washington, D.C. This included two events for the members of the International Trade Committee. The Committee held a table at the Committee Dinners event on April 6. The Committee also held the Committee April business meeting on Friday, April 8.

The Spring Meeting also featured several interesting topics on the “Trade Track.” The Committee’s showcase program was titled “Hot Topics in
International Trade Law.” Panelists discussed a variety of pressing issues, to include recent WTO disputes and impacts on other industries; the purpose and impact of pending U.S. trade legislation and whether it is likely be passed in 2011; recent trade remedy decisions within the agencies and at the Court of International Trade; and current international trade policy issues, such as pending Free Trade Agreements and the Obama Administration’s current efforts to enforce trade laws. The speakers were Stacy Ettinger, The Office of U.S. Senator Charles Schumer, Washington, D.C.; Bruce Wilson, King & Spalding LLP, Washington, D.C.; and Commissioner Dean Pinkert of the ITC. The Committee’s Co-Chair Amy Stanley Hariani moderated the program.

On April 12, 2011, the Committee sponsored a program in cooperation with American University, Washington College of Law entitled “Are AD/CVD Remedies Still Viable for U.S. Producers?” A panel discussed whether the recent dearth of AD/CVD filings signifies that Title VII of the Tariff Act of 1930 has outlived its usefulness. The speakers included Bradford Ward, Deputy General Counsel & Acting Assistant U.S. Trade Representative for Monitoring and Enforcement; John Magnus of TRADEWINS; Peter Ehrenhaft of Harkins Cunningham; and Daniel Porter of Winston & Strawn. The program was followed by a dinner honoring Mr. Ward.

On May 3, 2011, the Committee hosted a program on the Trans-Pacific Partnership Negotiations at the U.S. Chamber of Commerce. The Trans-Pacific Partnership includes the usual topics involved in a FTA, plus novel issues such as “regulatory coherence”, “competitive neutrality”, “supply chain”, and other sensitive 21st Century trade topics. An expert panel discussed the status and goals of the negotiations, and the complex challenges ahead. Speakers were Catherine Mellor, Associate Director, Southeast Asia International Division, U.S. Chamber of Commerce; Ben King, Counsellor - Trade and Economic, Embassy of New Zealand; and Everett Eissenstat, International Trade Counsel (Minority), U.S. Senate Committee on Finance. Gary Horlick, of the Law Offices of Gary N. Horlick, moderated event.

Several additional programs are in the works for the coming months. Check your email and the Committee website for upcoming details on all these programs.

**DOUBLE-REMEDIES AND DS 379**

By: John R. Magnus

**Introduction**

The WTO Appellate Body (“AB”) recently issued a decision finding the United States’ concurrent imposition of antidumping and countervailing duties on various Chinese products to be inconsistent with WTO rules.\(^1\) The decision reversed a lower panel ruling which had rejected China’s complaint as having no support in the text of the relevant WTO agreements. At issue was China’s claim that the U.S. import relief measures provided a “double remedy” by offsetting domestic subsidies twice – once through the antidumping duty and a second time through the countervailing duty. Although separate (cumulative) offsets for dumping and for domestic subsidization are normally regarded as non-controversial, China maintained that an antidumping duty calculated under the “surrogate” methodology applied by the United States to non-market economy (“NME”) products necessarily already reflects, and offsets, domestic subsidies. The AB largely agreed and rested its ruling against the United States on language in ASCM Article 19.3 which refers to imposing the “appropriate” per-unit amount of countervailing duty.

**A Bizarre Decision**

The following is a fair summary of the AB decision.

Domestic subsidies when used to reduce export price will, unless they also produce a lower normal value calculation, increase the recipient’s dumping margin and be offset by higher antidumping duties. It would be improper to separately offset such domestic subsidies through countervailing duties imposed on top of the (higher) antidumping duties. In NME cases, where domestic subsidies cannot affect normal value, it is therefore essential to know whether domestic subsidies have been used to reduce export price. Accordingly, when conducting simultaneous AD/NME and CVD investigations, administering


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authorities are obliged to do two things they are not normally accustomed to doing:

- Ascertain not only whether/to what extent dumping occurred during the POI, but also why it occurred (what role domestic subsidies played in the pricing of exports); and

- Ascertain how domestic subsidies were used, at least to the extent of understanding whether the recipient company reduced its export prices in a way that would not have happened in the absence of domestic subsidization.

Every step of this finding is problematic.

First, there is no logical reason why the principle announced by the AB would be limited to the NME setting. Insofar as it even makes sense to speak of “using domestic subsidies to reduce export price,” a ME producer is every bit as likely to engage in the tactic. And the regular (ME) antidumping methodology does not yield a normal value that is lower in the presence of domestic subsidies – certainly not in a systematic or dollar-for-dollar sense. So, if it is improper in the simultaneous AD/CVD scenario to offset through countervailing duties domestic subsidies which have been used to reduce export price, it is always improper. And if it is therefore necessary to understand the role of domestic subsidies in generating dumping margins, it is always necessary.

