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## Foreign Consignees Liable for Classification, Agencies Say

A foreign consignee can self-classify an item to determine whether it is subject to U.S. export controls, but it will be liable for a violation if it misclassifies the product or relies on incorrect advice from the U.S. exporter, officials of the Bureau of Industry and Security (BIS) and Directorate of Defense Trade Controls (DDTC) said in a joint letter. “If the U.S. exporter provides the foreign person with a jurisdiction and classification determination that is incorrect, then the foreign person similarly acts on such incorrect information to its peril,” wrote BIS Assistant Secretary Kevin Wolf and DDTC Deputy Assistant Secretary Kenneth Handelman in a letter to a United Kingdom trade group.

The undated letter sent in early November to the UK Export Group for Aerospace & Defense (EGAD) responded to a question asking whether a consignee or end-user could make a self-determination about an item’s classification. The answer, which DDTC will post on its Frequently Asked Questions (FAQ) website, said the foreign person could.

“The U.S. exporter is responsible for determining the jurisdiction and classification status of the items it is exporting. However, if reliable jurisdiction and classification information has not already been provided by another party, such as the original equipment manufacturer, then the foreign person may and, indeed, must make these determinations itself in order to avoid violating the ITAR or the EAR if it later reexports or retransfers the article or item,” the letter advises.

“Because the ITAR and EAR are extraterritorial, a foreign person’s failure to take the steps necessary to ensuring compliance with the ITAR and EAR can result in its being subject to fines and other punishment if its export or retransfer violated the ITAR or the EAR,” the two officials warn. The EGAD letter was prompted by complaints that foreign end-users often raise about their inability to get reliable classification information from some U.S. exporters on the products they purchase (see related story page 6).

## WTO Ends Impasse over Trade Facilitation Agreement

The World Trade Organization (WTO) agreed Nov. 27 to adopt concessions the U.S. made to India to end the impasse that has blocked implementation of the Trade Facilitation

Agreement (TFA) trade ministers approved at the WTO ministerial in Bali in December. The protocol adopted by the WTO General Council must now be ratified by two-thirds of the WTO's membership before it and the TFA can come into force, but the action clears the way for implementation of other measures adopted in Bali. There is no fixed deadline for completing the ratification process.

The protocol makes several key changes to the Bali text on public food stockholding to meet India's demands to protect its farm subsidies. While the WTO will continue negotiating on a permanent policy on food security issues, it will no longer have a December 2017 deadline to meet, allowing India to keep its program almost indefinitely (see **WTTL**, Nov. 17, page 1).

One key language change would amend the so-called "peace clause" adopted in Bali to say that until a permanent solution is reached, WTO members "shall not challenge through the WTO Dispute Settlement Mechanism, compliance of a developing Member" under the WTO agriculture agreement for its support for traditional staple food crops for public stockholding programs for food security purposes. The original text merely said members would "refrain" from such challenges.

In another change, the WTO agreed that if a permanent solution to the issue of public stockholding for food security purposes is not reached by the 11th Ministerial Conference, which will be held at the end of 2017, "the mechanism referred to in paragraph 1 of the Bali Decision, as set out in paragraph 1 of this Decision, shall continue to be in place until a permanent solution is agreed and adopted." Since India could block any permanent deal it didn't like, the peace clause could be in place for years.

The Council agreed that a permanent solution "shall be pursued on priority," with the goal of reaching a deal by the end of 2015. "In order to achieve such permanent solution, the negotiations on this subject shall be held in the Committee on Agriculture in Special Session (CoASS), in dedicated sessions and in an accelerated time-frame, distinct from the agriculture negotiations under the Doha Development Agenda," the protocol stated.

At the Council meeting, WTO Director-General Roberto Azevedo acknowledged that the last year "has been a tough period for our negotiating work" but praised the final results. "Nevertheless, I think we would all agree that we need to find an easier way of doing things. While we have seen renewed commitment to the WTO, the truth is that we must avoid repeatedly putting ourselves in this position," Azevedo said.

