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Tougher Reexport Rules May Replace Licensing Requirements

The end of export licensing requirements for some goods and technology as a result of the Obama administration's export control reforms will "come with a price," Bureau of Industry and Security (BIS) officials said July 27. The elimination of licensing requirements is likely to come with new controls on reexports as well as reporting or notification requirements, they told the BIS Sensors and Instrumentation Technical Advisory Committee. A model for such controls may be regulations BIS issued in May 2009 to lift license requirements for uncooled thermal-imaging cameras (UTIC) (see **WTTL**, May 25, 2009, page 4).

> "To the extent that something today, tomorrow or after the reforms no longer requires authorization for export when it did previously, that will come with a price associated with it," said BIS Assistant Secretary for Export Administration Kevin Wolf. That price may be "reexport controls or notification or authorizations or some other conditions," he said.

"We are still working out exactly what those details are in order to give confidence that if we decontrol the export of something to France, to pick a random example, that we have confidence with reexports thereafter," Wolf told the TAC. He promised to reach out to industry for comment before any changes in controls or control lists are adopted.

The need for reexport controls is intended to prevent exports to low-risk destinations being diverted to high-risk destinations, BIS Deputy Assistant Secretary Matthew Borman told the committee. "The UTIC rule is a model because that is exactly what we do," he said. "One of the things we want to start thinking about is what would be the impact if we start to tell U.S. companies that they can export without a license to, let's say, the EU-plus, but you can't do that until you get some kind of acknowledgment from the customer that they understand that they can't reexport that item outside the license-free zone without a Commerce license or transfer it in-country to someone who would take it out," Borman explained. "This is a significant piece, if we are going to take away license requirements for less critical technology to lower-risk destinations," he added.

NAFTA Panel Affirms ITA's Change in Zeroing Rules

A binational panel under the North American Free Trade Agreement (NAFTA) has upheld changes the International Trade Administration (ITA) made to its use of zeroing in antidumping investigations to comply with a World Trade Organization (WTO) ruling against its old

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practices. In a July 20 ruling, the panel affirmed ITA's abandonment of the use of zeroing in its June 2008 final order on light-walled rectangular pipe and tube from Mexico. The panel rejected petitioner arguments that ending zeroing contradicted U.S. court decisions that allowed the use of the old methodology and that ITA disregarded another court ruling on calculating price adjustments that are not granted specifically on sales of subject merchandise.

> The panel said ending zeroing did not contradict Court of Appeals for the Federal Circuit (CAFC) decisions in *Corus Staal* and *Timkin*, which said ITA had discretion to use zeroing because of ambiguities in U.S. trade law. "Inherent in the Department's discretionary authority to 'zero' dumping margins is discretionary authority not to 'zero' dumping margins," the binational panel stated.

"The Department exercised this discretion in its 2005 *Final Modification*, after following appropriate procedures," it continued. "Petitioners appear to accept that Commerce may lawfully decline to 'zero' dumping margins. They contend instead that the statute bars Commerce from 'offsetting' dumping margins," it noted. "The Panel is not persuaded that the same statutory provision that the Federal Circuit found to be ambiguous with respect to 'zeroing' is explicit with respect to offsetting," the panel said.

"The crux of Petitioners argument is that the court in *Timken* found only the single word 'exceeds' in section 1675(35)(A) to be ambiguous, but did not find any other language in the same provision, particularly the phrase, 'normal value exceeds,' to be ambiguous," the panel stated. "We find Petitioners' reading of *Timken* to be too narrow by far. Plainly, the court's analysis implicates the provision as a whole, as the language quoted above demonstrates. The court's holding in *Timken*, as affirmed by *Corus Staal I* and *II*, is not based on a single word plucked from its context in the statute," the panel declared. It also rejected arguments regarding price adjustments, noting that enactment of the Uruguay Round Agreements Act changed the law. The panel ruling also denied respondent complaints about the ITA final order, leaving the final margins in the order unchanged.