Second, there is a reason why administering authorities do not ask, and why the multilateral rules have never required them to ask, how domestic subsidies were used or why dumping occurred. These things are – at least for practical purposes, and within the tight timelines imposed on AD/CVD proceedings – unknowable. If a single person (say a grocery store clerk) got a raise, an extra $50 per paycheck over the course of a full year, would it be possible to say later how she used the extra money? Most likely every category of her spending (and saving if she is a saver) would have increased in some small proportion. It is no different when a producer receives domestic subsidies. Is there new machinery? It might have been purchased anyway. Did export prices change? A million other things (one obvious candidate being market conditions in the importing country) might have prompted that. The problems of investigation, and of proof, when it comes to connecting subsidies to later corporate behavior, would be insurmountable in any sort of investigation, let alone the time-constrained setting of an AD/CVD investigation.

Third, it is clear for other reasons that the WTO Members, by using the word “appropriate” in ASCM Article 19.3, were not committing to have their administering authorities do something that is impossible. The AB’s reading is not even plausible, much less the only permissible one. In fact, there is a specific rule on this point which has been in place at the multilateral level (in GATT Art. VI:5) since 1947. It holds that export-contingent subsidies may not be separately offset through countervailing duties imposed atop antidumping duties. The AB has now effectively rewritten this rule to apply also to domestic subsidies that are used (as export-contingent subsidies are presumed to be used) to reduce export price. By interpreting the term “appropriate” in ASCM Article 19.3 in this fashion, the AB has reduced to inutility (“surplusage”) the long-standing provision in GATT Art. VI.

A Broader Policy Argument

Those who argue against a CVD offset in the scenario discussed above also oppose a CVD offset in the other scenario – where domestic subsidies are not used to reduce export price. Here, a hypothetical is useful in understanding the legal and policy issues. Imagine two neighboring NME producers using identical recipes to make subject merchandise, selling that merchandise at identical prices in the U.S. market, benefiting from identical domestic subsidies, and generating identical total turnover. With identical recipes and export prices they will have the same normal value and dumping margin, and with identical domestic subsidies and turnover they will face the same CVD rate. Now imagine that one of the producers gets an extra subsidy – say a $10M cash grant – and does not use it to reduce the price of its U.S.-bound exports.

There will be no impact on the favored producer’s dumping margin. The normal value side of the NME dumping calculation has no means of reflecting the extra subsidy; with the same recipe as its neighbor, the extra-subsidized producer will continue to have the same normal value, and we have assumed that

\[\text{normal value} \neq \text{normal value} + \text{subsidy} \]

\[\text{dumping margin} \neq \text{dumping margin} + \text{subsidy} \]

\[\text{CVD rate} \neq \text{CVD rate} + \text{subsidy} \]

2 The AB apparently disagrees (see fn. 519, citing Panel Report at fn. 972), but does not explain why; it simply asserts: “in the context of domestic subsidies granted within market economies …, both the normal value and the export price will be lowered as a result of the domestic subsidy ….” The assumptions underlying this statement are not just debatable; they are almost certainly wrong. That the Panel had indulged the same wrong assumptions is no excuse for the AB doing so in such a momentous decision.
export price stays constant. So the extra subsidy will be offset, if at all, only through a higher countervailing duty. Should it be offset?

Here, the double-remedy argument emerges as a new installment of the age-old debate about the proper function of countervailing duties. Some will argue that a subsidy stipulated to have no effect on export prices is one we should ignore (i.e., should not offset). Others will insist that the function of countervailing duties is not to offset the price (or output) effects of subsidies, but rather to counter the subsidies themselves.

As a policy debate, it is interesting. As a legal debate, … not so much. There is not a smidgeon of doubt that U.S. law requires (where the injury test is met) a full offset of subsidies without consideration of their price/output effects. And there is not a smidgeon of doubt that WTO rules permit the approach reflected in U.S. law.

**Difficult to Implement**

The Appellate Body decision in DS 379 elevated policy preference over legal judgment, and in that respect should be lamented by everyone but most especially by the WTO’s supporters. The appropriate U.S. response would be to announce that it (1) has no intention of seeking to implement the decision, (2) will refuse to join in a consensus to reappoint (for second terms) the three AB members who signed the decision, and (3) will not approve a Doha Round package unless the AD/ASCM reforms in that package comprehensively remove all uses of the term “appropriate” as well as similar terms such as “fair” (as in “fair comparison”) and any other formulation that could be used by the WTO judiciary to impose its own policy preferences.

