

Vol. 34, No. 37

September 22, 2014

BIS Imposes China Rule on Exports to Russia

As part of the latest round of sanctions imposed on Russia by the U.S. and European Union (EU), the Bureau of Industry and Security (BIS) has extended the same licensing requirements it had imposed on exports under the so-called China Rule in 2007 to exports to Russia in final rules it published in the Federal Register Sept. 18. As with the China Rule, the change will require U.S. exporters to obtain a license for the export of items in 32 Export Control Classification Numbers (ECCNs) that are now controlled for anti-terrorism (AT) reasons when exported to military end-users or end-uses in Russia.

The extension of the China Rule to Russia will affect many low-level items, including some night-vision, aviation and aircraft products. The new rule is a “knowledge standard,” BIS Deputy Assistant Secretary Matthew Borman told the BIS Regulations and Procedures Technical Advisory Committee Sept. 16. “If you know it is going to a military end-use or end-user in Russia then you need to come in for a license,” he said.

Borman also noted that restrictions on exports to what are being called “frontier” energy projects in deep water, meaning deeper than 500 feet, shale and Arctic exploration are aimed at oil and not gas drilling. Under new licensing policies, BIS will “approve it if it is clearly only for gas,” he said (see **WTTL**, Sept. 15, page 9).

“We recognize that this is quite a complicated scheme,” Borman conceded. “The object in the energy sector is not to impact current Russian production,” he added. “The idea, though, is to impact their ability to sustain frontier production in out years when they need to move from conventional to so-called non-conventional frontier areas,” he said. The new rules also add a policy of license denial for items already requiring licenses to Russia for exports to “mixed users” that are involved in both military and civilian sectors. Although the EU has named these mixed end-users, BIS has not. The agency will “evaluate [licenses] on a case-by-case basis to determine ownership or other connections to military activities,” Borman said.

CAFC Reverses Ruling on Individual Liability for Import Filings

In a rare reexamination of one of its own panel rulings, the Court of Appeals for the Federal Circuit, sitting *en banc*, reversed an earlier three-judge panel decision and ruled

Sept. 16 that individuals are “persons” under the Trade Act and can be held liable for gross negligence in the filing of false Customs information even when that person is not the importer of record. An initial CAFC ruling in 2013 had reversed a Court of International Trade (CIT) decision that had upheld a Customs fine against Harish Shadadpuri, the president of Trek Leather, Inc., for understating the entry value of 72 men’s suits.

After the first panel reversed the CIT ruling, the U.S. appealed that decision and asked for en banc review of the case. None of the judges on the first panel participated in the new review of *U.S. v. Trek Leather, Inc.*, which led to the CIT ruling being affirmed (see **WTTL**, Aug. 5, 2013, page 7).

“Applying the statute to Mr. Shadadpuri does not require any piercing of the corporate veil. Rather, we hold that Mr. Shadadpuri’s own acts come within the language of subparagraph (A),” wrote Appellate Judge Richard Taranto for the court. “It is longstanding agency law that an agent who actually commits a tort is generally liable for the tort along with the principal, even though the agent was acting for the principal,” he continued, citing the *Restatement of Agency*.

“That rule applies, in particular, when a corporate officer is acting for the corporation... We see no basis for reading section 1592(a)(1)(A) to depart from the core principle, reflected in that background law, that a person who personally commits a wrongful act is not relieved of liability because the person was acting for another,” the judge declared.

“The issues for decision may be clarified by noting what issues are not before us. We are not faced with any issue about aiding-or-abetting liability under subparagraph (B) of section 1592(a)(1); the government relied only on subparagraph (A) in defending liability here. We are presented no issue about whether Mr. Shadadpuri was grossly negligent or whether, if he attempted to or did enter or introduce the merchandise at issue, he did so by means of false material statements or material omissions,” he wrote.

“The only questions presented for decision are whether Mr. Shadadpuri is a ‘person’ covered by section 1592(a)(1)(A) and whether his actions come within the ‘enter, introduce, or attempt to enter or introduce’ language of that provision,” Taranto noted. “There is simply no basis for giving an artificially limited meaning to this most encompassing of terms, which plainly covers a human being,” he wrote.

Azevedo Renews Push for Trade Facilitation Deal

World Trade Organization (WTO) Director-General Roberto Azevedo didn’t have much of a summer vacation in August and appears to have spent most of it traveling around the world trying to salvage the trade facilitation agreement reached at the WTO’s Bali ministerial. Those travels, however, didn’t produce any breakthrough to get the deal back on track after India blocked its implementation in July, Azevedo reported to a heads of delegation (HOD) meeting in Geneva Sept. 15 (see **WTTL**, Sept. 15, page 6).

