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STATE ISSUES GUIDANCE ON EXPORT DOCUMENTATION REQUIREMENTS

As anticipated (see **WTTL**, July 18, page 1), State's Directorate of Defense Trade Controls (DDTC) Sept. 1 posted guidance to require all export licenses to include a purchase order from the foreign buyer. Although the policy is directed at freight forwarders and consultants who apply for licenses on behalf of other parties, the guidance only refers to them indirectly. An early reaction to the guidance from the exporting community found more confusion than existed before the advice was issued, and State likely will have to provide more explanation in the future. "It's sort of no guidance guidance," one trade lawyer told WTTL.

> DDTC's Defense Trade Controls Licensing (DTCL) office says its guidance restates "longstanding practice," but trade sources dispute that contention. "At this time, DTCL finds it prudent to reiterate to exporters of defense articles the fundamental ITAR requirements for supporting documentation," the office states.

According to the guidance an export license for a Munitions List (ML) item is required to include a purchase order, letter of intent or other documentation, as well as a sign contract. "The purpose of this requirement is to confirm the legitimacy of the transaction, including the roles and responsibilities of all the parties," DTCL explains. "DTCL has received with increasing frequency supporting documentation that calls into question whether the applicants are in a position to fulfill their responsibilities as registered exporters and, in fact, whether anyone at the companies could meet the obligations as empowered officials under Section 120.25 [of the International Traffic in Arms Regulations]," it notes.

"The purchase documentation must be from the foreign party purchasing the defense articles," it continues. "The purchase documentation cannot be from its U.S. subsidiary since the latter entity is considered a U.S. person under the ITAR. The purchase order must be addressed and directed to the registered U.S. party selling the defense articles and submitting the export license application," DTCL says. Apparently recognizing that the seller and the applicant may be separate entities, the office says: "The documentation may contain references to other parties and their roles (e.g., suppliers, manufacturers, freight forwarders), but at a minimum mush specifically explain the role of the party submitting the license application."

CHINA PLAYS HARDBALL WITH U.S., EU ON TEXTILES

Any hopes that China would readily accept a return to the pre-2005 quota restrictions of the Multifiber Agreement have been dispelled by its hardline in talks with the U.S. and European Union (EU) the week of Aug. 29. The failed EU effort to renegotiate an earlier bilateral deal

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to limit Chinese apparel imports has given China the feeling it doesn't have to accept a broad, restrictive, long-term agreement with the U.S. (see **WTTL**, Aug. 22, page 2). The inability of the U.S. and China to reach a deal during Aug. 30-Sept. 1 talks will put the issue on the agenda for President Bush's Sept. 7 meeting in Washington with Chinese President Hu Jintao. Negotiators may try to reach an agreement on the periphery of that meeting. "The United States remains optimistic that we can continue to make progress on the remaining issues," said USTR Special Textile Negotiator David Spooner after the talks in Beijing ended.

> U.S. textile industry representatives said they were pleased Spooner didn't take a weaker stand in the talks with the Chinese. "We are pleased the U.S. government refused China's unreasonable demands," said Cass Johnson, president of the National Council of Textile Organizations.

Apparel importers and retailers, who concede a comprehensive agreement will be reached, urged U.S. negotiators to base any deal on what is actually happening in the market. "The Europeans have taught us what happens when an agreement is negotiated haphazardly and without adequate consultation with the importing and retailing community," said Laura Jones, executive director of the U.S. Association of Importers of Textiles and Apparel.

The consequences of the China-EU textile deal in June may be having a strong impact on both the U.S. and China in their talks. The China-EU memorandum of understanding caught large shipments of Chinese goods in transit to Europe, resulting in an outcry from retailers about shortages and paid for but undelivered goods. EU officials tried to get Beijing to adjust the implementation of the MoU, but couldn't reach an agreement. As a result, EU Trade Commissioner Peter Mandelson Aug. 29 took unilateral steps to release some of the shipments being held at EU ports. "In these circumstances, I cannot accept that EU retail businesses should be penalized unfairly by the introduction of the agreement we made with China," he said.

BIS KEEPS BUSH PROMISE ON NUCLEAR EXPORTS TO INDIA

The Bureau of Industry and Security (BIS) Aug. 30 kept part of President Bush's promise to India Prime Minister Mammohan Singh to ease U.S. export controls on nuclear equipment sales to India (see **WTTL**, July 25, page 4). BIS issued a final rule in the Federal Register lifting export licensing requirements the U.S. imposed unilaterally on India, while also taking six Indian entities off the BIS Entity List. The changes won't affect controls imposed by statute or under multilateral obligations by members of the Nuclear Suppliers Group (NSG).