But that short list presupposes a spine of the type not normally known to exist in Washington, DC. What if, instead, the Commerce Department seeks to travel the road the AB wants it to travel? The road will be bumpy because Commerce can never really know what the AB wants it to know:

- How did the producer deploy domestic subsidies within the mix of all other corporate resources and expenditures? Often the producer’s CFO could not even answer that question – and even if she could, and if she testified under oath at an agency hearing, there would be huge problems of credibility and documentary corroboration. And then there is the small problem that U.S. law (Section 771(5)(C)) specifically steers Commerce away from considering price/output effects when analyzing subsidies.

- What role did domestic subsidies play among the many possible causes of the normal value / export price differential? To even begin tackling that question, Commerce would have to collect and analyze reams of U.S. market data of the type normally reviewed only by the USITC – and obtained through the use of subpoena power which Commerce does not enjoy.

Respondents will insist they did use domestic subsidies to reduce their export price, so that the dumping margin fully reflects the subsidization. Petitioners will insist that no such cause-and-effect relationship exists. Commerce will have no way of learning where the truth lies, and no ability to make a finding that satisfies the substantial evidence standard. Everything will come down to where the burden of proof resides. Apparently, and despite the fact that respondent producers are the only ones who conceivably could have access to the relevant information, the AB will not countenance any assignment of a burden to them.3

So implementation would be, to say the least, problematic. One temptation will be to run the clock (that is, find ways to buy time, perhaps through partial compliance steps that leave the full AD and CVD offsets in place), on the assumption that once China graduates to ME status in 2016, the DS 379 decision will no longer pose a problem to concurrent AD/CVD proceedings. That assumption is not a sound one, however, as the issues presented here are in no way confined to the NME setting. Only the normal value analysis differs for NMEs, and the surrogate data used in NME cases do not yield normal values that differ for subsidized vs. unsubsidized producers. If Commerce

3 See AB Report at para 602: “In the same way, … as an investigating authority is subject to an affirmative obligation to ascertain the precise amount of the subsidy, so too is it subject to an affirmative obligation to establish the appropriate amount of the duty under Article 19.3. This obligation encompasses a requirement to conduct a sufficiently diligent ‘investigation’ into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record. We recall our finding above that, among the factors to be taken into account by an investigating authority, in establishing the 'appropriate' amount of countervailing duty to be imposed, is evidence of whether and to what degree the same subsidies are being offset twice when anti-dumping and countervailing duties are simultaneously imposed on the same imported products.”
was wrong to ignore the possibility that the domestic subsidies in the China cases were used (wholly or partly) to reduce export prices, then it is always wrong to do so regardless of how normal value is established.

What to Do?2

The DS 379 decision is not wrong because it is impractical. It is wrong because it lacks textual support and creates new obligations. The AB essentially started from an economic theory (about the “likely” effects of domestic subsidization), articulated a policy preference based on that theory, and then interpreted the word “appropriate” in ASCM Article 19.3 as a license to impose that policy preference on the defending Member. The economic theory is a simplistic and inaccurate one, however, and the policy preferences of AB members are not supposed to determine dispute settlement outcomes.

If the term “appropriate” in ASCM Article 19.3 (and AD Agreement Article 9.2) is really a license to legislate as this AB division apparently believes, then no area of Members’ trade remedy practice is safe from similar meddling. The DSU’s directive about decisions not increasing Members’ obligations apparently applies only when Members are already behaving in a manner the AB considers “appropriate.”

Presented with such a poorly-reasoned decision, an absence of decent compliance options, an increasingly urgent need to stop the runaway train that the AB (at least in this area of its decisional output) has become, and little to be gained by kicking the can down the road, the U.S. government should follow the Nancy Reagan approach pioneered in US – Gambling. It should JUST SAY NO.

FROM HERE TO THERE: U.S. EXPORT REFORM

By: Correen E. Wood* & William A. Nelson II*

United States (U.S.) and international companies all struggle with the ambiguity and regulatory overlap of the current U.S. export control system. The current Administration, in August of 2009, initiated review of the current export control regulations and identified areas to reform the system. The assessment found that the current U.S. export control system is overly complicated, it contains overlaps, and controls are not based on the market availability of products, causing a burden to U.S. manufacturer’s ability to sell their products abroad.4

President Obama has identified an initiative of export reform to facilitate the growth of the U.S. economy and marketability of U.S. origin goods abroad. The Administration has stated the goal of the reform is an effort to “build high walls around a smaller yard” by focusing enforcement efforts on the “crown jewels.”5 So let’s take a moment to look at what is proposed and what is happening in the four identified component areas: Single Primary Enforcement Coordination Agency, Single Control List, Single Information Technology (IT) System, and Single Licensing Agency.

