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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 Adds License Requirements on Numerous Sensor Products

Citing foreign policy concerns, the Bureau of Industry and Security (BIS) will impose new worldwide licensing requirements on products and technology used in vehicle cameras, helicopter landing gear, earthquake monitoring, home energy inspection and night photography. An interim final rule to be published in the Federal Register Oct. 14 will add two Export Control Classification Numbers (ECCNs) and make other changes.

> Commerce, State and Defense "have determined that imposition of these license requirements protects national security and foreign policy interests of the United States because of the items' potential military applications," the notice says. BIS is requesting public comments on the new rules.

Newly created ECCNs 6A990 and 6E990 will control "read-out integrated circuits (ROICs) that enable 3D automotive imaging and ranging in the wavelength range exceeding 1,200 nm, but not exceeding 3,000 nm, at distances up to 150 m" and technology for those circuits, BIS notes. ROICs "are used only in cameras to provide images for collision avoidance and navigation support for civilian vehicles at distances up to 150 m, and have potential military application because of the infrared detectors, which can be used to enable military personnel to detect images in the dark, enhancing nighttime warfighting capability," BIS explains.

New paragraphs also have been added to certain existing ECCNs to control radar for helicopter autonomous landing systems, seismic intrusion detection systems, which are used for monitoring earthquakes, and the "technology" for specified infrared up-conversion devices, all of which have civilian applications as well as military. Infrared up-conversion devices are "used to convert near-infrared light into visible light using an organic light emitting diode, which can be used in conventional night vision devices used for home energy inspection or night photography," the agency adds.

Supreme Court Won't Hear Challenge to Byrd Amendment

The Supreme Court denied without comment Oct. 6 a petition for a writ of certiorari to review the constitutionality of the Byrd Amendment. Two furniture importers, Ashley Furn-iture and Ethan Allen, had asked the high court to consider arguments against the law's requirement that only companies that had expressed support for the antidumping

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case against bedroom furniture from China during the investigation period can receive a share of collected antidumping duties (see **WTTL**, Sept. 8, page 6).

The two firms had argued that the requirement to express support for the case violated their constitutional free speech rights because it compelled them to state a position in favor of the case to be eligible to receive funds under the Continued Dumping and Subsidy Offset Act (CDSOA). They had asked the Supreme Court to reverse a ruling from the Court of Appeals for the Federal Circuit that had rejected that argument.

The Solicitor General's opposition to the petition may have had great weight in the court's decision not to hear the case. The Solicitor General said furniture firms were not forced to support a government position under the CDSOA; they only had to express their own views. It contended the law was no different than a class action lawsuit where a party has to join the plaintiffs' side to receive a share of any settlement.

UN Arms Treaty Reaches Milestone

Enough countries have ratified the United Nations Arms Trade Treaty (ATT) to meet the requirements to bring the pact into force on Dec. 24, 2014. The UN received a surge of ratification notices during the recent UN General Assembly meeting Sept. 25, bringing the total notifications as of Oct. 9 to 53, which is above the 50 needed to bring the treaty into force. UN sources expect more notices to be submitted in the months ahead.

Secretary of State John Kerry signed the ATT last September on behalf of the U.S. (see **WTTL**, Sept. 30, 2013, page 1). Even before UN members adopted the accord in April 2013, however, many members of Congress had said they would oppose its ratification. With the Senate likely to have more Republicans after the November elections, and perhaps a GOP majority, U.S. ratification seems even more unlikely.

Meanwhile, State "is working to finalize the transmittal package, which we hope to complete soon and submit to the White House," a department official told WTTL in an email. "We want to ensure that all USG stakeholders have an opportunity to thoroughly analyze, review and provide input on this ground-breaking treaty. The ATT touches on national security, international trade, law, and human rights. Ultimately the decision on when to transmit the treaty to the Senate for ratification is the president's," the official said.

At a high-level event at the UN Sept. 25, Angela Kane, the UN's high representative for disarmament affairs, read a statement from UN Secretary General Ban Ki-moon who raised the specter of the shooting down of Malaysian Airlines Flight 17 over the Ukraine. "The need for the ATT remains abundantly clear," Ban's statement said.

"Deadly weaponry continues to find its way into irresponsible hands. Unscrupulous arms brokers defy UN arms embargoes. Ruthless leaders turn their arsenals on their own citizens. Ammunition depots are poorly guarded. State-owned weapons go missing. Civilian airplanes end up in the crosshairs," he said. Only countries that have ratified the ATT are bound to its provisions, but many others have adopted measures that conform to its requirements. "Yet in order for the treaty to be effective, all governments must have well-functioning oversight of weapons transfers," Ban said.

