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BIS WORKLOAD SURGES: LICENSES UP 25%, ENFORCEMENT UP 70%

The number of export licenses handled by the Bureau of Industry and Security (BIS) in the last 12 months grew almost 25% compared to the same period a year ago, jumping to 15,534, the agency reported at its Update 2004 conference in Washington Oct. 5. During the fiscal year that ended Sept. 30, 2004, BIS export enforcement officials were even busier, reaching 63 settlement agreements for export violations, a 70% increase from last year, and imposing $6.2 million in civil fines, 51% more than a year ago.

> The increase in the export licensing load was driven by a combination of strong export growth for all U.S. industries and a continuing rise in the number of applications submitted for deemed exports, night vision products and chemicals used in the production of semiconductors, BIS officials explained. The growth in the licensing load, which followed a 15.6% increase in 2003, is a continuation of a three-year trend that has reversed the downward slide in cases in the late 1990s.

In the last year, the average time for completing a license review was 36 days. This compares to an average of 44 days in fiscal 2003, but the drop in time was due mostly to a revision in the way BIS counts the days, agency officials conceded. When BIS doesn't have to refer a case for interagency review, it can complete action in an average of 11 days. When cases go interagency, which is 92% of the time, it takes an average of 38 days to give a response.

In the last year, BIS approved 13,058 licenses (84%), denied 272 (1.75%), returned without action 2,181 (14%) and revoked 23. In addition to export licenses, BIS staffers completed 4,400 commodity classifications (32 days average), 400 license determinations for enforcement cases, 300 commodity jurisdiction reviews for State, 500 mass-market determinations for encryption products, and 600 export reviews as part of Customs' Operation Exodus.

The 63 enforcement settlements in fiscal 2004 compare to 37 settlements and $4.1 million in fines last year. BIS lawyers say they are accelerating the handling of cases recommended by the agency's compliance staff and field offices. Of the cases settled in 2004, 14 included both fines and denial of export privileges. Several cases also involved criminal fines and penalties.

CONFERENCE DROPS RESTRICTIONS ON DEFENSE EXPORTS TO EU

House and Senate members drafting a new defense authorization bill dropped proposed provisions that could have imposed trade restrictions on European Union (EU) companies that sell Munitions List (ML) items to China. Opposition from industry groups, the White House and

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key senators, such as Sen. Mike Enzi (R-Wyo.), succeeded in getting lawmakers to eliminate provisions in the House version (H.R. 4200) of the 2005 National Defense Authorization Act (NDAA) which would have added new licensing requirements on items on the Militarily Critical Technologies List (MCTL) and threatened retaliation against foreign firms that sell defense equipment to China (see **WTTL**, Oct. 4, page 3).

> At press time, the final version of H.R. 4200 and the conference committee report on the bill had just passed the House. The Senate was also hoping to vote on the legislation, but was expected to stay in session over the weekend to complete action on a backlog of measures, including the NDAA.

The threat of sanctions on EU firms was raised to thwart EU proposals to lift its arms embargo on China. While the House-Senate Conference was considering the NDAA bill, State officials were in Europe attempting to convince the Europeans not to go forward with their proposal.

Both the EU proposal to lift the embargo and the potential legislation were a concern to State, according to Ann Ganzer, director of the office of defense trade control policy at State. "We are very concerned about this," she told the BIS Update 2004 conference Oct. 5. "On a more pragmatic level we are very concerned about what his could mean for our defense trade relations with the Europeans," she said. "If the Europeans lift their embargo and start trading with China, this would complicate the picture," Ganzer warned.

Industry representatives say House Armed Services Committee Chairman Duncan Hunter (R-Calif.) isn't likely to stop trying to get these amendments enacted. "Hunter won't give up on this," one source said. Still included in the bill is language addressing congressional concerns about the use of offsets in defense contracts with foreign governments. The measure will require the Defense secretary to develop a comprehensive acquisition trade policy to ensure that U.S. firms are not disadvantaged by foreign offset demands.