Single Primary Enforcement Coordination Agency

A Single Primary Enforcement Coordination Agency was formed on November 9, 2010 when the President signed Executive Order 13558, establishing a Federal Export Enforcement Coordination Center (FEECC). The issuing policy in the order states that

“[e]xport controls are critical to achieving our national security and foreign policy goals. To enhance our enforcement efforts and minimize enforcement conflicts,

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4 See President’s Export Control Reform Initiative, https://www.export.gov/ecr/ (last visited April 6, 2011).
executive departments and agencies must coordinate their efforts to detect, prevent, disrupt, investigate, and prosecute violations of U.S. export control laws, and must share intelligence and law enforcement information related to these efforts to the maximum extent possible, consistent with national security and applicable law.”

The Department of Homeland Security will administer the FEECC, while the Department of Justice and the Department of Commerce will provide two Deputy Directors with a liaison from the Intelligence Community. This agency will de-conflict criminal and administrative enforcement operations and coordination of industry enforcement outreach activity; provide a conduit between Federal law enforcement agencies and the U.S. Intelligence Community; serve as the primary point of contact between enforcement agencies and export licensing agencies for enforcement and licensing matters; resolve interagency conflicts not settled in the field; and establish government-wide statistical tracking capabilities for U.S. export enforcement activities.

The Executive Order, and more specifically the FEECC, draws together all agencies which play a role in enforcement and regulation of U.S. exports: Department of State, Department of the Treasury, Department of Defense, Department of Justice, Department of Commerce, Department of Energy, Department of Homeland Security, and the Office of the Director of National Intelligence. There is, however, one caveat to this list of standard regulators: the President may designate other executive branches, agencies, or offices to aid in the enforcement and regulation of U.S. exports. The establishment of the FEECC elevates enforcement to a higher level of priority with the regulators, and will highlight the need for companies to fine-tune their compliance programs across the board of regulation enforcement. The focus of investigations will no longer be based on a single regulatory agency’s control, it will be combined oversight by all export agencies. The potential that one infraction under a subset of the regulations could set the risk of other regulators to start inquiries and investigations into tangent areas of focus and concern underlines the importance and need for comprehensive integrated compliance policies and plan development for corporations exporting or importing goods and technology. With the single point of coordinated enforcement, we could see single focused agency investigations taking on a holistic compliance stance when determining the requirements for settlement to include all regulations, not just the ones in which they have the authority to regulate, thus elevating the need to have comprehensive compliance programs.

No export compliance program can prevent all violations, which makes it vitally important that companies frequently test and update their compliance programs. Even if there are no criminal or civil penalties as a result of a government investigation, the company involved has an increased potential to experience impediments to their business model as a result of the investigation. Long term disruptions could include business partners requiring voluntary disclosures on suspected violations, lowering the marketability of certain products due to heightened compliance and control requirements, and businesses incurring a reputation of compliance problems in a highly competitive market.

Single Control List

On December 9, 2010, the Department of State and the Department of Commerce issued proposed regulations to reform their control lists, the U.S. Munitions List (USML), and Commerce Control List (CCL), respectively, in accordance with the Export Control Reform (ECR) Initiative. Both Departments also solicited public comments on how to make their control lists more “positive” and how to tier the lists taking into consideration the military or intelligence significance of an item and foreign availability information. In addition, the export screening lists administered by the Department of State, Department of Commerce, and Department of the Treasury have been consolidated into a common electronic format to facilitate the screening of parties to export transactions.

At the present time there are three main agencies responsible for the administration and enforcement of export control regulations: 1) the Department of Commerce administers the commercial and dual use items (i.e., items that have both commercial and military applications) and the CCL; 2) the Department of State administers items specifically designed for military application and the USML; and 3) the Department of the Treasury’s Office of Foreign Assets Control administers sanctions and embargo programs. These agencies have different

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7 “Positive” regulations describe items using objective criteria, such as qualities to be measured; or other precise descriptions, rather than broad, open-ended, subjective, catch-all, or design intent-based criteria.
approaches to identifying and controlling products, technology, and end users/uses, and as a result exporters are not always clear on which agency has jurisdiction.

In order to address the jurisdictional issues and other pitfalls of the existing regime, the applicable regulatory agencies will establish new criteria for determining what items need to be controlled, and develop a common set of policies for determining when an export license is required. The Department of Commerce will coordinate a restructuring of the CCL as currently embodied in the Export Administration Regulations (EAR), and the Department of State will coordinate a restructuring of the USML as currently embodied in the International Traffic in Arms Regulations (ITAR), to create “positive” lists based on objective criteria (i.e., technical parameters such as horsepower or microns).

Each list will be broken into three tiers. Tier I will be for highly sensitive items – items that provide a critical military or intelligence advantage to the U.S. and are available exclusively from the U.S. or items that constitute weapons of mass destruction. Tier II will be for less sensitive items – items that provide a substantial military or intelligence advantage to the U.S. and are available almost exclusively from multilateral partners and allies of the U.S. Tier III will be for items that provide a significant military or intelligence advantage, but that are broadly available around the globe that might have a foreign policy, national security concern, or make a significant contribution to the development of Tier I or Tier II items.