> The change in Section 743.3(a)(2) of the Export Administration Regulations removes the X under India for NP2 controls on the Commerce Country Chart. It doesn't remove other export licensing requirements that might apply to these items; nor controls on exports to entities that remain on the Entity List.

Removed from the Entity List are: Department of Atomic Energy units Tarapur (TAPS 1 & 2), Rajasthan (RAPS 1 & 2), Kudankulam (1& 2), plus three divisions of the Indian Space Research Organization, ISRO Telemetry, Tracking and Command Network (ISTRAC), ISRO Inertial Systems Unit Thiruvananthapuram (ILSU), Space Applications Center (SAC) Ahmadabad. TAPS 1 & 2 and RAPS 1 & 2 are under International Atomic Energy Agency (IAEA) safeguards. Kudankulam is under construction. "The government of India and the IAEA have agreed that this facility will be subject to IAEA safeguards upon completion," BIS reported.

LUMBER TALKS UNLIKELY TO RESUME DESPITE U.S. WIN AT WTO

Angry Canadians say they won't return to the negotiating table with the U.S. to resolve the dispute over softwood lumber because Washington can't be trusted to live up to any agreement that is reached. The ire north of the border peaked Aug. 29 after word got out that a World Trade Organization (WTO) dispute-settlement panel had issued a preliminary and still confiden-

tial ruling upholding the International Trade Commission's (ITC) redetermination under Section 129 that imports of Canadian lumber threaten to injure the U.S. industry (see **WTTL**, Aug. 12, page 1). Even though the ruling won't be issued in final form for a month or so, Canadian Trade Minister Jim Peterson said Ottawa intends to appeal the decision. He said Canada might go back to negotiations "when the time is appropriate" but for now "the main thrust of our action is to respect the terms of NAFTA."

> Sources familiar with the preliminary ruling say the decision will be challenged because of the standard the panel used to uphold the ITC's 129 determination. They say the panel found the ITC decision "not unreasonable," which is not a standard used in previous rulings. In addition, the panel didn't examine the new administrative record on which the ITC based its revised findings.

Canada contends that the Extraordinary Challenge Committee's (ECC) ruling against the ITC's original injury finding should have terminated the case and the 129 redetermination cannot dissolve the ECC's order. The U.S. has argued that the ECC decision is moot because whatever flaws that were found in the original ITC determination were corrected by the 129 ruling.

Regardless of the outcomes of some two dozen cases that have been filed before NAFTA and WTO panels, the final fate of the lumber dispute – short of a new bilateral deal – will come from U.S. federal courts. Two suspended cases pending at the Court of International Trade (CIT) challenging the first administrative review of the dumping order on Canadian lumber and the Section 129 ruling will be put back on the court's calendar in the next couple of weeks.

In an unusual procedure reflecting the importance of these cases, two three-judge CIT panels will hear arguments and rule on the suits. No decision is expected until January or February of 2006 and whichever side wins, the loser is certain to appeal the ruling to the Court of Appeals for the Federal Circuit. Thus, the final word from the U.S. courts, which have the power to enforce their opinions, probably won't come until late 2006. Parallel to these cases will be the new challenge to the application of the Byrd Amendment to Canadian imports (see story below) and the U.S. lumber industry's expected suit challenging the constitutionality of the NAFTA dispute-settlement mechanism.

SUIT CHALLENGES BYRD AMENDMENT'S APPLICATION TO CANADA

U.S. lawyers for Canadian lumber producers have found what they call "a simple and elegant" legal argument that could undermine the U.S. lumber industry's pursuit of restrictions on Canadian lumber imports. A suit filed Aug. 26 in the Court of International Trade (CIT) by the government of Canada and several trade groups representing lumber, wheat, and magnesium exporters claims the U.S. cannot apply the Byrd Amendment to imports from Canada because the law does not specifically mention Canada or Mexico as required by NAFTA.

> If the Byrd Amendment, which provides for the distribution of countervailing and antidumping duties to companies that supported the petitions against imports, didn't apply to the more than $4 billion in duties deposited for Canadian lumber, U.S. industry would have significantly less incentive to continue pressing their cases, Canadian groups contend. "Getting rid of Byrd would change the whole dynamic of negotiations," one Canadian source told WTTL.