Azevedo called the meeting to renew his push for WTO members to try and find a solution to the blockage of the deal. “From my conversations over the summer, it seems that the solution is still far from evident,” he reported. Azevedo urged the diplomats to share their views and their assessments about the way ahead with each other. “As I have said, in order to do this I think we must begin a period of intensive and comprehensive

consultations, starting now — with the intention of making rapid progress,” he said. Azevedo said he has asked negotiating committee chairmen to restart consultations on other Bali issues for a meeting of the Trade Negotiations Committee (TNC) Oct. 6. “This reflects the need for us to move quickly — to see if we are able to restore momentum to our work,” he said.

U.S. Resumes Labor Case Against Guatemala

With an eye toward expected union and congressional complaints about labor conditions in Vietnam, the U.S. reactivated an arbitration case against worker rights violations in Guatemala Sept. 18 after suspending the process three times. While not mentioned by U.S. officials, their action against Guatemala is likely to inform the debate over Vietnam’s inclusion in any Trans-Pacific Partnership (TPP) deal and the need for Hanoi to undertake similar labor reforms (see **WTTL**, Sept. 1, page 5).

The decision to reactivate arbitration came after Guatemala failed to implement an 18-point labor action plan (LAP) to fix problems the AFL-CIO identified in a petition to the U.S. Trade Representative’s (USTR) office six years ago, officials explained. The actual complaint against the Central American country, however, is its failure to enforce its existing labor laws as required by the U.S.-Central American Free Trade Agreement (CAFTA).

One of Guatemala’s failings was not enacting a new labor law that would give the government the power to impose sanctions on employers who violated labor laws, including on minimum wages and labor union rights. Although this was one of the 18 points called for in the LAP, USTR Michael Froman brought a shorter list of demands to Guatemala when he visited the country in July. The Guatemalans even failed to comply with this short list, one source told **WTTL**. The Guatemalan government has been unable to get the new legislation passed because of opposition claims that the law would be unconstitutional as well as business-interest resistance.

The reactivation of arbitration puts in motion a legal and negotiating process that could drag on for another year or more. Both countries will be filing briefs with the panel over the next two months. The panel is expected to hold a hearing early in 2015.

Mayrow Affiliates Settle Charges, Get off Entity List

A Hong Kong company affiliated with Mayrow General Trading and the company’s owner agreed to pay the Bureau of Industry and Security (BIS) civil penalties to settle charges of evading the denial order against Mayrow and engaging in prohibited conduct against a sister company. The U.S. imposed sanctions on Mayrow in 2006 because of its export of electronic components that ended up in Improvised Explosive Devices (IEDs) used against Coalition forces in Iraq and Afghanistan.

Hong Kong resident Bruce Lam, director of Creative Electronics Ltd. and owner of United Sources Industrial Enterprises (USIE), agreed Sept. 17 to pay \$250,000 to settle one charge of evasion. Creative Electronics agreed to pay BIS \$3.6 million to settle 58 charges of evasion and engaging in prohibited conduct in 2007. The entire penalty will be suspended for five years then waived if company commits no further violations. In a

separate settlement with BIS, USIE Sept. 18 settled 39 charges of unlicensed reexports to Atlnx Electronics and Mayrow in the United Arab Emirates from June 2006 to June 2007 and evasion. The company agreed to pay \$4.5 million, of which all but \$400,000 will be suspended for five years then waived if USIE commits no further violations. USIE also agreed to do an external audit of its export controls compliance program.

BIS said Lam instructed USIE, which was subject to the Mayrow order, to provide Creative Electronics, a newly created company, with USIE's U.S. supplier and transaction information to enable Creative Electronics to engage in 29 transactions with USIE's U.S. suppliers on behalf of USIE. Lam told a BIS representative that these actions were taken to avoid USIE's designation in General Order No. 3 and "that Creative Electronics was necessary in order for USIE to remain in business," the settlement added.

USIE was added to General Order No. 3 in June 2007 due to transactions involving Mayrow. The order was based on information that Mayrow and the related entities were acquiring electronic components and devices that were being used in IEDs. BIS revised its regulation so it could put Mayrow, along with Lam, Creative Electronics and USIE, on the Entity List in September 2008 after it recognized the problems exporters had complying with General Orders for parties that are not on the denied party list.

In a separate Federal Register notice Sept. 18, BIS removed Lam, Creative Electronics and USIE from its Entity List (see Brief, page 8). "These entities have reached agreements with BIS that include measures protecting U.S. national security and foreign policy interests. In light of the content of these agreements, the ERC [End-User Review Committee] deemed it no longer necessary to impose licensing requirements pursuant to Sec. 744.11 on the three entities," the notice said.