It is currently understood that a license will be required for items in Tier I for all destinations, while most of the items in Tier II will be authorized for export to certain destinations under license exemptions or general authorizations, and items in Tier III would not need a license. Under each tier, the classifications will be broken down further into sub-categories, similar to what are presently identified by the EAR with the addition of defense services and manufacturing agreements from the ITAR.

Several proposed rules have been published in the Federal Register to start the process. The Federal Register notices issued are described below.

Department of State Proposed Rewrite USML Category VII – Tanks and Military Vehicles.

The Department of State proposes to amend the ITAR to revise Category VII of the U.S. Munitions List. The proposed rule would revise Category VII (tanks and military vehicles) to describe more precisely the defense articles described therein. The Department of State has revised Category VII to assign all controlled defense articles under this category one of the three control criteria: Tier 1, Tier 2, or Tier 3. These tier designations were made upon a government-wide assessment of the appropriate level of export control for each item based upon different types of destinations, end-uses, and end-users.

Department of State Advanced Notice of Proposed Rulemaking: Revisions to the United States Munitions List.

The Directorate of Defense Trade Controls (DDTC) seeks public comment on proposed revisions to the USML that would make it a “positive list” of controlled defense articles, would base the public “tier” defense articles on the Administration’s three-tier control criteria, and would identify those current defense articles that do not fall within the scope of any of the criteria’s tiers.

Department of Commerce Advanced Notice of Proposed Rulemaking: Revisions to the Commerce Control List – Revising Descriptions of Items and Foreign Availability.

The Bureau of Industry and Security (BIS) seeks public comments on how the descriptions of items controlled on the CCL could be more clear and positive and “tiered” in a manner consistent with the control criteria the Administration has developed as part of the reform effort.

Department of Commerce Proposed Rule: Establishing License Exception Strategic Trade Authorization.
This proposed rule would add a new license exception to the EAR. The exception would allow exports, reexports, and transfers (in-country) of specified items to destinations that pose little risk of unauthorized use of those items. The new License Exception Strategic Trade Authorization (STA) would be in § 740.20 of the EAR. The new license exception would authorize exports, reexports, and transfers (in-country) to destinations that pose little risk of unauthorized uses, and for which U.S. national security and foreign policy justify authorizing transactions without the delay and expense of obtaining an export license. To provide safeguards against possible reexports to destinations that are not authorized under the License Exception STA, where there is a greater risk of diversion to unauthorized end-uses, the license exception would also impose certain notification, destination control statement, and consignee statement requirements.

Department of State Proposed ITAR § 124.16 entitled “Special Retransfer Authorizations for Unclassified Technical Data and Defense Services to Member States of NATO and the European Union, Australia, Japan, New Zealand, and Switzerland.”

The current requirement for the provision of nationality information for a company’s employees within a license to cover dual national and third-country national foreign employees places a tremendous burden on registrants gaining a license and approved end-users’ right to work issues regarding citizenship. This has been a constant contention between the U.S. and allies. This amendment places the affirmative responsibility upon the foreign company, government, or international organization, with the understanding that by accepting the USML defense article, they must comply with the provisions of U.S. laws and regulations to prevent the possible diversion of U.S. defense articles and technology. Due diligence is still the key to use this exemption, however the burden is on the licensee to certify that it can meet the elements of the exemption by using security clearance employees or other effective screening procedures, control plans, and internal company Non-Disclosure Agreements as a condition for access to ITAR-controlled defense articles and technology.

**Single Information Technology (IT) System**

The current system lacks a central IT system for tracking export control licensing and other activity within the U.S. government. The Administration’s proposal is for a single online resource to receive, process, and screen new license applications and end-users. The goal of a single, unified informational technology infrastructure is to reduce systematic incompatibilities and use agency resources more efficiently. The regulators have released a consolidated list to use for all required screenings; this single screening list can be found on the Bureau of Industry and Security (BIS) website.

**Single Licensing Agency**

The current system, where separate export-control lists are maintained by different agencies with licensing jurisdiction for items on their respective lists, results in jurisdictional confusion and overlapping approval processes. The plan is to consolidate export control licensing jurisdiction in a single licensing agency. The creation of a new single licensing agency will be accompanied by the creation of a single export license application. Exporters can use this single application to apply for licenses for both dual use and defense items (as well as licenses to engage in trade with sanctioned countries issued by the Treasury Department’s Office of Foreign Assets Control). This is the final phase of export reform and as such still has some challenges to work out. A large challenge will be obtaining Congressional approval to form one agency out of the many that control exports, although it is possible that the new agency could be created by executive action and not require Congressional legislation.