AIR WAR OVER THE ATLANTIC COULD SPUR PEACE TALKS

The 20-year commercial and diplomatic battle between Boeing and Airbus broke into an open trade dispute Oct. 6 with the apparent collapse of the 1992 transatlantic aircraft subsidy agreement and the U.S. and European Union's (EU) cross-filing of complaints at the World Trade Organization (see **WTTL**, Oct. 4, page 4). Despite escalation of the dispute to the WTO, the possibility of the negotiation of a new bilateral deal remains strong because neither the U.S. nor EU is likely to want to leave the fate of its aerospace industry in the hands of six disinterested foreign judges in Geneva.

> If the initial 60-day period of consultations fails to resolve U.S. and EU complaints about the other's allegedly unfair subsidies to its airplane producers, the dispute-settlement process at the WTO could take over two years to run its course through the panel and Appellate Body system. During that time, negotiations to set the future ground rules for the Boeing-Airbus duopoly are certain to continue to preserve parity between the two companies.

The U.S. and EU also may want to resolve the dispute outside the WTO because the case poses the risk of bringing international scrutiny to the whole web of domestic investment subsidies that local, state and regional governments give industries as incentives to build or keep plants in their locales. The case could also challenge the subsidy element in defense and R&D contracts. The EU complaint cites investment benefits given to Boeing by Washington State Kansas, Oklahoma and Japan, as well as Boeing's benefits from illegal FSC/ETI tax breaks

While generally available subsidies are permitted under WTO rules, others that are aimed at specific companies might be subject to countervailing duty (CVD) complaints. One of the main goals of the 1992 deal was to avoid CVD cases. Since the agreement pre-dated the creation of the WTO, it includes no mention of the use of the WTO dispute-settlement process. "After 12

years, the United States believes the 1992 agreement has outlived its usefulness and needs to be terminated," a USTR statement said. The attempt to negotiate a new deal failed to make headway, and the U.S. said it was exercising its right to withdraw from the accord.

> The U.S. told the EU it was withdrawing from the agreement under Article 10.2 of the pact because of EU non-compliance. The statements issued by the USTR's office on the case, however, didn't cite specific non-compliance. Instead, it said the U.S. wanted to prevent the EU from providing new subsidies to Airbus.

On Oct. 8, the EU sent Washington a letter claiming the U.S. didn't have grounds to abrogate the agreement, and therefore it was still in effect and the U.S. was obligated to "avoid any trade conflict" over issues covered by the agreement. The 1992 agreement includes three provisions for terminating the pact. One is for non-compliance; one is for failure to resolve an industry-sponsored CVD complaint. A third allows termination without cause, but it apparently wasn't used by the U.S. This article says either party could terminate the agreement after notifying the other in writing of its intention to do so. "The withdrawal shall take effect 12 months after the date on which the notification was received," says Article 13.3 of the accord.

COURT OVERTURNS ITA'S LIQUIDATION POLICY FOR ADMINISTRATIVE REVIEWS

A new policy the International Trade Administration (ITA) adopted in 2002 for issuing liquidation instructions to Customs following administrative review determinations doesn't comply with U.S. trade law and must be revised, Court of International Trade (CIT) Senior Judge Richard Goldberg ruled Oct. 4 (slip op. 04-125). The policy said ITA would provide Customs with new liquidation instructions in antidumping and countervailing duty cases within 15 days after the results of the review are published in the Federal Register.

> The liquidation notice should be given after 60 days to give respondents time to challenge the determination and seek court review within the deadlines set by law and CIT rules, Goldberg ruled. "The court is concerned that Commerce's new policy will compel parties, in every instance, to seek a preliminary injunction within fifteen days to prevent liquidation and preserve the court's jurisdiction, regardless of whether the party ultimately decides to challenge any aspect of the final determination," Goldberg wrote in *Tianjin Machinery v. U.S.*

BIS INCREASING FOCUS ON DEEMED EXPORT VIOLATIONS

BIS enforcement agents are stepping up their investigation and prosecution of deemed export violations because of the importance of controlling critical technology, but also because evidence of these violations is easier to obtain than for normal exports abroad. "One of the reasons we are making these cases effectively is because they are easier to make," Julie Salcido, the Special Agent in Charge of the BIS field office in San Jose, Calif., told the BIS Update 2004 conference Oct. 4.

