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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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Editor & Publisher: Samuel M. Gilston • P.O. Box 5325, Rockville, MD 20848-5325 • Phone: 301.570.4544 Fax: 301.570.4545

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Jury Questions Controls on "National Defense Information"

Although a federal jury convicted former Northrop Grumman engineer Noshir Gowadia Aug. 9 on 14 charges related to the release of defense technology to China, it acquitted him of three charges because of questions about export controls on "national defense information," as well as educational information. The jury reached its verdict after Honolulu U.S. District Court Chief Judge Susan Oki Mollway sent it separate instructions in response to questions it posed on when is it a crime to transmit defense information to a foreign national or government. The acquittals covered material that had been marked "Secret."

> Her instructions suggest the mere classification of data doesn't automatically mean it is controlled. "There are two things that the government must prove beyond a reasonable doubt," Molloway told the jury. "First, it must prove that the disclosure of the material would be potentially damaging to the U.S. or might be useful to a foreign nation," she stated.

"Second, it must prove that the material is 'closely held' by the U.S. government," she said. "The fact that information is classified by the government is not, standing alone, enough to make the information 'closely held.' However, in determining whether information or material is 'closely held' you may consider whether it has been classified by appropriate authorities and whether it remained classified on the date or dates pertinent to the indictment," Mollway said.

"One example of information that is not closely held is information that has been made public by the U.S. government and is found in sources lawfully available to the public," Mollway added. "It does not include general education in scientific subjects, unless the government proves beyond a reasonable doubt that the disclosure of the information would be potentially damaging to the U.S. or might be useful to a foreign nation, and that the information is 'closely held' by the U.S. government," the judge instructed the jury. Gowadia was convicted of conspiracy, violating the Arms Export Control Act, communicating national defense information to aid a foreign nation and to persons not entitled to receive it, unlawful retention of national defense information, money laundering and filing false tax returns.

Rebound in Car and Oil Imports Drives Up Trade Deficit

The surprising jump in the U.S. trade deficit for goods and services in June to almost $50 billion and the decline in exports from May have raised the question of whether the rebound in U.S. exports has shifted from the V-shaped recovery of the first half of 2010 to an L-shaped

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pattern. For the first six months of 2010, goods exports jumped 23% from the same period in 2009, while goods imports were up 27% (see Table 1). Although increased imports from China have garnered much attention, the main apparent cause of the overall jump in imports has been the recovery of the U.S. auto market and rising oil prices (see Table 2). The increase in auto imports parallels the strong results reported by Ford and GM for domestic car sales.

Table 1: U.S. Goods Exports and Imports for Selected Markets – 6 Months 2010 v. 2009
(In billions)

	Goods Exports 2010	Goods Exports 2009	% Change	Goods Imports 2010	Goods Imports 2009	% Change
Total	$612	$498	23%	$905	$715	27%
Canada	122	96	27	139	105	32
European Union	116	111	5	151	134	13
Japan	29	25	18	56	43	31
China	41	30	36	161	133	20
Brazil	16	12	38	11	9	21
OPEC	27	25	7	75	47	61

The Obama administration is likely to give credit for the strong growth in exports in the first half of the year to its National Export Initiative, but the rise is just bringing trade back to the levels of 2008 before the great trade crash of 2009.

The greatest increase in exports in the first half appears to have been to emerging markets such as China and Brazil, which grew 36% and 38%, respectively. Economic problems in Europe following the Greek financial crisis clearly put a damper on exports to the European Union. The mere 11% increase in imports of consumer goods in the first half indicates that Americans still remain cautious shoppers.

Table 2: Imports for Selected Sectors 6 Months 2010 v. 2009
(in billions)

	2010	2009	% Change
Autos	$108	$64	68%
Consumer Goods	234	211	11
Capital Goods	214	179	20
Industrial Supplies	300	212	60

The surge in imports of industrial supplies, which includes oil and petroleum products, reflects a jump in commodity prices as well as increased manufacturing and more miles being driven. But a 62% increase in the price of a barrel of crude oil to $74.63 in the first half of 2010 from $46.20 in 2009 accounts for most of it.