**Implementation**

To deploy the ECR Initiative, the Administration has prepared a comprehensive, three-phase approach:12

**Phase I**

The Administration’s goal through Phase I is to make “significant and immediate improvements to the existing system” and to prepare necessary legislative proposals for Phase III. The Administration will harmonize and refine the two primary control lists, the USML and the CCL, in preparation for creation of the

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unitary list. Phase I will also streamline licensing processes and standardize procedures to increase efficiency and prepare for a single licensing regime. Enforcement will be consolidated in a single center, to enable synchronization and will de-conflict enforcement procedures.

Phase II
In Phase II, the Administration will finalize the consolidation of the munitions and dual-use control lists. Phase II also will involve restructuring of the control lists, creating tiers of items depending on their sensitivity or importance, and will attempt to fully harmonize the Department of State and Department of Commerce licensing policies and practices, taking steps toward the transition to a single licensing system.

Phase III
The most significant changes will occur during Phase III of the reform, which entails 1) combining the Commerce Control List and the USML into one list; 2) creating a single licensing agency; and 3) forming a single enforcement-coordination agency. The creation of a single enforcement-coordination agency means that enforcement will become an even higher priority for the U.S. government, and that they plan on increasing efforts against individuals and companies who disobey the rules or have inadequate internal compliance programs.

While most of the proposed changes can be carried out primarily by Executive Order, creating a single licensing agency and a single enforcement coordination agency will require congressional action.

Conclusion
The ECR initiative reduces the complexity of the current export regulations by creating a Single Primary Enforcement Coordination Agency, Single Control List, Single IT System, and Single Licensing Agency. Skeptics have argued that the history of export reform has been mostly unproductive and believe that Phase III efforts will face challenges in both the House and the Senate. Only time will tell if they will be proven correct.

INCOTERMS 2010: SIGNIFICANT CHANGES TO THE ICC RULES FOR THE USE OF DOMESTIC AND INTERNATIONAL TRADE TERMS

By: Lester Rennard

The Incoterms\textsuperscript{13} rules for the use and application of international trade terms were first introduced in 1936 by the Paris-based International Chamber of Commerce (ICC). From their historic beginnings, these rules have gained international recognition, including UN\textsuperscript{CITRAL}'s stamp of approval, as the global standard commercial trade terms which define the roles, responsibilities and obligations of sellers and buyers, in the shipment and delivery of goods, and when referenced in international sale contracts. Incoterms rules are also compatible with the provisions of the United Nations Convention on Contracts For The International Sale Of Goods (1980)("CISG"), and define the point at which risk passes from seller to buyer in the movements of goods. When properly used, they help to eliminate any unnecessary confusion and misunderstanding as to such contractual obligations.

In response to developments affecting international trade, such as changes in commercial and shipping practices, the ICC periodically revises these rules on an average of a ten-year cycle. The international trade community has been impacted by major developments within the past decade, including changes reflecting global responses to issues of security, rapid technological changes in global communication as it relates to electronic data interchange (EDI), and increasing complexity in the regulation of international trade. The latest revision, Incoterms 2010, marks the eighth revision which effectively came into force on January 1, 2011 with significant changes to the 2000 version.

In recognition of the global need for security in the movement of goods, the new Incoterms rules now

\textsuperscript{13} Incoterms\textsuperscript{®} is a registered trademark of the International Chamber of Commerce. For information about Incoterms\textsuperscript{®} 2010 visit the ICC website at: http://www.iccwbo.org/incoterms/.

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\textsuperscript{13} Incoterms® is a registered trademark of the International Chamber of Commerce. For information about Incoterms® 2010 visit the ICC website at: http://www.iccwbo.org/incoterms/.
Obligate both sellers and buyers to cooperate in rendering assistance in obtaining security-related clearances in order that any potential threat to life may be monitored. Whereas Incoterms 2000 provided for the use of EDI as agreed by the parties, Incoterms 2010 has addressed the rapidly changing technological advances in communication by making the provision for not only the use of paper communications but also, where it is customary or agreed, a provision for “equivalent electronic record or procedure”.

This paper will consider the new rules for Incoterms 2010 including the changes in substance and format from the 2000 revision, when and how the rules apply, and their implication for how risk is transferred from seller to buyer.

**Overview of Incoterms 2010 Versus Incoterms 2000**

The 2000 version of Incoterms contains thirteen trade terms separated into four categories: Group E (EXW); Group F (FCA, FAS, FOB); Group C (CFR, CIF, CPT, CIP); and Group D (DAF, DES, DEQ, DDU, DDP). The primary concern of Incoterms up to this version was its focus on the obligations that sellers and buyers have to each other, relating to the shipment and delivery of goods in their international trade transactions.

The number of rules for Incoterms 2010 has been reduced to eleven trade terms separated into two distinct transport classes – (i) Rules for any mode or modes of transport and (ii) Rules for sea and inland waterway transport. Included in the eleven rules are two new rules (DAT – delivered at terminal, and DAP – delivered at place) introduced as replacements for four of the thirteen rules (DAF, DES, DEQ, and DDU) under Incoterms 2000. Rules DAT and DAP are similar in features to the former Group D categories of Incoterms 2000 rules, in that they are all terms that obligate the seller to bear all costs and risks of delivery, except any import clearance requirement, to a named place of destination.

