

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

Vol. 25, No. 22

May 30, 2005

COMMERCE IG CALLS FOR BETTER TRACKING OF CHEM-BIO EXPORTS

A new report from the Commerce Department's Inspector General (IG) says the Bureau of Industry and Security (BIS) needs to do a better job in determining the cumulative effect of exports of chemicals and biological products to countries and entities of concern to know if there has been a substantial increase in a country's ability to build weapons of mass destruction. This recommendation was one of several made in the report examining the agency's licensing process for products subject to multilateral controls under the Australia Group (AG).

The IG's office found the licensing process generally to be timely and in compliance with statutory and regulatory requirements. Although the just-released report was completed in March 2005, the IG staff based most of its assessment on licensing and review actions in the fiscal year that ended September 2003.

The lack of knowledge about the cumulative impact of licensing decisions is due partly to the insufficient intelligence resources in BIS and also because other federal agencies with intelligence capabilities, particularly the Central Intelligence Agency (CIA), don't share their information with BIS, the IG noted. The report reiterated a recommendation IG made in 1999 for BIS to work with the CIA, Defense, Energy and State "to develop a method to analyze and track the cumulative effect of dual-use exports to specific countries and regions."

Although licenses for chemicals and biologicals take just slightly more time for review than other products, the IG said the system could be improved if BIS did a better job of giving licensing officers guidance on review policies. "We found that the guidance BIS provides is an assortment of memos and documents issued over an 11-year period, and all are housed in different places within BIS, not readily accessible to licensing officers," the report declared.

The CIA was found to be the main clog in the interagency review process for chemical and biological exports. The interagency Chemical and Biological Weapons Control Group, known as the SHIELD, includes the CIA, State, BIS, Defense and Energy. Since CIA is not subject to Executive Order 12981, which set a deadline for licensing decisions, its reviews took more than 30 days in 17 of 56 cases. In FY 2003, the interagency escalation process through the Operating Committee also slowed licenses, but that process improved in FY 2004, the IG said.

FIRM TO PAY FINE AND HIRE CONSULTANT TO SETTLE FCPA CHARGES

Diagnostic Products Corp. (DPC) of Los Angeles will hire an independent consultant to review its compliance with the Foreign Corrupt Practices Act (FCPA) and also will pay \$4.8 million in

Copyright © 2005 Gilston-Kalin Communications, LLC. All rights reserved. Reproduction, copying, electronic retransmission or entry to database without written permission of the publisher is prohibited by law.

Published weekly 50 times a year except last week in August and December. Subscription in printed or electronic form is \$597 a year in U.S., Canada & Mexico; \$627 Overseas. Additional copies with full price subscription are \$75 each.
Circulation Manager: Elayne F. Gilston

finances as part of settlement agreements it reached with Justice and the Securities Exchange Commission (SEC) to resolve charges that its Chinese subsidiary, DePu Biotechnology, paid bribes to Chinese officials to win sales for its medical diagnostic products. The consultant, who has to be acceptable to SEC, will review DPC compliance for three years and submit a report and recommendations to the firm's board. A copy of the report also will go to the SEC.

As part of the agreement with the SEC, the company agreed to pay the government a disgorgement of \$2,038,727 plus \$749,895 in interest. A proposed plea bargain with Justice calls for the firm to plead guilty to violating the FCPA and to pay a \$2 million fine. The deal is subject to approval by a federal court.

"The payments by DePu which gave rise to these actions were promptly and voluntarily disclosed to the SEC and DOJ by the company as part of its voluntary and comprehensive remedial efforts after current management in the United States discovered the payments," the company said. It also noted that it had revealed the violations in its SEC filings in February 2003.

According to the SEC cease-and-desist order, DePu, which is based in Tianjin, China, between 1991 and 2002 "routinely made improper commission payments totaling approximately \$1.6 million to doctors and laboratory employees who controlled purchasing decisions at these state-owned hospitals." The SEC charged DPC with making the illegal payments, booking the payments as legitimate sales expenses and not recording the payments properly in its books.

The SEC also noted that DPC management discovered the payments after DePu conducted an internal tax audit and reported the results to the DPC board. "In January 2003, DPC instructed DePu management to stop all commission payments. DPC also took remedial measures, revised its code of ethics and compliance procedures, and established a compliance program with respect to the FCPA," the SEC order said. "We are relieved that this chapter of the company's history is drawing to a close and that we can look forward to putting these matters to rest," said DPC Chairman Michael Ziering.