U.S. Claims Guatemala Violating CAFTA-DR Labor Rules

In the first invocation of the labor provisions of a free trade agreement, the U.S. asked Guatemala July 30 to consult on American labor union allegations that the Central American country is failing to comply with provisions in the Dominican Republic-Central American Free Trade Agreement (CAFTA-DR) requiring it to enforce laws to protect worker rights. The AFL-CIO and six Guatemalan unions had filed a complaint with the U.S. government in April 2008, seeking action against Guatemala under the labor rules in the trade pact. At issue is the failure to enforce laws permitting the right to organize and bargain collectively.

> "With this case, we are sending a strong message that our trading partners must protect their own workers, that the Obama Administration will not tolerate labor violations that place U.S. workers at a disadvantage, and that we are prepared to enforce the full spectrum of American trade rights from labor to the environment," U.S. Trade Representative (USTR) Ron Kirk told an audience in Pittsburgh where he announced the request for consultations. Kirk also said the U.S. was concerned about labor violence in Guatemala. "We will be working with partners across the Obama Administration to examine and take up this issue with Guatemala as well in the near future," he said.

The consultations request was in a letter Kirk and Labor Secretary Hilda Solis sent to Guatemalan officials. The letter triggers a process under CAFTA-DR Article 16.2.1(a), which starts with 60 days of consultations. If those talks fail, the process can be escalated up to a trade ministers level and then to an arbitration panel. A ruling against Guatemala at the end of the day with no compliance could lead to the imposition of a fine on the county. Ironically, the U.S. runs a trade surplus with Guatemala. In 2009, the U.S. had a surplus $727 million on $3.8

billion in exports and $3.1 billion in imports. In the first five months of 2010, the surplus was $445 million. About 36% of U.S. imports from Guatemala are apparel and household goods. In 2009, the U.S. also imported $595 million in fruit and $339 million in coffee.

> The most significant increase in trade has been in gold, with imports in 2009 surging to $326 million from $258,000 in 2005. The mining operations of Goldcorp, Inc., a Canadian company, have been the subject of complaints and reports about human rights and environmental abuses. The biggest element in bilateral economic relations, however, is the more than $3 billion that Guatemalans in the U.S. send back home in the form of remittances every year.

At a press conference after his speech, Kirk defended the Obama administration's emphasis on trade enforcement and disagreed with suggestions that the policy aims to appease anti-trade groups. "This isn't picking on poor little Guatemala," he declared. "I don't think we should dismiss this as pandering to any one element," he added. He said that talking to people around the country he has found that they are "frustrated – and have a right to be – that we have not been as aggressive about trade enforcement as we have been about signing deals." To get approval of deals with Korea, Panama and Colombia, "we have to have a more healthy balance between enforcement of our rights as well as getting market access," Kirk said.

BIS Clarifies Grace Period for Encryption Exports

BIS amended its new encryption regulations in the July 27 Federal Register to clarify a misunderstanding about the ability of firms to ship encryption products during a short grace period before the rules go into effect Aug. 24. The amendment makes it clear that firms can self-classify and export under the new rules from June 25, 2010, when the new encryption regulation was published, through August 24, 2010, without registering first, as long as they register afterwards. The June 25 rule caused confusion for some exporters who thought they had to register first before taking advantage of the liberalized export policy, causing an interruption in their export operations.

> "The registration requirement remains prospective (i.e. by August 24, 2010), and BIS is not actually triggering any requirements with which the affected entities would not otherwise have to comply," the agency said. "The encryption clarification rule simply clarifies that those who proceed with export between June 25, 2010, and August 24, 2010, must file with BIS by August 24, 2010," it added.

The amendment adds a sentence to the introductory text of paragraph (b) of Section 740.17 that reads, "For items self-classified under paragraph (b)(1) of this section from June 25, 2010 through August 24, 2010, and for requests for classification under paragraphs (b)(2) and (b)(3) of this section submitted from June 25, 2010 through August 24, 2010, exporters have until August 24, 2010 to submit their encryption registrations." BIS said the intent of the grace period was to give industry time to gather information it needed to submit with the required encryption registrations, to change internal procedures and to train personnel before submitting the encryption registrations.