Under the new Incoterms 2010 rule DAT, the sale contract requires delivery to be made to a named terminal (including a specific point at the terminal if required) at a named port or place at the destination, unloaded from the arriving carrier or transport, and made available at the disposal of the buyer. This rule provides for the terminal to be any agreed place and could be a port, warehouse, quay, rail, air cargo, or other agreed facility. The seller is responsible for any export clearance and carriage, and bears all costs and risks up to the point of placing the unloaded cargo from the arriving mode of transport at the disposal of the buyer, in strict compliance with the parties’ agreement.

Although, under rule DAT, the seller is responsible for the costs and risks of carriage to the agreed point of destination, neither the seller nor buyer is obligated to the other for insurance cover. The seller will, no doubt, procure marine insurance to cover its risk exposure up to the point of delivery. The buyer is responsible for all import custom obligations and formalities and bears all costs and risks from the point at which the goods are placed at its disposal. The new Incoterms rule DAT is similar in application to the former rule DEQ under Incoterms 2000, which required the goods to be delivered and unloaded at a destination pier, and may thus be used in cases formerly requiring DEQ application.

The second new Incoterms 2010 rule DAP, is applicable where the sale contract requires goods to be delivered by seller at a named destination, ready for unloading from the arriving carrier or vehicle and made available at the disposal of the buyer. The seller is responsible for any applicable export clearance, and bears all costs and risks for carriage to the named place of destination. The buyer is responsible for all costs and risks of unloading goods from the arriving transport, and for import customs formalities. Under this rule, neither seller nor buyer has any insurance obligation towards the other. Since the seller is responsible for all costs and risks of delivery, it would naturally obtain marine insurance cover for up to the point of delivery.

Under rule DES of Incoterms 2000, a contract typically required delivery to a named port at destination, with the buyer having responsibility for the unloading of the goods. Since the named destination could be a port and the arriving vehicle a ship under rule DAP of Incoterms 2010, this feature of rule DAP makes it an appropriate substitute in cases formerly requiring rule DES. The fact also that this rule requires that goods be made ready for unloading at the buyer’s disposal makes it similar, in such application, to the former rules DAF, DES, and DDU, under Incoterms 2000.

Other changes in the rules for Incoterms 2010 include the manner in which terminal handling charges and “string sales” are addressed and how insurance and security related clearances are to be handled. It is the rule that a seller is responsible for arranging and paying for carriage of the goods to the destination under Incoterms rules CPT, CIP, CFR, CIF, DAT, DAP, and DDP. The buyer may thus be billed twice for such
related costs as terminal handling charges. These charges might be included in the seller’s invoice and also billed to the buyer by the carrier or terminal operator. This concern is now addressed in that the new rules of Incoterms 2010 seek to avoid such potential double billing by providing for such charges under each relevant rule.

Under rules CPT, CIP, FAS, FOB, CFR, and CIF of Incoterms 2010, provisions are made for addressing string sales by creating an optional obligation for seller to “procure goods shipped” rather than having to be the shipper. This became necessary since the nature of commodity, as opposed to manufactured goods, gives rise to frequent sales of the cargo while still in transit. The question arises as to which seller in the string is the shipper of the commodity. Since the original seller would have been responsible for shipping the goods, a seller further down line in the string is merely procuring, on behalf of a buyer, “goods that have been shipped”.

Under Incoterms 2000, there were only two rules, CIP and CIF, that obligate just one party, the seller, to procure marine insurance cover for goods as part of the seller and buyer’s responsibilities to each other. There was no provision obligating the buyer to procure insurance cover under the rules. In 2009, the Institute Cargo Clauses were revised and influenced changes in the way Incoterms 2010 addressed the matter of insurance obligation. There is still only a seller’s obligation for procuring marine insurance coverage. Instead of the two rules under Incoterms 2000, there are now three rules, CIP, CIF, and CPT, which obligate the seller to such responsibility. There continues to be no buyer insurance obligation under the rules.

Under the other rules of Incoterms 2010, except the above three rules that obligate the seller, the parties do not have any mutual obligation to each other for contract of insurance but must mutually cooperate in providing each other with relevant information upon request for the purpose of pursuing insurance cover. It must be noted that the lack of obligation under most rules to provide cover does not mean that insurance cover is not required or should be optional. It simply means that the parties must address the issue of marine insurance coverage outside of the Incoterms rules.