BIS PROPOSES TO MANDATE LICENSES FOR MT EXPORTS TO CANADA

Although the Export Administration Act (EAA) has expired, BIS has taken the advice of the Government Accountability Office (GAO) to apply the law to licensing requirements for exports of missile technology (MT) items to Canada. In the May 24 Federal Register, BIS proposed a change in the Export Administration Regulations (EAR) to reverse a nearly 65-year-old policy of exempting Canada from U.S. export control requirements (see **WTTL**, March 14, page 3).

In a 2001 report, the GAO had noted that the exclusion of Canada from the licensing requirement for MT items was in conflict with Section 6(l) of the EAA, which requires licenses for MT-controlled products to all destinations and with no license exceptions. BIS had sought industry comments on the GAO report in 2001. Those comments were universally opposed to the change.

BIS seems to want help from industry to justify keeping the existing Canadian exception. "BIS requests more specific comments as to the effect that the rule will have in terms of the numbers of license applications that the industry and/or individual companies would expect to submit under such a requirement, and, if possible, estimated additional costs of complying with a license requirement," it said the preamble to the proposal.

CUSTOMS FACING PRESSURE TO TIGHTEN CARGO AND CONTAINER SECURITY

Since Sept. 11, 2001, Customs has tried to increase scrutiny of imported cargos while not impeding the flow of legitimate trade. Two reports from the General Accountability Office (GAO), however, have given congressional critics of those program more ammunition to demand tougher cargo screening. The reports claim there are significant shortcomings in the

Customs-Trade Partnership Against Terrorism (C-TPAT) and the Container Security Initiative (CSI). Testifying before a House subcommittee May 26, Richard Stenna, GAO's director for Homeland Security and Justice Issues, said the C-TPAT validation system "is not rigorous enough to achieve its stated purpose." Although Customs and Border Protection (CBP) wanted to validate all C-TPAT participants within three years, it has validated only 11%, he noted.

In addition, CBP hasn't issued guidelines to its supply chain specialists on the scope of validations. Specialists and companies jointly agree on what parts of a company's system should be validated. "Importantly, CBP has no baseline standard for what minimally constitutes a validation," Stenna said in his statement.

The GAO also faulted CSI, which is now operational in 35 ports. "Although CBP's goal is to target all U.S.-bound containers at CSI ports before they depart for the United States, it has not been able to place enough staff at some CSI ports to do so," Stenna said in his statement. "As a result of these imbalances, 35% of U.S-bound shipments from CSI ports were not targeted and were therefore not subject to inspection overseas," he added. In addition, 28% of containers referred to host countries for inspection were not inspected for a variety of reasons. For the 72% inspected overseas, inspectors found some anomalies but no weapons of mass destruction.

COURT AMENDS YAKOU DECISION TO CLARIFY REACH OF BROKERING LAW

The U.S. Court of Appeals for the District of Columbia has issued a short, two-page ruling to clarify its earlier decision on the application of the U.S. law on arms brokering in the *U.S. v. Yakou* case (see **WTTL**, April 4, page 1). The court's initial ruling in January, which said the brokering amendment to the Arms Export Control Act (AECA) did not apply to non-U.S. citizens, upset State and Justice because it appeared to open a large loophole in the law. The court's May 9 clarification was posted on the Directorate of Defense Trade Controls website.

The court, in response to a request for clarification from the government, added a few sentences to make it clear that the brokering law might still apply to foreign nationals who are "otherwise subject to the jurisdiction of the United States."

This change won't affect the decision that acquitted Sabri Yakou, an Iranian who once was a lawful permanent resident (LPR) or "green card" holder in the U.S., but who had voluntarily abandoned that status.

Since the Yakou ruling, State legal staffers have claimed the decision was very narrow and did not set a precedent. By adding the "subject to the jurisdiction" language, the appellate court has given the government broad leeway to take action against foreign nationals under the brokering amendment where it can find a reason to bring them under the jurisdiction of U.S. law.

SUPACHAI SOUNDS MORE UPBEAT NOTE ON DOHA ROUND PROGRESS

World Trade Organization (WTO) Director General Supachai Panitchpakdi told the WTO General Council May 26 that Doha Round negotiations are taking place in a "somewhat brighter background" than in April when he last reported on the progress of the Trade Negotiating Committee. Nonetheless, negotiators will have to maintain a sense of urgency to reach key agreements by the July General Counsel meeting if the WTO Ministerial Meeting in Hong Kong in December is to be a success, he said.

