

# Washington Tariff & Trade Letter®

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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## EXPORT LICENSES FOR VENEZUELA GETTING CLOSER SCRUTINY

The Bush administration is reviewing its export control policy for Venezuela, but export licensing officers at the Bureau of Industry and Security (BIS) and State's Directorate of Defense Trade Controls (DDTC) are already denying or returning without action (RWA) some Venezuela export applications that previously would have been approved. According to sources at both agencies, the focus of attention is on crime control products and parts for military weapons systems, including the F-16 jet, previously sold to Venezuela.

State Department licensing official Juan Santos told the BIS Update 2005 conference Oct. 25 that U.S. export licensing policy for Venezuela is "a work in progress." In the meantime, licenses are being handled on a case-by-case basis, he said. Another official said cases continuing to get favorable treatment are for products intended to support Venezuela's anti-narcotics and anti-terrorism efforts.

Speaking on background with WTTL, another State official confirmed the department's case-by-case review policy. But "with our foreign policy difficulties with [Venezuelan President] Hugo Chavez, they're just getting a lot more scrutiny," he conceded. "A lot of licenses that maybe a few years ago might have been approved are being returned without action," he said. License applications are now being reviewed by State's Latin American regional bureau and its human rights staff. "Chavez declared himself an enemy of the United States. You don't go out of your way to be helpful to countries that act that way," the official told WTTL.

## U.S. CONCERNED BAHRAIN WON'T KEEP PROMISES ON BOYCOTT OF ISRAEL

Some U.S. officials are concerned that Bahrain won't be able to keep its promise to end its participation in the Arab League boycott of Israel because of strong public opposition to opening relations with the Jewish state. The Chamber of Deputies, the lower house of the Bahrain Parliament, passed a non-binding resolution Oct. 12 opposing the government's closing of the boycott office in Bahrain and objecting to any ties with Israel (see **WTTL**, Oct. 3, page 3). There also have been demonstrations against opening formal relations with Israel.

In September, Bahrain Finance Minister Mohammed Al Khalifa sent a letter to U.S. Trade Representative (USTR) Rob Portman, promising to work to end the boycott. "In the hope of advancing peace and regional cooperation, the Kingdom of Bahrain recognizes the need to dismantle the primary Boycott of Israel and is beginning efforts to achieve that goal," he wrote. According to press reports in Bahrain, Bahrainian officials encountered strong opposition from legislators in Parliament when they presented their plans for closing the boycott office and

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tried to explain the commitments they made as part of the free trade agreement (FTA) with the U.S. A report in the Bahrain Tribune said one official told the deputies that Bahrain would not lift the ban on imports from Israel until after the Arab League and the Gulf Cooperation Council approved such a move.

While one U.S. official told WTTL that Washington is worried about the backlash in Bahrain, a U.S. trade official played down the actions in the Bahrain Parliament. "It is our understanding that the government of Bahrain has no intention of drafting such a law," he told WTTL. "News reports on that issue are misleading and inaccurate -- the legislature cannot draft or pass its own laws," he said. "What the Parliament did was pass and send to the government a 'desired proposal' -- akin to a 'sense of the Congress' resolution. It is up to the government to decide whether or when to draft up legislation," he explained.

### **PLANNED CATCH-ALL PROPOSAL WILL PUT EMPHASIS ON "KNOWS"**

The proposed military catch-all regulation that BIS is drafting will emphasize that exporters will be required to seek export licenses for items not listed on the Commerce Control List (CCL) when they "know" that an item or technology is going to a military end-use, but not when they have a "reason to know" that it is going to a military end use. According sources working on the draft, the distinction between "know" and "reason to know" is important. The rule is being deliberately written to avoid requiring licenses based merely on the potential diversion of an export to military uses without specific knowledge, one source explained.

The proposal is also expected to provide a clear explanation of what constitutes "military use," according to one source. This definition will limit the scope of the rules, the source suggested.

The source said officials drafting the catch-all proposal are aware that many Chinese firms are owned or controlled by the People's Liberation Army (PLA) or top military officers. PLA ownership or control of a company would not necessarily mean it is subject to a licensing requirement. Each case would be evaluated based on the product being exported, the type of business buying the product and the relationship being the buyer and the military. BIS Assistant Secretary for Export Administration Peter Lichtenbaum has testified that military end use will not capture products that are "capable" of military end use (see **WTTL**, June 27, page 1).