The suit cites NAFTA Section 408 which states: "Any amendment enacted after the Agreement [NAFTA] enters into force with respect to the United States that applies to: (1) section 303 or title VII of the Tariff Act of 1930 or any successor statute, or (2) any other statute which (A) provides for judicial review of final determinations under such section or successor statute or (B) indicates the standard of review to be applied, shall apply to goods from a NAFTA country only to the extent specified in the amendment." The Canadians claim Byrd amended Title VII but didn't mention Canada as other trade act changes have. U.S. government lawyers argue that Section 408 only applies to the treatment of goods and not the disbursement of duties.

LICHTENBAUM ADDS ACTING ITA ASSIGNMENT TO HIS JOB LIST

BIS Assistant Secretary for Export Administration Peter Lichtenbaum, who is already serving as acting BIS under secretary, has been given the extra assignment to be acting under secretary of the International Trade Administration (ITA) following the death Aug. 18 of Timothy Hauser. Hauser, who was ITA deputy under secretary, had been serving as acting head of the agency following Grant Aldonas' return to the private sector in the spring (see **WTTL**, June 6, page 4).

> Commerce sources expect Lichtenbaum to hold the ITA job until the end of September by which time the Senate should act on President Bush's nomination of Franklin Lavin to succeed Aldonas. Lavin, currently U.S. ambassador to Singapore, was ITA deputy assistant secretary for Asia in the Reagan administration.

[**Editor's Note:** The death of Tim Hauser, 56, was a painful shock to everyone who knew and had worked with him, including this editor. He died of a heart attack while on vacation with his wife Kathryn and son Christopher in North Carolina. Tim, who was with Commerce for 25 years, was named ITA deputy under secretary in 1991 and was the chief operating officer for ITA's 2,500 employees and its $382 million budget. Because he served so often as acting under secretary during political transitions, the ITA staff considered him the permanent under secretary. His integrity and competence, along with his almost permanent smile, had won the respect and affection of the entire trade community.]

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EXPORT ENFORCEMENT: Ali Khan, chief executive officer of Turboanalisis, Inc. and Turbo Technologies, LLC, has reached settlement agreement with BIS under which he will pay $110,000 civil fine for his personal role in 10 alleged export violations. BIS charging letter claimed he participated in conspiracy that attempted to export aircraft parts to Iran through Singapore and Malaysia without licenses.

MORE EXPORT ENFORCEMENT: LPPAI of Houston, Texas, which does business as P.A., Inc., agreed to pay $50,000 civil fine and be denied export licensing privileges for five years to settle BIS charges that it exported nickle alloyed pipes to Iran without licenses. BIS suspended denial order for five years on condition that LPPAI remains in compliance with export regulations.

EVEN MORE EXPORT ENFORCEMENT: In Federal Register notice Aug. 25, BIS announced settlement agreement with Sunford Trading Ltd., of Hong Kong under which firm will pay $33,000 civil fine and have export privileges denied for three years. Agency had charged company with three export control violations related to export of industrial hot press furnaces to Beijing Research Institute of Materials and Technology in China without approved license.

EXPORT INDICTMENT: Federal grand jury in Fort Lauderdale, Fla., Aug. 18 issued indictment against Chin Kan Wang and Robin Chang on charges of conspiring and exporting radio communications encryption modules to Taiwan without approved licenses. Justice statement said exports went to Taiwan Sato Kensetsu Kogyo Co., Ltd. for use by Taiwanese Coast Guard.

FREIGHT FORWARDERS: Importer can be liable for Customs violations committed by its freight forwarder even if forwarder acted fraudulently and without importers' knowledge, CIT Senior Judge Richard Goldberg ruled Aug. 26 (slip op. 05-107). In *U.S. v. Pan Pacific*, he said "assigning liability to defendants for Juang's fraudulent violations of 19 U.S.C. section 1592 is also supported by sound public policy." Court's holding in this case "serves an additional public policy interest by creating proper incentives for importers in the future," he wrote.

LOST IMPORT DOCUMENTATION: Customs in Aug. 26 Federal Register gave importers opportunity to reconstruct entry summaries that were lost when CBP offices at World Trade Center were destroyed on Sept. 11, 2001. Deadline for submission depends on when Commerce issues liquidation notices.

COCOA: CIT Judge Judith Barzilay Aug. 29 (slip op. 05-110) ruled International Labor Rights Fund and other labor groups lacked standing to bring suit against Customs to compel agency to undertake investigation of forced child labor practices on cocoa plantations in Ivory Coast.

CONGO: State in Aug. 29 Federal Register amended ITAR to expand ban on defense exports to Democratic Republic of Congo to comply with UN resolution extending arms embargo to entire country.