**New Transport Classification of Incoterms 2010**

The first transport class of Rules for any mode or modes of transport includes seven of the eleven rules for Incoterms 2010 (EXW, FCA, CPT, CIP, DAT, DAP, and DDP). This class of rules is applicable whether the transport mode is based on carriage by such modes as ground transport, rail, air, inland waterway, maritime, or multimodal. It must be observed that the two newly introduced rules, DAT and DAP, are both included under this first class of Rules and are thus applicable regardless of the mode or combination of modes of transport.

The second class of Rules is for sea and inland waterway transport and includes the remaining four rules (FAS, FOB, CFR, and CIF). This class mandates that the named point of delivery and the place where the goods are placed at the disposal of the buyer should both be ports only. Under the former rules of Incoterms 2000, the actual point at which risk is transferred from seller to buyer under rules FOB, CFR, and CIF is the ship’s rail – an archaic image of the risk swinging to and fro across an imaginary perpendicular line. Any damage or loss to cargo occurring on the side of the ship’s rail pointing toward the pier was the responsibility of the seller, while if such occurrence were to happen on the side of the ship’s rail toward the vessel it became the responsibility of the buyer. Incoterms 2010 resolved this problematic issue by replacing the “ship’s rail” as the point at which risk is transferred for a more practical provision mandating that actual risk is transferred when the goods are delivered on board the vessel.

**Application of Incoterms 2010**

The revision and introduction of Incoterms 2010 have terminated the rules’ former exclusive focus on international trade only, by recognizing their application also for commercial sale contracts in domestic commerce. This application should be of particular interest to nations organized into trade blocs such as member countries of the European Union (EU), and also of interest to such domestic markets as the United States. The EU countries have long been forging an integrated community market that liberalizes trade and de-emphasizes the formalities of national borders when trading among themselves. The adoption of Incoterms 2010 and the appropriate use of the rules should create greater uniformity and certainty when interpreting and applying related contracts.

In the United States, Incoterms 2010 rules and their applicability to domestic sale contracts should also be of great interest as replacement for relevant sales and delivery terms that were formerly included under Article 2, Part 3 of the Uniform Commercial Code (UCC) and eliminated in a 2004 revision. Former UCC domestic
terms-of-sale, such as FOB, when defined, conflicted with similar Incoterms rules. This conflict between the UCC former sales terms and Incoterms was based on the fact that the UCC used sales terms for the purpose of transferring title to goods, while Incoterms rules are not meant to address issues of title, but buyers and sellers' obligations to each other regarding the shipping and delivery of goods. The conflict removed by the discontinued use of UCC sales terms and the provision for application of Incoterms in domestic commerce should make Incoterms 2010 the most popularly used rules of all former revisions if its adoption is encouraged in the U.S. domestic market.

When and How to Use Incoterms 2010 Rules

There is much emphasis on the need for sellers and buyers to choose and incorporate the most appropriate Incoterms rule to apply as the shipping and delivery terms of their sale contract. This choice should be influenced by the nature of the goods, mode of transport, and responsibilities for carriage, insurance, export clearance, and import custom formalities, as applicable. The new classification system of the rules of Incoterms 2010 into two distinct classes of transport simplifies the process of determining the choice of rules available for specific modes of transport. The rule for a specific delivery term will then be influenced by the responsibilities and obligations that each party will assume in the transaction. The specific rule chosen will determine the point at which risk is transferred from seller to buyer.

As an illustration, a seller in Atlanta, Georgia has contracted to sell widgets to a buyer in Hamburg, Germany. The sale contract requires the goods to be shipped by ocean, and the seller to deliver the goods to the carrier at its facility at the port of Savannah, Georgia and be responsible for carriage and insurance to Hamburg. In this case, one may initially look to either classification of Incoterms 2010 as both can accommodate maritime transport. Since the seller is obligated for carriage and insurance, the appropriate Incoterms rule in this illustration would be CIP (Carriage And Insurance Paid To), since this rule is applicable to any mode of transport. The sale contract would therefore reflect the delivery terms as: CIP Hamburg, Germany, Incoterms 2010.

In the above illustration, the point at which the risk is transferred from seller to buyer and the goods are considered delivered is when the goods are handed over to the carrier in Savannah, Georgia, even though the seller is responsible for obtaining marine insurance at minimum cover for the goods during carriage, and also for the cost of carriage to Hamburg, both at an ultimate cost to the buyer.

Conclusion

The introduction of Incoterms 2010 does not void the continued usage of the former rules of Incoterms 2000. Users should therefore clearly state within their contracts the specific version of Incoterms that apply. The correct application of the Incoterms rules to specific commercial transactions is critical for both domestic and international traders.

FINALLY …

We invite you to submit articles for the next edition of the International Trade Committee’s newsletter. Articles should relate to international trade and be between 1000 and 2500 words. The next deadline is July 31, 2011. Please contact Brad Bigos (bradbigos@gmail.com) with topic ideas, or with comments and questions on the newsletter.

We also continue to improve the newsletter and would enjoy hearing your thoughts on how we might improve.