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FCPA Definition Stands After Supreme Court Denies Appeal

Among a slew of petitions for certiorari that the Supreme Court denied Oct. 6 without comment was one from two Florida men seeking to have their convictions for violating the Foreign Corrupt Practices Act (FCPA) overturned and to have the law's definition of "instrume ntality" clarified. As a result of the high court's denial of the petition, an appellate court's interpretation of the FCPA will stand.

In May, the 11th Circuit Court of Appeals upheld the FCPA convictions of Joel Esquenazi and Carlos Rodriguez, the former president and vice-president, respectively, of Terra, one of two telecommunications companies involved in a scheme to bribe officials of Telecommunications D'Haiti S.A.M. (Haiti Teleco) to secure telephone contracts.

"The central question before us, and the principal source of disagreement between the parties, is what 'instrumentality' means (and whether Teleco qualifies as one)," wrote Appellate Judge Beverly Martin for the court (see **WTTL**, May 26, page 7). Martin's opinion defined "instrumentality" under the FCPA as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own," she wrote.

"The 11th Circuit's decision is consistent with several prior U.S. district court decisions addressing the meaning of 'foreign official' under the FCPA, and, in the wake of the Supreme Court's denial of certiorari, now serves as the most authoritative opinion on the topic," Akin Gump lawyers wrote in an update to clients Oct. 8.

Commerce Hasn't Nailed Down Nail Kit Scope, CIT Rules

If third time isn't the charm, maybe a fourth remand might sort out Commerce's scope policy for mixed-media products containing items subject to an antidumping order. Court of International Trade (CIT) Senior Judge Nicholas Tsoucalas ordered Commerce Oct. 6 to conduct a fourth remand determination to correct its scope ruling in the case against nails from China (slip op. 14-118). The Commerce ruling has already faced two remands for differing reasons from the CIT and one from the Court of Appeals for the Federal Circuit (CAFC) in *MCN III* (see **WTTL**, July 22, 2013, page 7).

Tsoucalas said Commerce's third remand order failed to meet the requirements that the CAFC set out in its ruling for how the department can determine whether a mixed-media product falls within the scope of a dumping order. In this case, the petitioner, Mid-Continental Nail Corp., is challenging Commerce's determination that nails inside toolkits imported by Target don't fall within the order's scope.

Among the issues raised in the case was whether Commerce properly adopted its scope policy without going through a public comment process and instead using past scope rulings as its guide. Another question was whether the department met its own revised four-part test for determining scope. Commerce claimed that previous publicly available scope rulings provided the basis for its decision. According to Tsoucalas, Commerce altered the four-factor test it used in the first remand results to comply with previous CIT orders and CAFC's ruling in *MCN III*. Its four new factors are: (1) the "unique

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language of the order"; (2) the "practicability of separating the component merchandise for repackaging or resale"; (3) the "value of the component merchandise as compared to the value of the product as a whole"; and (4) the "ultimate use or function of the component merchandise relative to the ultimate use or function of the mixed-media set as a whole," Tsoucalas noted.

> He said the CAFC explicitly granted Commerce the ability to support a mixed-media standard without conducting notice-and-comment under the Administrative Procedures Act (APA), so long as the department's test complied with the *MCN III* guidelines. But he ruled that Commerce failed to comply with the CAFC's directions.

Among the reasons for that ruling was the department's failure "to demonstrate how the 'unique language of the order' is relevant to its mixed media test," he wrote. "Contrary to Commerce's assertions, these scope rulings appear to answer the *Walgreen* question based on the facts and circumstance in each particular case, and do not identify a broader ascertainable mixed media standard," he added. "Ultimately, Commerce's mixed media test fails to comply with the instructions the CAFC articulated in *MCN III*, which required Commerce to draw an ascertainable mixed media standard from information that was publicly available at the time the Nails Order was issued," he continued.

"These nine scope rulings do not identify a coherent and ascertainable standard encompassing all of the factors in Commerce's mixed media test, and thus, they do not provide guidance that would allow importers to predict how Commerce would treat their mixed media products. Because Commerce's test is inconsistent with *MCN III*, this court declines to find whether Commerce's application of its four-factor mixed media test was supported by substantial evidence," Tsoucalas ruled.

DDTC Updates ITAR Controls as Reform Nears Anniversary

As the first list transfers under Export Control Reform hit their first birthday, State used the anniversary to "streamline, simplify and clarify" its International Traffic in Arms Regulations (ITAR) in the Oct. 10 Federal Register. The final rule changes specific controls and the definition of specially designed, moves other definitions and clarifies the language in parts of the regulation.

> In one change, State revised the note to paragraph (b) of the specially designed definition "to clarify that catch-all controls are only those that generically control parts, components, accessories, and attachments for a specified article and do not identify a specific specially designed part, component, accessory, or attachment."