Advanced Export Information Filing Pilot Could Start This Year

A pilot test of the Advanced Export Information (AEI) system could start by the end of 2014 following the acceptance of some 75 exporters to participate in the program, according to government officials. The joint Census-Customs and Border Protection (CBP) program will test an alternative that might replace the so-called Option 4 way of filing required export shipment data after the export occurs instead of before.

The two agencies received some 85 applications from firms volunteering to participate. They rejected about 10 because they either did not have enough exporting volume or had past export compliance troubles. Exporters that will participate in the pilot trade in a variety of products, including agriculture commodities, aerospace, chemicals and electronics.

Among the participants are 44 firms that now use Option 4. In all, some 1,200 exporters now use Option 4 regularly. Success of the pilot will be based on whether "we get it right," said CBP Officer Ted Clifton. CBP will also determine whether it is comfortable getting the 10-12 data elements that must be filed in AEI and the information gives Customs "what we need," he said. Over the next couple of months before the test goes into full operation, participants will be submitting test data to see if their systems are properly providing the needed information. At least two companies have already bowed out of the program because of the difficulty in changing their information technology

systems to provide CBP with the required data. While the pilot is going on, participants that also use Option 4 can continue to use that option, Clifton said. Under Census rules that go into effect Oct. 2, Option 4 data will have to be submitted five days after shipment rather than current 10-day deadline (see **WTTL**, Feb. 3, page 7). The AEI pilot was developed as Census and CBP look ahead to the elimination of the Option 4 choice for exporters, a goal CBP has been pushing for many years.

Customs Lawyers Deserve Higher Fees, CIT Rules

Because there are a limited number of lawyers practicing in the specialized work of Customs law, they are entitled to receive higher fees than other non-specialized lawyers, Court of International Trade (CIT) Senior Judge Donald Pogue ruled Sept. 18 in a decision under the Equal Access to Justice Act (EAJA), ordering the government to pay fees and expenses in a case it lost. Pogue approved the request of Shah Bros., Inc. for reimbursement of expenses after the firm was forced to get a second court ruling that its imports were chewing tobacco and not snuff, even though an earlier decision had agreed with its classification and Customs disregarded the ruling.

Pogue's written decision cites affidavits Shah submitted to justify paying its lawyers more than the \$125 an hour Justice offered (slip op. 14-109). The firm wanted attorneys' fees ranging from \$375 per hour to \$595 per hour.

Shah's attorneys attested that there are approximately 200 Customs law practitioners in the U.S., and the hourly rates customarily charged for experienced attorneys in this field are generally "not less than \$300 per hour and range up to more than \$700 per hour," Pogue noted. "Each affiant also declares that associates are billed depending on their level of experience – ranging from \$225 to \$525 per hour at one firm, \$225 to \$360 at the second firm, and \$300 to \$550 at the third firm – with two of the three partners emphasizing that attorneys with ten or more years of experience are usually billed at the higher end of that range," he pointed out.

More experienced, partner-level attorneys at their firm charge "as high as \$900", "as high as \$645", and higher than \$700 per hour for Customs-related matters, Pogue wrote. "As the evidence here establishes that the customary rates charged for legal work in this field normally range from \$300 to \$700 per hour, with rates for associates with less than ten years of experience billed as low as \$225 and as there is no evidence to situate the relative complexity of this case as compared to the type of legal work at either the high or the low end of that range, a cap at \$450 per hour for the more experienced attorneys, and \$300 per hour for attorneys with less than ten years of experience, appears both sufficient and reasonable on the evidence presented here," he ruled.

Developed World Citizens Have Negative Views on Trade

The largest global survey ever taken of public opinions about trade has found citizens of developed countries, including the U.S., Japan, Germany, France and Italy, the most skeptical about the benefits of trade, while those of developing countries are the most positive. The survey conducted by the Pew Research Center underscores why negotiations on trans-Pacific and transatlantic trade agreements have become so difficult. The Pew survey asked the same questions about trade in 44 countries and conducted

48,643 interviews to get answers. The survey sought views on the impact of trade on jobs and prices as well as opinions about foreign direct investment and mergers and acquisitions. “The broad takeaway from the survey is that publics around the world are pro-trade in principle but protectionist in practice,” Bruce Stokes, director of Pew’s global economic attitudes program, told the Peterson Institute, where the survey was released Sept. 17. In India, “the public is more open to trade than politicians,” he noted based on the survey results. He also conceded the word “trade” has different meaning in different countries, meaning imports in some countries and exports in others.