DDTC Eschews Fine for Remedial Action in Consent Agreement

State's Directorate of Defense Trade Controls (DDTC) agreed July 15 to allow AAR International, Inc., of Wood Dale, Ill., to implement remedial trade compliance measures in lieu of a civil fine for alleged violations of the International Traffic in Arms Regulations (ITAR). The consent agreement resolved DDTC charges that a firm that AAR purchased, Presidential Airways, Inc., committed 13 ITAR violations through exports of controlled items to Afghanistan, the Bahamas, Burkina Faso and Iraq without approved licenses and failing on one occasion to obtain a DSP-83 non-transfer certificate. The alleged violations occurred before AAR's AAR Airlift, LLC, acquired Presidential, which also operates Aviation Worldwide Services, LLC, Air

Quest, Inc., STI Aviation, Inc., and EP Aviation, LLC. The firms provide supply-chain management, communications and logistics support to the Defense and State departments and many of the alleged violations involved shipments for U.S. government customers.

> "When determining the charges to pursue, the Department considered mitigating factors, including that all of the violations were committed before AAR Airlift purchased Presidential, that the majority of Presidential's violations were committed while Presidential was servicing U.S. Government programs, that Presidential has already implemented remedial compliance measures, and that Respondent has agreed to implement additional improvements to Presidential's compliance program," DDTC said in its proposed charging letter. In the consent agreement, DDTC said these same factors were considered in the decision not to debar AAR.

Justice Won't Make FCPA Case against Microfinance Institution

The Justice Department informed a U.S.-based microfinance institution (MFI) July 16 that the department would not take enforcement action against it under the Foreign Corrupt Practices Act (FCPA) for grants the MFI wants to make to a bank that has a foreign government official on its board of directors. The Justice FCPA Advisory Opinion responded to a request from the non-profit MFI, which said it is converting many of its local operations to commercial entities. As part of the process, one of its non-banking Eurasian subsidiaries found that it had to make a grant to a local MFI bank with a government board member as a condition to obtain a license from the Eurasian country's regulating agency to operate in the country.

> "Based on the due diligence that has been done and with the benefit of the controls that will be put into place, it appears unlikely that the payment will result in the corrupt giving of anything of value to such officials," Justice stated. "As an initial matter, it is important to note that the expressed motivation of the Regulating Agency here is to ensure that grant money given to the Eurasian Subsidiary for humanitarian purposes in the Eurasian country continues to be used for humanitarian purposes in that country," it added.

* * * Briefs * * *

FCPA: General Electric Company agreed July 27 to pay $23.4 million fine to settle SEC civil charges that four of its foreign subsidiaries paid kickbacks to Iraqi officials in exchange for contracts between 2000 and 2003 as part of UN Oil-for Food Program. In 18-page civil complaint filed in D.C. U.S. District Court, SEC identified subsidiaries as Marquette-Hellige and OEC-Medical Systems (Europa) AG and acquired firms as Ionics Italba S.r.L. and Nycomed Imaging AS.

ANTIDUMPING: ITA in July 28 Federal Register proposed change in rules for filing of antidumping and countervailing duty petitions to require all documentation to be submitted electronically. Initial call for comment on pilot program drew responses from only two law firms (see **WTTL**, June 21, page 4).

SHORT-MEMORY DEPT.: House passed bill (H.R. 1875) July 28 on voice vote to create Emergency Commission to End the Trade Deficit. Members apparently forgot they had created bipartisan U.S. Trade Deficit Review Commission in 1999. Earlier commission split along party lines in its final report in November 2000 on causes of deficit and its cure (see **WTTL**, Nov. 20, 2000, page 3).

DOHA ROUND: "After some months of impasse in the negotiations, my own sense is that we are beginning to see signs of a new dynamic emerging," WTO Director General Pascal Lamy told informal meeting of WTO Trade Negotiating Committee July 27. "I think that somewhere around mid-October would be a good time to evaluate our progress," he said.

TARIFF BILL: Senate July 27 passed Miscellaneous Tariff Bill (H.R. 4380) by voice vote, sending it to president for signature (see **WTTL**, July 26, page 1).

BLANKETS: ITC made final determination July 28 on 6-0 vote that dumped imports of woven electric blankets from China are materially injuring U.S. industry.