"I am pleased that the United States was able to work with India and other WTO members to find an approach that preserved the letter and spirit of the package of decisions reached at last year's Bali Ministerial Conference," U.S. Trade Representative (USTR) Michael Froman said in a statement. European Union Trade Commissioner Cecilia Malmstrom also applauded the deal in a statement, saying the Bali agreements "confirm the WTO's role at the centre of international trade policy. In short: the WTO is back in business."

## **Human Security Grows as Issue for European Export Controls**

European export control agencies are shifting their focus from national security concerns to the human rights impact exports may have on people in the country of destination. In Germany particularly a political debate has arisen over defense exports and the call of

some political leaders to reduce German military exports. A European Union (EU) proposal for export control reforms includes “human security” as one of its priorities (see **WTTL**, May 12, page 1). German Vice Chancellor and Economics Minister Sigmar Gabriel has called for reducing German exports of military items and adhering to principles the government promulgated in 2000, which includes limiting defense exports to EU member countries and NATO members or related allies.

As a result of this pressure, the German export licensing process for defense goods has slowed, Holger Beutel, director of export monitoring in Germany’s Federal Office of Economics and Export Control, told the Global Trade Controls conference in London Nov. 18. “In Germany, the human rights aspect is very important,” Beutel said.

“We don’t want arms exports to countries where there may be human rights violations,” he said. As a result, Germany has “a restrictive policy toward so-called third countries that are not members of the EU and not members of NATO or NATO-equivalent countries,” he explained. Licensing of defense items “is definitely more restrictive than in former years,” he added. “It will take longer to get a license perhaps, but it is not that we will deny everything,” Beutel told the conference. About 60% of German defense exports still go to third countries, he noted.

European companies have also become sensitive to the potential impact exports might have on human rights, Frederik Hallgren, director and head of group trade compliance at Ericsson, told the conference. There is rising concern “about security in the country of destination,” he said. For information and communications products, there is “special interest in how the products are used in the country of destination,” he said. This has especially happened since the Arab Spring and concerns about Internet interception, surveillance and monitoring equipment. He noted new controls the Wassenaar Arrangement adopted last December for intrusion software.

Three years ago, Ericsson established an internal board “to decide whether to approve or disapprove business opportunities that could be questionable or problematic,” Hallgren said. Issues the board considers include integrity, privacy and human rights and how the country of destination will use the exported products and whether they will be used properly. This is what companies need to do “to remain credible and claim you are a good citizen,” he suggested. He also noted the role of human security included in the EU export control reform plans. He called this “a new paradigm” for future export controls.

## **BIS Clarifies Regulations on Cloud-Based Software**

As the cloud becomes ever more ubiquitous in providing software and other services, export control agencies must continue to clarify and refine their policies. In its latest advisory opinion, the Bureau of Industry and Security (BIS) found use of “cloud-based storefronts” even by foreign government end-users does not constitute an export of software when the server is in the U.S. and thus is not under the jurisdiction of its Export Administration Regulations (EAR).

In the opinion posted Nov. 24, BIS responded to a September request that asked whether a 2009 opinion on providers of computational capacity in the cloud applied to online storefronts, which are settings where users don’t download software but instead utilize the

software application's features and functions in the cloud. The request also asked whether a license would be required to allow government end-users of a country not listed in Supplement No. 3 to Part 740 of the EAR to utilize software classified as Export Control Classification Number (ECCN) 5D002 on the Commerce Control List.

“Consistent with the January 13, 2009 Advisory Opinion there is no export of software in the cloud-based storefront fact pattern described above. Instead of downloading the software and processing data locally the foreign user of a U.S. server sends its data to the cloud for processing, and causes its processed data to be transmitted back to it. Although there may be export of technology in this context, there is no export of software,” BIS said in the opinion dated Nov. 13.

“Because there is no export of software, there is no basis for a license requirement if government end users of a country not listed in Supplement No. 3 to Part 740 of the EAR utilize software described in section 740.17(b)(2) if it is located on a server in the United States,” BIS said.

“Please also note that software described in section 740.17(b)(2) that has been classified by BIS may be exported under License Exception ENC to a non-government end user in any destination other than Sudan, Syria, Iran, Cuba or North Korea, for purposes of creating a cloud-based storefront. If the software is accessed and utilized by government end users, no reexport of the software would take place, consistent with the analysis above,” BIS said. The advisory opinion was signed by C. Randall Wheeler, director of the BIS information technology controls division.