The survey bolsters concerns about reaching deals on a Trans-Pacific Partnership (TPP) or Transatlantic Trade and Investment Partnership (TTIP) and getting public and political support for the accords. Among TPP negotiators, only 20% of U.S. respondents said they believe trade creates jobs and only 15% of Japanese believe it. In contrast, 78% of Vietnamese believe trade creates jobs. On the TTIP side, only 13% of Italian respondents see trade creating jobs and only 24% of French respondents agreed.

When asked whether growing trade and business ties with other countries is good or bad, Africans had the most positive view, with 87% saying it is good. In Asian countries, 86% had a positive view. In the U.S., the good response dropped to 68%, and in Europe it was 79%. In developed countries, the number of positive responses has fallen since the last similar survey was taken in 2002, Pew reported. Respondents in all regions had a more positive attitude toward foreign investment in new factories in their countries than in merger and acquisition of domestic firms.

Industry Has Positive Outlook in China, AmCham Says

In Washington for its annual “doorknock” with administration officials and members of Congress, leaders of the American Chamber of Commerce in Shanghai (AmCham Shanghai) told reporters Sept. 17 that its 400 members are “largely positive about China,” despite reports of Chinese government regulations, increased labor costs and a nascent anti-monopoly law (see **WTTL**, Sept. 8, page 2).

“Generally speaking, we’ve got a good news story,” said AmCham Chair Robert Theleen, citing a survey released earlier in 2014. Statistics showed that 87% of members “would say that their businesses are profitable” and 70% enjoyed revenue growth in 2013, Theleen added.

Regarding the six-year-old antimonopoly law, “we can’t find examples of tangible actions that have damaged U.S. companies,” he said. Other groups representing U.S. firms operating in China say they are increasingly concerned about how the law is being enforced and the potential targeting of foreign companies in China.

One of the chamber’s main objectives in Washington was to ask its friends to support a U.S. Bilateral Investment Treaty (BIT) with China, even if that’s unlikely. “China’s view of the TPP [Trans-Pacific Partnership], which was contemptuous two years ago, is no longer so. In fact, the BIT is a ...way to not be left behind,” Theleen said. “It certainly would be helpful from AmCham Shanghai’s point of view if the U.S. government supported the initiatives of the BIT, regardless of what the likelihood is of success and the complexities of it,” he added. AmCham Shanghai President Kenneth Jarrett refuted

reports of U.S. companies relocating facilities to countries with lower labor costs such as Bangladesh and Vietnam. From survey results, “the percentage is pretty small, it’s all in the low single digits, so we actually haven’t seen anything that significant,” he said. “In our survey, the data that we collected from our members doesn’t show that this is a meaningful trend. For many companies, as they make strategic decisions about their footprint, they are looking at a ‘China +1’ strategy,” Jarrett added. “Labor in China is not cheap at all, and it’s been cheaper in other locations around Southeast Asia for quite some time. China still has the attraction of having a very big market, you have economy of scale, so the supply chain is very effective,” he said.

China May Seek to Launch Alternative to TPP

While there has been speculation that a meeting of the Asia-Pacific Economic Cooperation Forum (APEC) in Beijing in November might be the place where a breakthrough will be announced on a Trans-Pacific Partnership (TPP) deal, there are new suggestions that China might use the session to press for a broader vision that would by-pass a TPP agreement. China might use the APEC gathering of heads of state to seek agreement on the launch of work on a Free Trade Area of the Asia-Pacific, suggested Brandeis University Professor Peter Petri Sept. 18.

Petri cited studies he has done that show China losing as much as \$50 billion a year initially in exports if trade were diverted by a successful TPP. A year ago there were signs Beijing was considering entering the TPP talks, but those signs have cooled lately. China will want to announce a “big project” at the APEC meeting, Petri told a TPP program in Washington.

Meanwhile, as U.S.-Japan negotiations on agriculture and autos remain stuck, former USTR Clayton Yeutter told the meeting that the key to a deal with Japan on agriculture will require giving the Japanese a long phase-in period to open its market, perhaps 15-20 years. “If you can’t adjust in that time, you should change the whole system,” Yeutter said. Other sources familiar with the talks have said a phase-in period has been one of the main approaches being discussed in the negotiations, although there has been no agreement on what that period should be.

* * * Briefs * * *

ANTIBOYCOTT: Caterpillar subsidiary Electro-Motive Diesel, Inc., (EMD), which manufactures engines in LaGrange, Ill., agreed to pay BIS \$26,350 civil penalty Sept. 8 to settle 31 charges of failing to report receipt of requests to engage in restrictive trade practice in documents from Bangladesh in 2005-2006.