State's Directorate of Defense Trade Controls (DDTC) also updated U.S. Munitions List (USML) Category II (guns and armament) "to clarify that grenade launchers are controlled in paragraph (a) as a result of the revisions previously made to USML Category IV [launch vehicles]." USML Category IX (military training equipment) was amended "to enumerate military training not directly related to a defense article," State noted. "This change is required in order to provide exporters a USML category to cite for military training when not related to a defense article," it added. In several places, DDTC moved definitions to the relevant USML category, specifically Categories

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VI (vessels of war), VII (military vehicles), VIII (aircraft) and XX (submarines). In addition, "the word 'enumerated' is replaced with the word 'described' in the paragraphs of the USML for technical data and defense services directly related to the defense articles in that Category to clarify that the controls on technical data and defense services apply even if the defense article is described in a catch-all," DDTC noted.

> In some sections, DDTC changed specific controls on certain items. For example, the threshold for lithium-ion batteries controlled in Category VIII(h)(13) "is increased from greater than 28 volts of direct current (VDC) nominal to greater than 38 VDC nominal, so as not to control on the USML such batteries in normal commercial aviation use." Also, it added the phrase "electric-generating" to the control describing fuel cells "to clarify that fuel bladders and fuel tanks are not within this control."

Despite attempts at clarifying the ITAR, DDTC still can't resist its old war on clear English. For example, the revised rules say: "Minor reference corrections are made to Supplement No. 1 to Part 126, including moving the footnote to the entire Supplement from the end to the opening to better clarify if an item is excluded from eligibility in any row, it is excluded from that exemption, even if also described in another row that contains a description that may also include that item."

CIT Injunction Blocks Use of Invalid Dumping Duties

Commerce can't use dumping margins that courts have found to be invalid while awaiting the results of a remand determination in an administrative review, CIT Senior Judge Richard Goldberg ruled Oct. 6. To block the department's use of questionable margins on imports of lined paper products from India, he granted a preliminary injunction requested by Navneet Publications(India) Ltd. "over the government's objections."

> "The court first holds that it has jurisdiction to enjoin the liquidation of entries at the 11.01 percent rate, even though those entries were made during a subsequent review period. The court also finds that Navneet meets the traditional requirements to secure a preliminary injunction," Goldberg wrote.

In a complex case of overlapping administrative reviews, Commerce's findings from the fifth administrative review of the imports were remanded by the CIT, while a sixth review was underway, followed by the launch of the seventh administrative review. Commerce had tried to continue to impose the margins from the fifth review during the period of the seventh.

In the fifth administrative review, Commerce assigned Navneet, a cooperative respondent not selected for individual review, an 11.01% all-others rate. Navneet challenged the ruling at the CIT, which held that the all-others rate was not based in substantial evidence and remanded the findings to the department for adjustment. Meanwhile, the sixth administrative review assigned Navneet a 0.25% rate for entries during that period. A seventh review was initiated and then withdrawn.

Goldberg agreed that Navneet's products are "covered" by the fifth review so an injunction is warranted. "In sum, because a fifth-review determination covers the contested entries, the court may enjoin liquidation of those entries at the invalid fifth-review rate," he ruled. "The entries may be liquidated later—most likely at a fifth-review rate revised

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on remand, or perhaps at the 11.01 percent rate if the Government appeals and the Federal Circuit sustains the Final Results," he noted (slip op. 14-119).

Intel Subsidiary Pays BIS $750,000 for Unlicensed Exports

In a case of substantial mitigation for a voluntary disclosure, an Intel subsidiary agreed to pay a much-reduced civil penalty to settle charges of exporting software to foreign government end-users without Commerce licenses. Wind River Systems of Alameda, Calif., agreed Oct. 7 to pay BIS $750,000 to settle 55 charges, including four for exports to Entity List organizations in China, from 2008 through 2011.

> The exports of operating software classified under Export Control Classification Number (ECCN) 5D002 went to end-users in China, Hong Kong, Russia, Israel, South Africa and South Korea. Some exports to China went via Hong Kong. The software was worth $2.98 million. The exports to the blocked entities in China were valued at an addition $27,759.

In 2012, the company voluntarily disclosed the potential violations of U.S. export controls to BIS. "I approved penalties in this case because the violations were ongoing over a period of several years," said BIS Assistant Secretary for Export Enforcement David Mills in a statement. "Because the violations were voluntarily disclosed, the company received significant mitigation. This penalty should serve as a reminder to companies of their responsibility to know their customers and, when using license exceptions, to ensure their customers are eligible recipients," Mills added.

"Wind River takes export compliance very seriously, and have made a number of enhancements to our export compliance program. After cooperating with the government on this matter, we are pleased to be closing this chapter," Joy Robins, Wind River's director of trade, said in an email to WTTL. Intel acquired Wind River in July 2009.