In a May advisory opinion, State's Directorate of Defense Trade Controls (DDTC) opened the door to using certain security techniques to put on the cloud controlled technical data without a DDTC license under certain conditions (see **WTTL**, June 16, page 2).

## **European Commission Approves TTIP Transparency Measures**

The European Commission, the EU's administrative arm, threw down the gauntlet Nov. 25 to U.S. trade officials on transparency in talks toward a Transatlantic Trade and Investment Partnership (TTIP). The commission approved a proposal by EU Trade Commissioner Cecilia Malmström to increase transparency and publish TTIP draft texts, at least on the EU side of the negotiations (see **WTTL**, Nov. 24, page 3).

The commission promised to: make public more EU negotiating texts that it already shares with member states and the EU Parliament and provide access to TTIP texts to all members of Parliament (MEPs), not just a select few, by extending the use of a 'reading room' to those MEPs who had no access before. It also will classify fewer TTIP negotiating documents as “EU restricted;” make them more easily accessible to MEPs outside the reading room; and publish and update on a regular basis a public list of TTIP documents shared with the Parliament and the Council.

Now it is up to U.S. Trade Representative's (USTR) office to meet the EU halfway, some sources observed. One congressional source told **WTTL** “the details are less than the headline, but it will be grist for the mill in Congress and the Citizens Trade Campaign, et

al.” Internet transparency advocates also weighed in. As Jeremy Malcolm, senior global policy analyst with the Electronic Frontier Foundation (EFF), wrote on Twitter, “USTR claims its proposals for #TPP, #TTIP have to be kept confidential. EU shows it needn't be so. Your move, USTR.”

## India, U.S. Trade Ministers Cover Much Ground, Few Commitments

At the end of the first India-U.S. Trade Policy Forum in four years Nov. 25, the two countries said they foresee further dialogue but made few specific commitments. Indian Minister of Commerce and Industry Nirmala Sitharaman and USTR Michael Froman exchanged views on “a range of trade and investment issues” during the meeting, including on agriculture, services, investment and intellectual property, a joint statement said.

The vague commitments include agreements to “establish a new technical dialogue” on food safety and “work towards facilitating agricultural trade.” Also, they agreed to “follow up on exploring the possibility of enhanced market access” and to “increase engagement on services and investment issues.” Further, Froman and Sitharaman agreed to “deepen bilateral engagement aimed at promoting bilateral investment across sectors,” to “exchange information on international standards,” and to “deepen cooperation to build capacity and generate awareness.”

During the forum, Sitharaman highlighted India’s work on a new policy on intellectual property rights (IPR), “which would stimulate innovation across sectors in the country,” the joint statement noted. In return, the U.S. “agreed to share information on this subject to support India’s on-going efforts,” it said.

The Alliance for Fair Trade with India (AFTI) thanked Froman and his team for “advancing meaningful conversations with India about longstanding and new barriers U.S. business are facing in India,” in a statement after the meeting. “We look forward to concrete and near-term steps to address and resolve these barriers. Only then can the United States and India reach the full potential of their economic relationship,” it added. AFTI is an industry coalition that includes the National Association of Manufacturers, Chamber of Commerce and PhrMa, among other groups.

The day after the meeting, Indian Commerce Secretary Shri Rajeev Kher announced plans for a new foreign trade policy but released no details on the specific actions India will take help its exporters deal with the slowdown in trade with key markets such as the European Union and Japan. In a statement Nov. 26, Kher said the measures would also target new markets in Africa, South East Asia and former Soviet republics.

On the eve of the meeting in New Delhi Nov. 24, Froman lectured India on local content requirements and other trade barriers. “As a number of studies have demonstrated, rigid local content requirements are likely to spawn less competitive industries, increase costs to producers and consumers and lower India’s economic welfare,” he said in his prepared speech to the Federation of Indian Chambers of Commerce and Industry (FICCI).