EXPORT ENFORCEMENT: Harold Rinko of Hallstead, Pa., pleaded guilty Sept. 16 in Scranton, Pa., U.S. District Court to conspiracy to illegally export laboratory equipment, including portable gas scanner, flowmeters for measuring gas streams and other items used to detect chemical warfare agents, to Syria without licenses. Indictment against Rinko, plus UK citizen Ahmad Feras Diri, and his brother, Syrian citizen Moawea Deri, along with brothers’ company, d-Deri Contracting & Trading, was unsealed April 23 (see **WTTL**, April 28, page 5). Diri was arrested in London in March 2013 and is awaiting extradition to U.S. Deri remains at large.

MORE EXPORT ENFORCEMENT: Italian company Area Sept. 11 agreed to pay BIS \$100,000 civil penalty to settle one charge of selling U.S.-origin network monitoring equipment to Syrian

Telecommunications Establishment (STE) without required authorization in February 2011. Monitoring equipment was worth approximately \$140,000 and classified under ECCN 5A002.

EVEN MORE EXPORT ENFORCEMENT: Erik Perez-Bazan, of Hidalgo, Texas was sentenced Sept. 15 in McAllen, Texas, U.S. District Court to 75 months in prison followed by three years' supervised release for illegally exporting grenade-launcher barrels and other USML items to Mexico from December 2012 through June 2013. Perez-Bazan pleaded guilty in August 2013 and has been in custody since his arrest in June 2013.

ENTITY LIST: In Sept. 18 Federal Register BIS added 28 persons in Afghanistan, Armenia, Australia, China, Greece, Hong Kong, India, Ireland, Pakistan, Singapore, UAE and UK under 34 entries to Entity List. Rule also added two addresses for Cho-Man Wong in Hong Kong and one additional subordinate entity to Pakistan Atomic Energy Commission (PAEC). In addition, BIS removed three entries in Hong Kong -- Bruce Lam, Creative Electronics and United Sources Industrial Enterprises. Lam and Creative Electronics settled BIS export charges Sept. 17 (see related story page 3).

TRADE PEOPLE: In slew of voice votes before leaving town, full Senate Sept. 18 confirmed nominations of Robert Holleyman to be deputy USTR and Nathan Sheets to be under secretary of Treasury for international affairs. Senate Finance Committee unanimously approved both names in July (see **WTTL**, Aug. 4, page 7). Holleyman will be responsible for "services trade, intellectual property rights and issues impacting the United States' relationship with countries in South and Central Asia as well as China," USTR statement noted.

ALUMINUM OXIDE: In 6-0 "sunset" vote Sept. 18, ITC determined that revoking antidumping duty order on refined brown aluminum oxide from China would cause renewed injury to U.S. industry.

EX-IM BANK FRAUD: Memphis exporter Saba Inc. agreed Sept. 18 to pay \$3.5 million for fraudulently obtaining loan for construction of retirement community in Turkey from Deutsche Bank that was guaranteed by Ex-Im Bank. Civil fraud lawsuit in Manhattan U.S. District Court against Turkish business agent Hasan Besneli continues, Ex-Im noted.

ENVIRONMENTAL GOODS: Second round of talks toward Environmental Goods Agreement (EGA) with 13 WTO partners will take place in Geneva Sept. 22-26. At event in Washington Sept. 17, USTR Michael Froman said, "We're going to work together to slash tariffs on everything from wind turbines, to water treatment filters, to solar water heaters." EGA talks were formally launched in July (see **WTTL**, July 14, page 8).

STEEL BAR: CAFC Sept. 16 affirmed CIT decision to uphold Commerce's application of adverse facts available (AFA) in antidumping investigation of stainless steel bar from India. In decision written by Appellate Judge Jimmie Reyna for three-judge panel, CAFC found decision to resort to facts otherwise available and to apply an adverse inference against Mukand, Ltd. is supported by substantial evidence. "Commerce reasonably concluded that Mukand failed to cooperate to the best of its ability when responding to Commerce's requests for information," Reyna wrote in *Mukand, LTD. v. U.S.* "To avoid the risk of an adverse inference, respondents must take reasonable steps to maintain full and complete records and put forth maximum effort to investigate and obtain all requested information," he ruled. "Mukand thus had a duty to account for size-specific cost differences in its responses using reasonably available information or explain why such information was not available," he added.

EX-IM BANK: As expected, House and Senate approved "continuing resolution" to keep funding government Sept. 17 and 18, respectively, with provision extending Ex-Im charter nine months (see **WTTL**, Sept. 15, page 2).