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

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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LAWMAKERS CONSIDERING FEES FOR USML LICENSE APPLICATIONS

Members of Congress are considering the idea of imposing a fee on U.S. Munitions List (USML) export licenses filed with State as a way to raise revenue to fund the hiring of additional staff for the Directorate of Defense Trade Controls (DDTC). According to congressional sources, these lawmakers view the problems with the current licensing process at State and the delays in processing as due to a shortage of license reviewers and staff. Legislation would be needed to impose the licensing fee and to dedicate the payments to the administration of the export licensing system, one congressional source told WTTL.

> The licensing fee idea is seen as one possible solution to the export licensing problems identified by a coalition of exporters and trade associations that is seeking reforms in the licensing process at DDTC as well as at the Bureau of Industry and Security (BIS). The Coalition for Security and Competitiveness has recommended changes in the procedures at the two agencies but has carefully drafted its proposals to avoid the need for legislation (see **WTTL**, March 12, page 3).

Congressional sources concede it would be difficult to change the Arms Export Control Act (AECA) to address industry complaints about the DDTC licensing process. "An easier fix, albeit a partial fix, is to insure that DDTC has enough staff to do its job," one congressional source told WTTL. "If they were to charge an application fee, in addition to the current registration fee, some small amount on each licensing action, that could easily generate enough revenue to pay for a doubling of their staff," he added. The amount of the suggested fee would be based on the amount of work that is needed to review the license.

ITC ASKED TO CONSIDER SUPREME COURT RULING ON PATENTS

The respondent in a pending Section 337 patent-infringement case has asked the International Trade Commission (ITC) to review the Initial Determination (ID) on an administrative law judge based on the Supreme Court's landmark patent ruling April 30 in *KSR International v. Teleflex, Inc*. Attorneys for Ninestar Technology have asked the ITC to adopt the unanimous Supreme Court's opinion which said a patent is invalid if it's "no more than the predictable use of prior art elements according to established functions."

ALJ Paul Luckern had sided with the complainants, Seiko Epson, Inc. and its affiliates, which charged Ninestar with infringing its patents for certain ink cartridges and components (case 337-TA-565). The ITC has extended until June 29 the deadline for deciding whether to review Luckern's ID. "Precisely the same 'rigid approach' rejected by the Supreme Court was utilized

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by the ID here," wrote Ninestar's lawyers at Schulte Roth & Zabel. "The application of this erroneous standard cannot be allowed to stand in face of the *KSR* decision," they wrote. "*KSR* indisputably reformulates the analysis which courts and ths Commission must use in judging the obviousness of patents before it," their letter asserted. The firm noted that the Court of Appeals for the Federal Circuit adopted the *KSR* policy in a May 9 ruling (06-1402) in the case of *Leapfrog Enterprises v. Fisher-Price*.

> Attorneys for Epson, Adduci, Mastriani & Schaumberg, rebutted Ninestar's reading of the KSR ruling. "The Supreme Court in *KSR* and the Federal Circuit in *Leapfrog* affirmed the decisions of the trial judges in those cases because they determined that the underlying factual findings were not clearly erroneous," they wrote. "Ninestar has identified no basis that Judge Luckern's factual findings regarding the nonobviousness of the asserted patents were clearly erroneous," they continued. Their letter argued that Ninestar did not satisfy the burden of proving the obviousness of Epson's patents.

BISers SAY ENTITY LIST PROPOSAL NOT AIMED AT LOWERING STANDARDS

The BIS proposal for expanding the criteria for behavior that can get parties placed on the Entity List is not intended to lower the standard for being placed on the list, BIS officials contend. "There was no attempt to change the threshold," Eileen Albanese, director of the BIS Office of Exporter Services, told the Regulations and Procedures Technical Advisory Committee June 12 (see **WTTL**, June 4, page 1).

> Industry representatives at the meeting raised concern that the proposed change would lower the standard for getting placed on the list. They also said it could be harder to screen clients based on the broader criteria, particularly national security and foreign policy actions, that might lead to getting listed.

One industry representative noted that current rules for the Entity List are tied to a specific end use and allow exports for non-identified end uses to the party. He noted that Indian organizations that were on the list were subject to controls for only certain identified items. Under current rules, which place parties on the list for nonproliferation concerns, an exporter may still be able to get a license if it can isolate its export from the proliferation activity that led to the listing. The current regulation "tells you what you need to do" to export to an Entity List party," he said. With the proposed changes, "you really won't know what to do," he argued.