“To achieve its full potential, India’s manufacturing future lies in creating the conditions in which world class investment will want to come to India, not in building uncompetitive industries behind a wall of protectionism. As the Government of India pursues its ‘Make

in India' initiative, we stand ready to be supportive, including by engaging on how to successfully achieve its objectives without distorting its trade relations with the United States or other major trading partners," Froman said.

On IPR, Froman said it is in India's interests to "have and to enforce a world-class intellectual property rights regime." Patents, copyright, trade secrets, piracy, counterfeiting and compulsory licensing are "challenging issues, but dealing with them directly is critical if India is to play a leadership role in the knowledge economy, including on its way to becoming 'Digital India.' And in that regard, we have great interest in the ongoing review of India's Intellectual Property Rights Policy," he added.

## Foreign Firms Complain About New Burdens from Export Reforms

For all the benefits that U.S. exporters have gotten from export control reforms, foreign customers complain they face more burdens and risks from the changes. Among their key concerns is uncertainty about the correct classification of items moved from the U.S. Munitions List (USML) to the Commerce Control List (CCL) and differences between new Export Control Classifications Numbers (ECCNs) for items transferred to the CCL 600 series and the continued use in Europe of Wassenaar Munitions List numbers, according to speakers at the Global Trade Controls and Compliance Conference in London Nov. 18.

Rather than having to deal with just two categories of products – military and dual-use – foreign customers say they now have to deal with three categories with the addition of 600-series "munitions" items that are not quite civil. Foreign firms that were familiar with the Export Administration Regulations (EAR) "now have to retrain their staff that EAR is not that civil only," said Adela Deaconu, director of corporate export controls for Phillips Corporation.

Companies that make commercial products, like Phillips, had to assure that their components didn't include parts or components subject to the International Traffic in Arms Regulations (ITAR), that they were ITAR-free, she noted. Now they are asking, "am I making a military-free product," Deaconu said. "What does it mean when an item is on the CCL and under ITAR?" she asked. For firms that are used to dealing with the EAR "it is still difficult because some of these items are military not dual-use," she said.

Because EU countries have not made similar changes to their control lists, items exported from the U.S. to the EU are still treated as Munitions List items, and importers "have to convince European authorities that these are not military items," Deaconu said. This is especially a problem for 600-series items now exported under license exceptions. "If a U.S. exporter uses a license exception going to Europe, it gets stuck in customs because you do not have a military license," she noted. In addition, because EU countries have not changed their rules, reexports of these items from Europe may still require a license.

Another concern is the lack of information on the new 600-series classifications and whether the U.S. exporter has correctly reclassified an item that was on the USML. "The biggest frustration I have with my suppliers being on the other side is not that I don't trust them; they just don't want to give me the information," Deaconu said. Even when U.S. firms provide the information, "they tell me not to trust them," she added. When they provide new classification information she is still worried "how thorough are they doing

that,” she said. “For those of us on the buyers side, on the commercial side of things, it’s a challenge,” she declared (see related story page 1).

David Lorello, a partner with Covington & Burling in London, noted the extra legal risks European firms have taken on because of the reforms. When items were subject to ITAR, foreign customs “had a closer relationship with U.S. partners” often through Technical Assistance Agreements or Manufacturing Licensing Agreements. Reforms “leave a European company on its own and less reliant on its U.S. partner,” he said. “Life was so much easier under ITAR....Now it’s all on our shoulders,” he added.

## Russia Taking “Sophisticated” Approach to Foreign Investors

Russia is using its own laws to insist that foreign subsidiaries in Russia continue to honor contracts despite the sanctions imposed by their home countries. “The Russian reaction to sanctions has actually been very sophisticated. They’ve understood what the law applies to and have essentially been able to react or tailor their response to counterparties to do this,” Ross Denton, a partner in London with Baker & McKenzie, told the Global Trade Controls Conference in London Nov. 18.

Denton was part of a panel that examined the impact sanctions have had on firms doing business in Russia since the EU and U.S. tightened sanctions on Moscow in the wake of its actions in Ukraine and Crimea. In addition to the continuing operation of subsidiaries in Russia, speakers cited the difficulty foreign firms face trying to determine whether Russians with whom they are dealing are owned or controlled by entities or individuals placed on denied party lists or named as specially designated nationals (SDNs).