BIS Imposes Fines and Warning in Antiboycott Cases

With penalties ranging from a simple warning to almost $30,000, four companies have settled charges of violating the antiboycott rules of the Export Administration Regulations (EAR) with the Bureau of Industry and Security (BIS). On Aug. 3, BIS reached a settlement with Multi-Cam, Inc. of Dallas, Texas, which agreed to pay a $28,800 civil fine to settle eight antiboycott charges, including furnishing boycott-related information and failing to report boycott information requests to BIS.

On July 23, BIS agreed to settle four charges with Mashreqbank PSC (Bank) of New York, the U.S. office of Mashreq Bank, which claims to be the largest private bank in the United Arab Emirates. The bank "voluntarily disclosed information concerning certain of its transaction to BIS," but "neither admits nor denies the truth of the allegations," the settlement stated. BIS imposed a civil penalty of $12,800 on the bank for four alleged violations for furnishing information concerning its business relationships with or in a boycotted country.

In a third case July 23, BIS settled charges against OAC Shipping Company Inc. of Miami with a $6,600 civil penalty. BIS' Proposed Charging Letter accused OAC of furnishing letters of credit to a bank in Qatar, advising bank that, "The carrying vessel is allowed by Arab authorities to call at Arabian ports." In the last case, BIS issued a warning letter July 26 to M&R International (MRI) of Norwalk, Conn., for allegedly failing to report to BIS receipt of "a

request to engage in a restrictive trade practice or boycott." BIS imposed no monetary penalty against MRI, telling the firm: "Having considered all the facts and circumstances known to us at this time, including the results of our examination of MRI's export transactions, we are closing this investigation with the issuance of this Warning Letter."

EU Expected to Appeal WTO Ruling on ITA Compliance

The European Union (EU) is expected to appeal a World Trade Organization (WTO) dispute-settlement panel report to be issued Aug. 16 on its failure to comply with the multilateral Information Technology Agreement (ITA). The EU is assessing how comments to a draft of the report circulated in June were incorporated into the final report and whether to appeal, an EU spokesperson said (see **WTTL**, June 21, page 1). Europe's "ultimate goal" is an ITA "fit for the 21st century," but talks on revising the pact are independent of the dispute findings, the spokesperson said. The agreement is based on dated technology, she said; adding: "Technology has changed and we think that makes it necessary for the ITA to change as well."

> Although it has been confidential, sources said the panel's interim report found the EU's application of the ITA inconsistent with its WTO commitments. The EU had claimed the duty-free provisions of the accord did not cover certain set top boxes with a communication function, flat-panel displays and multifunction digital machines and had imposed tariffs on them.

The U.S. has 20 to 60 days to request formal adoption of the findings as the EU considers the appeal. The U.S. will likely ask for adoption of the panel's findings during a Sept. 21 meeting of the WTO Dispute Settlement Body (DSB), but it could ask for a special meeting of the DSB a few days earlier. An EU appeal would suspend consideration.

If the final panel report makes the same finding as the draft, that "is extremely good news," said John Neuffer, vice president of the Information Technology Industry Council. The case has never been just about the three products in the case, he said. Rather it is about protecting the integrity of an agreement viewed as critically important by industry, Neuffer asserted. Executives said talks on amending the pact are moving slowly, in part, because everyone is waiting for the final results of the dispute.

State to End to Dual and Foreign National License Requirements

In proposing to end export licensing requirements for dual and third-country nationals working outside the U.S, State's Directorate of Defense Trade Controls (DDTC) will shift the burden of preventing the diversion of defense articles and technical data to the foreign recipients and end-users of those items. Instead of requiring DDTC authorization to allow these "foreign persons" to have access to defense items, the proposed changes to the International Traffic in Arms Regulations (ITAR) published in the Aug. 11 Federal Register would require foreign consignees and end-users to implement "effective procedures to prevent diversion to destinations, entities, or for purposes other than those authorized."

> While U.S. exporters won't have to identify the countries of birth of dual nationals and third-country nationals in their export applications under the proposal, they should amend their export compliance programs to assure that their foreign consignees have in place technology control plans or security systems to screen employees who will have access to controlled technical data, advises Lynn Van Buren, a partner in the DLA Piper law firm in Washington. She also noted that the proposal won't change requirements to file DSP-5 license applications for foreign nationals working in the U.S.