Although BIS officials repeatedly say the coming proposal will implement the Wassenaar Arrangement's 2003 statement of understanding (SOU) to control unlisted items going to military uses in embargoed countries, their explanation of the rule suggests the U.S. restrictions will be tougher than those applied by other Wassenaar members. BIS officials have said the proposed rule would apply when exporters "know or are informed" that an export is going to a military end use. The Wassenaar SOU calls for controls only when exporters "are informed" that their customer is a military end use. Industry representatives have already complained that Germany and the United Kingdom will not apply the SOU to exports to China and will only impose a licensing requirement when the exporter "is informed" that a license is needed.

### **U.S. EXPECTS WASSENAAR TO ADOPT NEW COMPUTER METRIC**

The plenary meeting of the Wassenaar Arrangement in December is expected to approve a U.S.-sponsored proposal to revise the methodology for calculating the computing power of high-performance computers (HPC). After several years of intense inter-agency debate and discussions with industry, U.S. agencies agreed to propose a metric that would replace the current CTP formula that measures computing power by million theoretical operations per second (MTOPS) with a new "weighted trillion floating operations per second" (Teraflops) formula. The new formula will liberalize current computer export controls and restrict only a limited number of truly powerful supercomputers, government sources told WTTL. The new

formula will be weighted to reflect differences between vector and scalar HPCs and will use publicly available specifications for its calculations. Industry has complained for many years that the CTP formula currently in the Export Administration Regulations (EAR) requires the use of numbers that companies don't usually have or don't release publicly.

BIS staffers are discussing whether the new computer rules should be published as a stand-alone regulation after the plenary acts in December or as part of the annual Wassenaar omnibus regulation which implements all the changes adopted by the regime. If the rules wait for the rest of the Wassenaar changes, it may be next summer before the new policy goes into effect.

## **SHARP DROP IN NIGHT VISION LICENSES BLAMED ON EXPORT CONTROLS**

Industry executives say a sharp drop export licenses BIS handled in fiscal year 2005 for thermal imaging devices reflects the damage export controls are doing to the U.S. industry. They say the decline, which comes as the global market for these products is growing, also represents a shrinkage in market share for U.S. firms which once dominated the field. The executives warn that foreign devices, particularly from France and China, will soon be taking market share in the U.S. as foreign firms are able to reduce prices based on increasing volume.

After years of a steady increase in the number of night vision export licenses submitted to BIS, the agency experienced nearly a 14% decline in applications in the fiscal year that ended Sept. 30, 2005, BIS Deputy Assistant Secretary for Export Administration Matthew Borman told the BIS Sensors and Instrumentation Technical Advisory Committee (SITAC) Oct. 27. BIS completed action on 2,582 cases in that period compared to more than 3,000 in fiscal 2004, he reported.

BIS approved 2,413 licenses, denied one and returned without action 168 applications. The average processing time for these licenses was 30 days, Borman noted. The top five destinations for night vision exports were Japan (807), Germany (389), United Kingdom (161), South Korea (127) and Italy (80). Borman said there may be technical factors in the market that caused U.S. exports to decline. Nonetheless, "when you look at the trend line that had been on steep trajectory up for the last several years and this is the first year where it starts to go down, even though you know the foreign market continues to expand, you really have to look closely at the role export controls play in that," he said.

## **COURT BARS CONSPIRACY CHARGES FOR EXPORT VIOLATIONS UNDER IEEPA**

An increasingly common charge that is included in civil and criminal complaints – conspiracy to violate the Export Administration Regulations (EAR) – may no longer be available to the government, a recent court ruling indicates. The government cannot use the International Emergency Economic Powers Act (IEEPA) to charge an exporter with conspiracy to violate EAR, D.C. U.S. District Court Judge John Bates ruled Oct. 21, 2005, in a decision on several pre-trial motions filed in the criminal prosecution case of Robert Quinn and Michael Holland.