> In regular export cases, a good portion of the evidence is overseas, and BIS may have a hard time collecting it, she explained. For deemed export cases, the evidence is in United States. "We can subpoena the evidence we need," Salcido said. "If we hit you with a subpoena, you have to comply. Its fairly transparent. You have controlled technology, the person is not a U.S. person and has access and is working on it," she added.

Salcido noted several recent enforcement cases, including one against Lattice Semiconductor, in which large civil fines were imposed. "We're making a lot more deemed export cases," she said. "There are a number in the pipeline, and you'll see a lot more in the future." BIS agents are looking for deemed export cases. "We are going to be coming out to look at deemed exports as much as, if not more than, tangible exports, because the manufacturing capability is

so significant," she said. Salcido pointed out several compliance weaknesses that BIS agents find during their investigations. One is the breakdown in communication between export managers and the human resources staff that is responsible for hiring and bringing foreign nationals into companies. "Sometimes we find that they don't even know each other," she said. "They don't have phone numbers or how to get in touch with each other in big companies," she added. "I would remedy that. I would get these people together often," she advised.

> Another problem is incomplete classification of technology. "We see this with new small and middle-size companies a lot, where there is emerging or new technologies or start ups, and they don't know their stuff is controlled," she noted. Firms also fail to monitor foreign nationals who move from one project to another. "That could get you into trouble, if no one is looking," she warned.

SOMETHING-FOR-EVERYONE BILL GETS FSC/ETI BILL NEAR PASSAGE

Propelled by a $10 billion buy-out plan for tobacco farmers, a House-Senate Conference Committee agreement on legislation (H.R. 4520) to repeal and replace the WTO-illegal Foreign Sales Corporation/Extraterritorial Income Tax (FSC/ETI) law sailed through the House Oct. 7 by a 280-141 margin (see **WTTL**, Oct. 4, page 3). At press time, however, the measure was stalled in the Senate by a filibuster by senators who objected to its failure to include Senate-sponsored provisions giving FDA new authority to regulate tobacco. Unless the filibuster is ended, the Senate isn't likely to get to vote on cloture and final passage until Sunday, Oct. 10.

> It is not clear yet whether the legislation will achieve its main purpose of getting the EU to lift its retaliatory tariffs on U.S. exports. The measure includes a phase-out of the FSC/ETI tax breaks, to which the EU continues to object.

NAFTA JUDGES REJECT EXTRAORDINARY CHALLENGE ON MAGNESIUM

In a ruling that is likely to give ammunition to both sides of the U.S.-Canada dispute over softwood lumber, a NAFTA Extraordinary Challenge Committee (ECC) Oct. 4 upheld a binational panel ruling on pure magnesium from Canada. While agreeing with the U.S., which sought the appeal, that the panel had exceeded its powers by conducting a de novo review of the facts in the case, the ECC found the panel's ruling didn't meet all three of the required criteria for reversal. It noted, however, that a U.S. appellate court decision that came after the panel's ruling would have provided grounds to sustain the challenge.

> The U.S. sought the ECC review after a binational panel had ordered Commerce to revoke its "sunset" review determination that dumping of pure magnesium was likely to recur if the dumping order were revoked. Although the panel failed to apply the correct standard of review, its decision didn't threaten the integrity of the dispute-settlement process because it relied on a Court of International Trade (CIT) decision that had not yet been overturned, the ECC decided.

After the panel ordered Commerce to revoke the dumping order, the Court of Appeals for the Federal Circuit reversed the ITC in *Nippon Steel v. ITC* in October 2003. If that ruling had come before the panel's order, the panel could not have ordered Commerce to revoke its order and could have only remanded the case again for reconsideration based on the panel's findings.

* * * BRIEF * * *

MISCELLANEOUS TARIFFS: At press time late on Oct. 8, House-Senate Conference Committee meeting was scheduled to complete action on long-delayed Miscellaneous Trade and Technical Corrections Act of 2004 with hope of late night passage by Congress.. Conference was to consider draft compromise which includes repeal of Antidumping Act of 1916, which WTO ruled not in compliance with WTO agreement. In addition to scores of tariff waivers, bill would give Laos normal trade relations status.