Smoke Clears on Indonesia, U.S. Dispute over Clove Cigarettes

The long-standing dispute at the World Trade Organization (WTO) between U.S. and Indonesia over the U.S. ban on clove cigarettes ended Oct. 3 when both parties came to a "mutually acceptable solution." While no details were released on the agreement, the deal could avoid up to $55 million in retaliation against U.S. exports to Indonesia. "We are pleased that an agreement was reached that keeps the flavoring ban in place and that both countries can now move forward together to improve our overall trade relationship," said a statement by a spokesman for the U.S. Trade Representative's (USTR) office.

"This agreement also signifies the mess that is the United States' ban on Indonesian non-menthol and clove cigarettes in the U.S. market," said a statement from Indonesia's Ministry of Trade. "After the case was submitted to the WTO, the U.S. did not change their policy to comply with the ruling of the WTO's DSB [dispute settlement body] because what the United States Government did was in fact just campaigning against the dangers of smoking menthol cigarettes instead of banning their sales," it said.

The two countries told the WTO "they have reached a mutually agreed solution to the matter raised by the Government of Indonesia." As a result, "Indonesia hereby with-

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draws its request to the DSB pursuant to Article 22.2 of the DSU for authorization to suspend the application to the United States of concessions and other obligations" under the General Agreement on Tariffs and Trade and other WTO agreements, they advised. "Indonesia having withdrawn its request under Article 22.2 of the DSU, the United States hereby withdraws its objection to that request," said the notice from Deputy USTR Michael Punke and Iman Pambagyo, Indonesia's deputy representative to the WTO.

The WTO Appellate Body ruled in April 2012 that the U.S. ban violated WTO rules (see **WTTL**, April 9, 2012, page 3). In 2013, Indonesia asked for authorization to retaliate against $55 million worth of U.S. goods because of Washington's failure to comply with the WTO ruling. The arbitrator's decision had been circulated to members, but in June, Indonesia and the U.S. "requested the Arbitrator to suspend the circulation of the Arbitrator's award." They also asked that "no award of the Arbitrator shall be circulated while the suspension is in place, and the confidentiality of any draft award shall be maintained until the award is circulated."

* * * Briefs * * *

EXPORT ENFORCEMENT: Dmitry Ustinov of Moscow was sentenced Oct. 9 in Wilmington, Del., U.S. District Court to 18 months in prison for conspiring to export night-vision devices and thermal imaging scopes to Russia from July 2010 through April 2013 without State licenses. Ustinov pleaded guilty July 10 after being extradited from Lithuania.

MORE EXPORT ENFORCEMENT: Bilal Ahmed of Bolingbrook, Ill, pleaded guilty Oct. 2 in Chicago U.S. District Court to violating International Emergency Economic Powers Act. He admitted he shipped carbon fiber and microwave laminates to Pakistan's Space and Upper Atmosphere Research Commission without Commerce licenses. Ahmed was arrested in March and remains free on $100,000 bond. Sentencing is scheduled for Jan. 15, 2015.

CHLORINATED ISOCYANURATES: In mixed final votes Oct. 9, ITC determined that U.S. industry is materially injured by subsidized imports of chlorinated isocyanurates from China, but not by dumped imports from Japan. Affirmative vote on China was 6-0, while negative Japan tally was 5-1 with Vice Chairman Dean Pinkert as only yes vote.

ANTIBOYCOTT: McWane International Sales Company in Birmingham Ala., agreed to pay BIS $7,000 civil penalty Sept. 29 to settle five charges of violating antiboycott regulations. It allegedly furnished information about business relationships with boycotted countries or blacklisted persons and failed to report receipt of requests to engage in restrictive trade practice in letters of credit from UAE and Qatar. Company filed voluntary disclosure. "The letters of credit were inadvertently processed without detection of the inappropriate language. McWane International detected the language as part of a routine internal compliance audit," wrote Mickie Mills Coggin, company spokesperson, in email to WTTL.

SHELVING: In 6-0 preliminary vote Oct. 10, ITC found U.S. industry may be injured by dumped and subsidized imports of boltless steel shelving prepackaged for sale from China.

OFAC: Treasury Oct. 6 issued Ukraine General License No. 3 authorizing transactions with Turkish bank Denizbank A.S., subsidiary of Sberbank of Russia, which U.S. sanctioned in September (see **WTTL**, Sept. 15, page 9). Sberbank acquired DenizBank in June 2012.

EX-IM BANK: With reduction of its export financing in fiscal 2014, which ended Sept. 30, compared to 2013, Ex-Im had less profit to send Treasury. It announced Oct. 9 it had transferred $675 million to Treasury from its excess earnings. In fiscal 2013 it sent $1.057 billion.

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