A BIS staffer at the meeting tried to assure members that the revised Entity List will operate the same way the current list does. BIS intends to identify the entity placed on the list, the items covered by the restrictions and the licensing policy that will apply if licenses are required. "We are trying to follow the nonproliferation model as closely as possible," he said.

CENSUS TO VISIT EXPORTERS WITH POOR AES COMPLIANCE

The Census Bureau between now and Oct. 1 will be visiting 40 exporters, including some freight forwarders, who are achieving less than 80% compliance with Automated Export System (AES) filing requirements. Bureau officials will be recommending steps those firms should take to increase their compliance to the 95% compliance rate Census considers acceptable. The visits are part of the bureau's AES Compliance Review Program. "We are allowing 90 days to come into compliance," William Bostick Jr., director of the Census Foreign Trade Division, told the BIS Regulations and Procedures Technical Advisory Committee June 12.

"If you do not come into compliance within those 90 days, then we may consider passing your company's name to BIS or CBP," he added. The procedural improvements that Census will recommend are based on "best practices" guidelines that it is developing from visits it made in April to some high compliance and low compliance exporters. "If you ignore those recom-

mendations, and you take no action whatsoever to start to come into compliance, then the assumption that we're making is that, if you are ignoring our regulations, you are probably ignoring other regulations and therefore we more than likely will pass it on to BIS and CBP to look at that company and to look at their regulation," he added.

> Bostick said Census is still in discussions with Customs and Border Protection (CBP) about a Customs proposal to allow it to share AES export data with foreign customs agencies as part of a broad international effort to safeguard cargos and shipments (see **WTTL**, March 12, page 3). Census has resisted the CBP demand and the argument over the issue has gone on now for over two years. As a consequence of the disagreement, Census has never published a final rule to implement Mandatory AES filing requirements for all exports.

The delay has also prevented adoption of the higher $10,000 penalty for each violation of Census requirements and BIS enforcement of those rules. If Census agrees to accept the Customs demand, the bureau will repropose the regulations and start the process from scratch, Bostick said. Once such an agreement is reached, it will take another 12 to 18 months for the reproposal, comment and final rule process, Bostick told the RAPTAC.

TWO SENATE BILLS TARGET CHINA'S UNDERVALUED CURRENCY

The Bush administration and Congress moved closer to a clash over how to deal with China as two groups of senators proposed legislation to address the undervaluation of the Chinese renmimbi. The chances for either of the measures or a combination of the two to become law, however, may depend on the whether a China currency bill can make it through the legislative process without becoming loaded down with other trade legislation. Both bills are aimed at making it harder for Treasury to avoid taking action against Beijing's exchange rate policies.

> Senate Finance Committee Chairman Max Baucus (D-Mont.), along with Sens. Charles Grassley (R-Iowa), Charles Schumer (D-N.Y.), and Lindsay Graham (R-S.C.), June 12 introduce a bill (S. 1607) to repeal the current law requiring Treasury to identify countries that manipulate their currencies and to replace it with new requirements to identify currencies that are "misaligned." This is same concept the foursome last year said they would offer as an alternative to the more drastic Schumer-Graham proposal to impose a 27.5% duty on Chinese imports.

The bill would set new standards for defining when a currency is misaligned, require Treasury calculate the amount of misalignment and to take certain actions to get the misaligner to get its currency aligned, imposed 180-day and 350-day deadlines for action, and provide certain sanctions when those efforts fail. One provision would require the USTR to seek WTO dispute settlement. Another would allow Commerce to adjust the U.S. sales price in antidumping cases involving goods from misaligner countries by the amount of misalignment calculated by Treasury. Senate staffers claimed the change in the antidumping rules is WTO compliant.

Banking Committee Chairman Chris Dodd (D-Conn.) and Ranking Member Richard Shelby (R-Ala.) announced plans June 12 to introduce their own currency bill to strengthen Treasury's ability to declare a currency misaligned and to require the department to take actions to correct the misalignment. Because Banking traditionally has jurisdiction over international currency issues, a jurisdiction battle between Finance and Banking could emerge over the China legislation. Baucus acknowledged the jurisdiction issue at the press conference announcing his bill. He said he had spoken with Dodd about it. "That will not be an issue," Baucus said.