Recent mini-ministerial meetings of trade officials made it clear "that ministers were expecting more than just progress reports" from the July session, Supachai said. "Although there is a brighter overall picture, it is still not good enough. We are still well behind where we should be, and time is not on our side," he said. Supachai said progress has been made in agriculture talks, but details still needed to be resolved on how to convert non-ad valorem tariffs to ad valorem equivalents (AVE). Talks on non-agriculture market access (NAMA) have not yet reached convergence on a formula for cutting tariffs, but should begin to move faster once the

farm talks have settled the AVE issue. Although the services negotiations were in a “state of torpor,” Supachai said he has written to members who have not yet made an offer, urging them to file offers. The trade facilitation talks have seen “encouraging signs,” he said.

* * * BRIEFS * * *

BIS: Craig Burkhardt, Commerce chief counsel for technology, is serving as acting chief counsel for BIS. He will fill post of retired Roman Sloniewsky until career replacement is found.

HOUSE: Ways and Means trade subcommittee chairman Clay Shaw (R-Fla.) will have surgery May 31 in Tampa to have small cancerous growth removed from his lung. Shaw, who had cancer before, will not need radiation or chemotherapy and is expected to make full and speedy recovery, his office said.

DEEMED EXPORTS: At request of industry, BIS has extended until June 27 deadline for filing comments on its March 28 advance notice of rulemaking for possible change in deemed-export rules.

DR-CAFTA: White House may be in better shape on vote for pact than previously forecast. Opponents say 190 Democrats and 40 Republicans would vote today against trade deal. That adds up to 230, suggesting supporters may be only 12 votes shy of needed majority. Some reports had claimed gap was 30-40 votes.

ITA: President Bush has nominated Israel Hernandez to be assistant secretary of Commerce and director general of U.S./Foreign Commercial Service. He was travel aide to then-Governor Bush and later served in White House as deputy assistant to president. Current US/FCS chief Rhonda Keenum is moving to White House to be deputy assistant for public liaison.

NMEs: ITA in May 26 Federal Register asked for public comments on potential change in how it determines what is “meaningful” in calculating inputs from market economies in antidumping cases on goods from nonmarket economies.

SOFTWOOD LUMBER: For fourth time, NAFTA binational panel May 23 told ITA to revise CVD ruling on softwood lumber to comply with changes ordered in third remand. Ruling says ITA only complied with seven of 14 changes panel ordered last time. Separately, Canada asked WTO May 19 to establish panel to review U.S. compliance with earlier WTO rulings on use of “zeroing” in antidumping decision of lumber. Ottawa sought authority to retaliate up to C\$400 million, if panel finds U.S. hasn’t complied.

TEXTILES: China has agreed to restrict growth of exports to U.S. on shirts, trousers and underwear following receipt of request for safeguard consultations, CITA reported in May 24 Federal Register. CITA said it will prorate 7.5% restrictions on these categories starting May 23 through Dec. 21, 2005.

ISRAEL-JORDAN-EU: Israel, Jordan and EU have reached agreement, subject to EU Council approval, to allow cumulation of goods from Jordan and Israel in determining country-of-origin for purpose of EU’s PanEuroMed trade preference program. Move follows upgrading of Jordan-Israel trade agreement. U.S. officials failed to include cumulation provision for Israeli components in U.S.-Jordan FTA.

COTTON: WTO has circulated Doha Round proposal made by four African cotton-producing countries, Benin, Burkina Faso, Mali and Chad, calling for elimination of trade-distorting domestic cotton subsidies by Sept. 1, 2005, and export subsidies by July 1, 2005. Proposal also seeks duty-free and quota-free market access to developed countries for cotton from least developed countries.

SAUDI ARABIA: Responding to reports that U.S. is close to bilateral agreement with Saudi Arabia on its accession to WTO, bipartisan group of 47 House members wrote to USTR Rob Portman May 25, arguing that accession deal is premature. Lawmakers cited Saudi Arabia’s continuing support for Arab League boycott of Israel, insufficient help in curbing terrorism, human rights abuses and lack of religious freedom.

WTO: On voice vote, Ways and Means Committee May 24 recommended disapproval of H.Res. 27, bill which would withdraw congressional approval of Uruguay Round Agreement establishing WTO. As privileged legislation, measure will still get to House floor for vote, but date of vote is not yet announced.

CUBA: Sen. Max Baucus (D-Mont.) told May 24 confirmation hearing for Tim Adams to be under secretary for international affairs that he will block Adams’ confirmation because Treasury went ahead and imposed new payment restrictions on agriculture sales to Cuba despite Montana Democrat’s objections.

VIETNAM: Vice trade minister made eight new commitments to liberalized trade rules during appearance May 20 before WTO working party on its accession to WTO. Hanoi hopes to join WTO in December.