“We also have seen that the counterparties we are dealing with are quite sophisticated on this,” agreed Nisha Sawhney, international legal counsel with Royal Dutch Shell. “They have seen certain things coming; they have anticipated certain contractual language changing with mitigations and protections that we seek to put in and are countering that language quite heavily,” she said.

Although Russian law applies to foreign subsidiaries, the Russians have made only limited attempts to enforce them against those firms. In one case, they reportedly forced Visa and MasterCard to continue to do business with Bank Rossiya, which was named a SDN in March. The two credit card companies were able to get licenses from the Office of Foreign Assets Control (OFAC) to continue their business with the bank, according to Denton.

“At the moment, all the Russian huge companies, they have decided to take a pause,” said Vladimir Efremov, an associate with Baker & McKenzie in Moscow. “Our understanding is that there was a political signal from the Kremlin not to escalate the situation against the foreign companies in Russia,” he noted. Legal cases would have to go through Russian courts and investors may have to wait until the courts act to see how the laws will be applied. For now, the laws would not allow foreign firms to use a force majeure argument to get out of a contract, he said. It also has been difficult to identify firms that are owned or controlled by Russian oligarchs that have been placed on various sanctions list. While the U.S. and EU have targeted about 100 individuals for sanctions, Efremov’s firm has identified some 5,000 unlisted, related firms that could be subject to sanctions. The

oligarchs have set up “very, very diffuse” holding companies that are hard to trace, Denton noted. An attempt to track the ownership of some companies may lead to a lawyer on high street in Nicosia, Cyprus, who won’t disclose whom he represents. “The point is you never really know of whom you are dealing with and what the risks as businesses you are willing to take when you are dealing with entities where you really can’t figure out who owns what,” Denton cautioned.

## UK Enforcement Action Takes Profits for Illegal Exports to Iran

The United Kingdom has taken a rare enforcement action against a British individual and firm for exporting valves to Iran without a license, using a law aimed at seizing profits from illegal actions. Gary Summerskill, from Cambridgeshire, England, agreed Nov. 26 with Her Majesty’s Revenue and Customs (HMRC) to pay £68,000 (\$107,405) in profits to settle charges that his company, Delta Pacific Manufacturing Limited, made three shipments of alloy valves, valued at £3.4 million (\$5.3 million), to Iran without an export license. Delta Pacific was ordered to pay profits of £1,072,000 (\$1,693,599).

Observers in the UK note that while export enforcement in the UK is relatively rare, the real rarity in this case is the use of the Proceeds of Crime Act (POCA) in an export control case. POCA has been used previously but mainly in brokering, one source noted.

Summerskill, the company’s managing director, attempted to skirt the ban by diverting the components through Hong Kong and Azerbaijan, said a HMRC press release announcing the settlement. Investigators “found evidence that Summerskill was fully aware that the final destination of the goods was Iran and that they were subject to an export ban,” it said. Alloy valves are subject to an export ban to various countries including Iran because of their potential use in weapons.

In March 2014, Summerskill was sentenced to 30 months in jail after an HMRC investigation. If he doesn’t pay the latest fine within six months, he faces 15 more months in jail. Fines of £225,000 (\$351,805) were imposed on the company at that time. “Summerskill knew that he was acting illegally – he manipulated a system which has been put in place to protect public safety simply to line his own pockets. He has not only paid the price by losing his liberty but he now has to pay back the money he has made from his criminal activities or face more time in jail,” said Peter Millroy, HMRC assistant director.

### \* \* \* Briefs \* \* \*

IRAN: Despite saber rattling by some members of Congress who are calling for new sanctions against Iran, lawmakers won’t do anything during the current lame-duck session, congressional sources say. Legislation (S. 1881) to tighten sanctions against Iran was proposed while talks on deal to end Tehran’s nuclear program were underway, but probably won’t be pushed this year since the talks failed to reach conclusion by Nov. 24 and have been extended seven months. House leadership reportedly opposes measure because they don’t want to be blamed if bill’s passage caused collapse of talks. They’d rather have President Obama to blame, one source said.