The two former employees of Clark Material Handling Co. are charged with violating the Iranian Transactions Regulations (ITR) in connection with the export of forklift truck parts to Iran (see **WTTL**, Oct. 17, page 4). "Even if the bulk of the EAR remain in effect by virtue of Executive Order 13,222, the conspiracy provisions of the EAR were rendered inoperative by the lapse of the EAA [Export Administration Act] and could not be repromulgated by executive order under the general powers that IEEPA vests in the president," Bates wrote. He agreed, however, that IEEPA does give the president the power to keep EAR rules in place despite the EAA's lapse. "As a matter of statutory interpretation, the court finds merit in the government's argument that, generally speaking, IEEPA's language anticipates that the president or his agents will promulgate rules and regulations much like those contained in the EAR," he wrote. Justice Oct. 25 obtained a superceding indictment charging Quinn and Holland with

conspiracy under the general conspiracy statute of 18 USC 371. That charge, however, carries a maximum penalty of five years in prison compared with ten years for conspiracy under EAA. “We do not intend to appeal” the Bates ruling, a Justice lawyer told WTTL. BIS enforcement officials claim they can still charge conspiracy in administrative settlement cases. [**Editor’s Note:** A copy of Judge Bates’ 42-page ruling will be sent to WTTL subscribers on request.]

## EU STEPS UP DEMAND FOR RECIPROCITY IN DOHA ROUND TALKS

With the Oct. 28 announcement of a new offer to open its agriculture market in the Doha Round negotiations, the European Union (EU) made it clear that any further progress in the talks will depend on it seeing better offers on non-agriculture market access (NAMA) and services from advanced developing countries belonging to the G-20. The conditions the EU set for its farm offer also include a demand for agreement to address what it calls “abusive recourse” to antidumping procedures, establishment of an international register of geographical indications and reforms of state trading enterprises in Canada, Australia and New Zealand.

USTR Rob Portman said the new EU offer is a move in the right direction, but he was disappointed with the limited market access opening Europe has proposed. He said the U.S. calculation of the EU offer found that the plan would cut the average for all EU farm tariffs by 39% and not the 46% the EU claims. This would be hardly more than the 36% cut in the Uruguay Round and still less than the G-20 has offered, he stated. Portman also complained that the EU call for allowing 8% of tariff lines to be treated as sensitive products was too much.

EU officials have complained that none of their offers in the last year have produced reciprocal offers from the G-20, particularly India and Brazil, to reduce industrial tariffs or open their services markets. U.S. officials have shared that dissatisfaction, and an effort to get better offers from the G-20 is underway. Portman said he shared EU concerns about the need for progress in NAMA and services but felt those offers would come from India and Brazil once an improved farm proposal would come from the EU. “I believe from my private conversations with them and in their public statements they are prepared to make a fair contribution in both these areas, if they can see progress in agriculture,” Portman said. But he also emphasized that “agriculture is central to this round” and the EU can’t use the lack of progress in other areas as an excuse not to move forward with a better offer.

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**EXPORT ENFORCEMENT:** Cymer of San Diego, Calif., has reached settlement agreement with BIS to pay \$19,250 civil fine to resolve charges that include “deemed export” release of controlled U.S. technology to foreign nationals from Russia and China. Firm voluntarily self-disclosed alleged violations.

**MORE EXPORT ENFORCEMENT:** For 22 allegedly unlicensed exports of optical sighting devices, choke tubes and related equipment to Canada, Overton’s Inc. of Greenville, NC, has agreed to pay \$6,600 civil fine as part of settlement agreement with BIS.

**CHINA:** U.S. Oct. 26 invoked rare provisions of Article 63.3 of WTO TRIPS agreement to request that China provide information on its prosecution of intellectual property violations. U.S. asked for response by Jan. 23, 2006, but WTO rules place no deadline on answer. U.S. could use China’s response to build case that Chinese are systematically not enforcing rules despite laws on books.

**CENSUS:** Harvey Monk, chief of foreign trade division, has been promoted to Census assistant director for economic programs, position which oversees trade division. His successor is William Bostic Jr., who is currently chief of Census manufacturing and construction division.

**BIS:** John Wanat, who was special agent in charge of BIS office in Herndon, Va., name assistant director for investigations in Office of Export Enforcement.

**SOFTWOOD LUMBER:** Commerce delayed issuing new CVD rate on softwood lumber from Canada Oct. 28 and asked NAFTA panel to clarify its Oct. 5 ruling requiring new rate (see **WTTL**, Oct. 10, page 4).