The DDTC proposal fulfills the second of two promises President Obama made in March to begin the process of export control reforms. BIS' publication in June of an interim final

rule amending encryption controls was the other. DDTC faced delays in proposing the change to ITAR rules on foreign persons because of questions that congressional staffers had raised to earlier drafts of the proposal (see **WTTL**, May 31, page 1).

> "The current requirement for the provision of additional information within a license to cover dual national and third-country national foreign employees has created a tremendous administrative burden on approved end-users and has evolved into a human rights issue, which has become a focus of contention between the U.S. and allies and friends without a commensurate gain in national security," DDTC said. "The proposal will be very good for foreign companies, especially in Europe and Canada," Van Buren told WTTL.

Under the proposed change to ITAR Section 127.1(b), a foreign consignee can be eligible to receive a defense article by having "(i) A security clearance approved by the host nation government for its employees" or (ii) "a process to screen its employees and to have executed a Non-Disclosure Agreement that provides assurances that the employee will not transfer any information to persons or entities unless specifically authorized by the consignee or end-user," the proposal states. In addition, the end-user or consignee "must screen its employees for substantive contacts with restricted or prohibited countries listed in Sec. 126.1," it says. "Substantive contacts include, but are not limited to, recent or regular travel to such countries, recent or continuing contact with agents and nationals of such countries, continued allegiance to such countries, or acts otherwise indicating a risk of diversion," the proposal advises.

* * * Briefs * * *

TRADE PEOPLE: Dennis O'Connell, former director of Treasury's Office of Trade and Tariff Affairs, died Aug. 3. He was 68 years old. Earlier in long career at Treasury, he served as director of OFAC, including during Iranian hostage crisis in 1980. He also held posts at Customs and BAFT.

FCPA: David Turner, former business director at Innospec, Inc., and Ousama Naaman, its agent in Iraq, reached agreement with SEC Aug. 5 to settle charges tied to their role in Innospec's FCPA violations and bribery of Iraqi officials under UN Oil for Food Program (see **WTTL**, May 10, page 4). Without admitting or denying SEC's allegations, Naaman will disgorge $810,076 plus prejudgment interest of $67,030, and pay civil penalty of $438,038. Turner agreed to disgorge $40,000. "No civil penalty was imposed based on, among other things, Turner's extensive and ongoing cooperation in the investigation," SEC said.

MORE FCPA: After seven-year legal battle with Mercator Corporation, a N.Y. merchant bank, including government's attempt to restrict defendant's access to classified documents, Justice agreed Aug. 6 to accept firm's guilty plea to one count of violating FCPA and plea of its chairman, James Giffen, to single misdemeanor charge of failing to disclose Swiss bank account. Although first indictment in 2003 included 65 counts, including bribing of Kazakhstani officials in connection with oil lease sales in country, Mercator pleaded guilty in Manhattan U.S. District Court to giving two snowmobiles to senior Kazakhstan official.

IRAN: OFAC Aug. 12 issued one-paragraph guidance on import sanctions on Iranian goods under recently enacted Iran Sanctions Act (see **WTTL**, July 12, page 1). New law, "among other things, prohibits the importation of Iranian-origin goods and services into the United States, effective 90 days after the Act's date of enactment. No exception to this prohibition may be made for the commercial importation of Iranian-origin goods described in section 560.534(a) of the Iranian Transactions Regulations (31 C.F.R. Part 560)," OFAC advised. Agency said it "cannot authorize by general or specific license the commercial importation of such Iranian-origin goods (which include certain foodstuffs and carpets) on or after September 29, 2010. Consequently, the general license in section 560.534 of the ITR will be eliminated by September 29, 2010, and any such goods for commercial importation into the United States must be entered for consumption before that date."

SUDAN/IRAN SANCTIONS: U.S. subsidiary of shipping conglomerate A.P. Moller-Maersk has agreed to pay more than $3 million to settle OFAC allegations that it violated Sudanese Sanctions Regulations and the Iranian Transactions Regulations. OFAC announced settlement with Maersk Line, Limited (MLL) of Norfolk, Va., and its wholly owned U.S. subsidiaries, Farrell Lines Incorporated and E-Ships, Inc., July 29. Agency accused shipper of providing unlicensed services for 4,714 shipments of cargo originating in or bound for Sudan and Iran. OFAC said MLL did not voluntarily self-disclose matter, but alleged violations constituted non-egregious case. OFAC agreed to mitigate 95% of potential $61,768,000 penalty.