COOL: As expected, U.S. told WTO Dispute-Settlement Body (DSB) Nov. 28 it is appealing to Appellate Body compliance panel ruling against changes Agriculture Department made to Country of Origin labelling (COOL) regulations (see WTTL, Oct. 27, page 4). DSB chair was ready to cancel meeting where adoption of panel report was scheduled, but Mexico and Canada asked for

session only to be suspended and reconvened at any time, sources in Geneva report. U.S. agreed to suspension on condition that it be notified before meeting was reconvened so it would have enough time to prepare for it. U.S., Canada and Mexico are working on plan for presenting appeal to Appellate Body so schedule would not overload already over-burdened process.

EXPORT REFORMS: Draft regulation aimed at creating common definitions for ITAR and EAR is now circulating interagency but no estimate on when it might be published.

LINE PIPE: In 6-0 preliminary vote Nov. 26, ITC found U.S. industry may be injured by dumped and subsidized imports of certain welded line pipe from Korea and Turkey.

EXPORT ENFORCEMENT: Former Army captain Justin Gage Jangraw of Rockford, Mich., was sentenced Nov. 21 in D.C. U.S. District Court to eight months in prison for exporting defense articles without State license and unauthorized removal of classified documents. Jangraw operated online business “Sexyweapon.com” and on eBay, selling military-grade weapons parts and accessories. He pleaded guilty in August (see **WTTL**, Sept. 8, page 7).

ALUMINUM: Court of Appeals for Federal Circuit affirmed Nov. 18 CIT ruling that upheld Customs classification that Flexalcon imported by Alcan came under HTSUS subhead 3921.90.40 with 4.2% duty rate as other “plates, sheets, film, foil and strip, of plastics.” Alcan had protested Customs classification, arguing import should come under HTSUS subheading 7607.20.50, which is duty-free as “aluminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials).”

VITAMIN A: CAFC Nov. 20 also affirmed CIT decision to side with Roche Vitamins, Inc., in ruling that imports of BetaTabs, which is mixture containing beta-carotene, antioxidants, gelatin, sucrose and corn starch, and can be used as a source of Vitamin A in foods, beverages, and vitamin products, should be classified as “Provitamins, upmixed” under HTSUS subheading 2936.10.00 and duty-free. Government had appealed CIT ruling.

ITAR: DDTC Nov. 26 waived provision in ITAR Section 123.22(a)(2) that requires Customs and Border Protection (CBP) to decrement DSP-73 temporary export licenses for export of Government Furnished Equipment hand carried out of U.S. for use in service of U.S. government contract. “Under this new policy, companies will be required to obtain a DSP-73 for all of the defense articles to be carried abroad by their personnel. CBP may review the documents as they see fit, but for DSP-73s issued under this policy CBP will not be required to decrement the license at the time of export or import,” DDTC said.

VEU: In Dec. 1 Federal Register BIS updated authorization for Validated End User (VEU) Lam Research Service Co., Ltd. in China. Specifically, agency changed two addresses for Lam’s eligible destinations in Beijing, removed two existing facilities in Jiangsu Province and Shanghai and added eight eligible facilities.

ALUMINUM EXTRUSION: CIT Judge Delissa A. Ridgway remanded to Commerce Nov. 24 scope ruling on aluminum extrusion from China as requested by Plasticoid Manufacturing Inc., which sells cutting and marking straight edges. “On remand, Commerce shall advise whether – but for the fasteners exception and the Geodesic Domes Scope Ruling and its progeny – the straight edges at issue would be considered ‘finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry’ and therefore would be excluded from the scope of the Orders,” she wrote (slip op. 14-136).

WELDED PIPE: CIT Judge Leo Gordon remanded to Commerce Nov. 26 its Section 129 determination aimed at avoiding double remedies against circular welded carbon quality steel pipe from China subject to antidumping and countervailing duty orders as sought by domestic industry. Based on review of Commerce decision, “court must therefore remand the Final Determination to Commerce for further explanation,” he wrote (slip op. 14-137).