HEARING OFFERS PREVIEW OF TOUGH ROAD FACING U.S.-KOREAN FTA

The first House hearing on the U.S.-Korea Free Trade Agreement (KORUS) June 13 offered a vivid preview of the trouble facing the pact on the road to its congressional approval. Deputy

U.S. Trade Representative (USTR) Karan Bhatia underwent a bipartisan grilling on provisions that are in the accord or missing from it on auto trade and rice, and whether goods produced in North Korea's Kaesong Industrial Complex will be eligible for duty-free treatment. Bhatia said they wouldn't be. Members also questioned South Korean investment in Iran and whether pending Iran sanctions legislation could block such investments.

> Business community supporters of KORUS say they were not surprised by the strong negative reaction from the members of the Foreign Affairs Committee's subcommittee on terrorism, nonproliferation and trade. Many of the members on the subcommittee have opposed previous trade deals as well, they note.

KORUS supporters also say it is too soon to tell how members really feel about the deal. A vote on the agreement, which the U.S. and Korea are scheduled to sign on June 30, isn't expected until late this fall or the spring of 2008. Much of the criticism being raised about the pact, including by some members at the hearing, is aimed at certain constituencies, supporters contend. The business community, led by industries that will benefit most from the deal, is mounting a strong campaign to win votes for the agreement. Industry representatives have already begun meeting with members to build support. "The feedback from members has been remarkably favorable," one executive told WTTL.

The key to getting KORUS approved will be improving benefits for U.S. automakers. At this stage, no change is expected in text of the agreement, but continued efforts will be made to find improvements as implementing legislation gets closer. The aim would be to get sufficient improvements in auto trade to win support from House Ways and Means Committee Chairman Charles Rangel (D-N.Y). "Rangel has to feel comfortable enough with the deal to take it through the committee," one source suggested.

* * * BRIEFS * * *

BIS: New Under Secretary Mario Mancuso told reporters June 14 that he is committed to making BIS regulatory process transparent, reasonable, rational and efficient. Business "might not always agree with what we do, but I think at a minimum they are entitled to an analytically vigorous regulatory process," he said. Mancuso also said export controls are not risk or cost free. "Export controls have second and third order consequences not just for industry but for national security as well," he said.

ALSO BIS: Thomas Madigan, with 20 years of government law enforcement experience, has been named assistant director of OEE for investigations. Post oversees OEE field operations. He comes to BIS from ICE where he was chief of its arms and strategic technology unit and also served with ICE unit in Baghdad in 2003. Before ICE he was with Customs working on nonproliferation issues.

EXPORT ENFORCEMENT: BIS in June 12 Federal Register imposed temporary denial orders on Cirrus USA plus its two offices in Singapore and India, Cirrus Singapore and Cirrus India, along with four of its officers, Parthasarathy Sudarshan, Mythili Gopal, Akn Prasad, and Sampath Sundar. Company and individuals were indicted in March on charges of exporting controlled items to organizations in India that were on BIS Entity List without approved licenses from BIS (see **WTTL,** April 9, page 1).

SHOES: Reps. Joseph Crowley (D-N.Y.) and Kevin Brady (R-Texas) June 12 unveiled legislation to eliminate tariffs on imported shoes and sneakers. "Once enacted, this common-sense, uncontroversial reform of an outdated duty system will stop this unfair practice that costs families up to $5 billion annually," Crowley said. Pair said importers in 2006 paid $1.9 billion in shoe tariffs, some of which ranged up to 67.5%. When mark-ups are added through supply chain, tariffs added $4-5 billion to retail prices, they argued.

OFAC: EPMedsystems, Inc. of West Berlin, N.J., has agreed to pay $33,000 civil fine to settle OFAC charges that it violated Iranian Transactions Regulations with exports to Iran between 1999 and 2004. Firm voluntarily disclosed violation, OFAC said. EPMedsystems last November reached separate settlement with BIS, which imposed $244,000 civil fine because agency claimed firm's self-disclosure was materially incomplete and misleading (see **WTTL**, Dec. 11, page 1).

SHRIMP: ITA June 9 completed Section 129 review of antidumping duty order on shrimp from Ecuador to bring U.S. into compliance with WTO ruling. Revised findings found dumping margins for imports to be *de minimis* and recommended revocation of order.