BUSINESS REGULATION

International Export Controls and Economic Sanctions

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I. Introduction

Export controls and economic sanctions developments in 2005 were dominated by both the continuing effort to combat worldwide terrorism and an increasing concern regarding exports of sensitive technology, particularly to China. The U.S. response to terrorism and proliferation concerns are more likely to continue to shape export controls and sanctions policy in the coming years. This article contains a summary of selected developments in 2005 in the areas of dual-use export controls, munitions export controls, and economic sanctions.

II. Dual-Use Export Controls

A. DEEMED EXPORT RULEMAKING

On March 28, 2005, the U.S. Department of Commerce Bureau of Industry and Security (BIS) published an Advance Notice of Proposed Rulemaking entitled *Revision and Clarification of Deemed Export Related Regulatory Requirements* (the Notice).[1] The Notice stated that the BIS action was taken in response to recommendations contained in a March 2004 U.S. Department of Commerce Office of Inspector General (OIG) Report entitled *Deemed Ex-*

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1. Revision and Clarification of Deemed Export Related Regulatory Requirements, 70 Fed. Reg. 15,607 (March 28, 2005) [hereinafter Revision and Clarification]. In addition to the proposed change to the deemed export rule discussed here, the proposal also would revise the definition of use technology under the ITAR, and revise certain hypothetical examples contained in the EAR concerning export of technology. *Id.*

port Controls May Not Stop the Transfer of Sensitive Technology to Foreign Nationals in the U.S.[2] Most significantly, the proposed rule would change certain important criteria for the deemed export rule.[3] Under current law, the disclosure of technology to a person, wherever that disclosure occurs, is considered an export of the technology to that person's country of citizenship or country of permanent residence.[4] Under the proposed rule, such disclosure would be deemed to be an export to the person's country of birth, regardless of the person's most recent citizenship or permanent residency.[5] The Notice drew over 300 comments from the public.[6] In response, the comment period was reopened by BIS on May 27, 2005.[7] A revised proposal was expected to be published in the Federal Register at the end of 2005, but had not been published as of the time this article went to press.

B. Military Catch-All

Despite preliminary lobbying by a wide segment of U.S. industry,[8] it appears that BIS will soon propose to amend the Export Administration Regulations (EAR) by imposing a license requirement for the export, reexport, or transfer of certain items to certain destinations when the exporter, reexporter, or transferor knows that the items are intended for a military end-use. A draft proposal was circulated in August 2005 and has been variously dubbed the "military catch-all" provision and the "China catch-all" provision (because of the current emphasis on controlling exports of military and dual-use items to China).[9] BIS indicated that the proposal is required by the Statement of Understanding (SOU) agreed upon by Wassenaar Arrangement member countries in December 2003. The SOU states that:

> Wassenaar member countries will take appropriate measures to ensure that their regulations require authorization for the transfer of non-listed dual-use items to destinations subject to a

2. U.S. Dep't of Commerce, Office of Inspector General, Bureau of Indus. and Sec., Deemed Export Controls May Not Stop the Transfer of Sensitive Technology to Foreign Nationals in the U.S., Final Inspection Report No. IPE-16176 (March 2004). In its report, the OIG concluded (among other things) that existing BIS policies under the Export Administration Regulations (EAR) could enable foreign nationals from countries and entities of concern to access otherwise controlled technology.

3. *See* Important EAR terms and principles, 15 C.F.R. § 734.2(b)(2)(ii) (2006).

4. *Id.*

5. *See* Revision and Clarification, *supra* note 1.

6. The comments in their entirety may be reviewed online at the following URL: http://www.bxa.doc.gov/FreedomForInformation/FINAL%20deemed%20doc%20without%20respective%20comments.pdf. A detailed critique of the proposal is beyond the scope of this article. Comments filed by the American Bar Association Section on International Law outline some important concerns. Those comments are available on the website of the ABA Committee on Export Controls and Economic Sanctions at the following URL: http://www.abanet.org/intlaw/committees/business_regulation/export_controls/deemedexportcomments.pdf.

7. *See* Revision and Clarification of Deemed Export Related Regulatory Requirements, 70 Fed. Reg. 30,655 (May 27, 2005).

8. *See, e.g.*, David J. Lynch, *U.S. Chinese Trade Relations Get Trickier*, USA Today (Sept. 13, 2005), *available at* http://www.usatoday.com/money/world/2005-09-13-us-china-relations_x.htm. The National Foreign Trade Council and twenty-one other U.S. business organizations have called upon the Bush Administration to re-evaluate adoption of a catch-all control. *See* Letter from AeA, Aerospace Industries Association et al. to the Hon. Stephen Hadley, Assistant to the President for National Security Affairs (Sept. 21, 2005), *available at* http://www.nftc.org/default/deemed%20export/BIS%20Catch-all%20Ltr%20Hadley%209-21-5.pdf.

9. *See* A Joint Hearing with the House International Relations Committee on the E.U. Weapons Sales to China: Hearing Before the House Armed Services Committee, 109th Cong. (Apr. 14, 2005); Washington Trade Daily, November 23, 2005, Vol. 14, No. 232.

binding United Nations Security Council arms embargo, and any relevant regional arms embargo either binding on the Wassenaar member country or to which a Wassenaar member country has voluntarily consented to adhere, when the authorities of the exporting country inform the exporter that the items in question are or may be intended, entirely or in part, for a military end-use.[10]

Under the proposal as drafted, BIS would (1) require a license for exports, reexports, or transfers of uncontrolled items to nineteen countries subject to arms embargoes[11] if BIS determines the exporter knows that the item is intended for military end-use; (2) apply to that determination the existing EAR knowledge standard, including "awareness of high probability, or conscious disregard or willful avoidance of facts"; (3) define military end-use as "incorporation into, or production, development, maintenance, operation, installation, or deployment of" items on the U.S. Munitions List[12] or the Wassenaar Munitions List; and (4) establish a "presumption of denial" policy for China if an item would "make a direct and significant contribution to military capabilities in a manner that would alter or destabilize regional military balance contrary to U.S. foreign policy interests."[13] At the Annual BIS Update Program in October 2005, BIS indicated that it expected to publish a Notice of Proposed Rulemaking sometime in December 2005, though nothing had been published at the time this article went to press.

C. Libya Developments

During 2005, BIS took a number of actions to further ease restrictions on exports to Libya. BIS promulgated an interim rule on April 29, 2004,[14] to lift most U.S. sanctions.[15] A number of public comments were made in response to this rule.[16]

1. *Installed -Base Procedure*

On March 22, 2005, BIS published a final rule revising the EAR with regard to Libya.[17] Of particular significance was the guidance related to installed base items and their treat-

10. U.S. Dep't of Commerce, Bureau of Industry and Security, Draft Regulations, *Implementation of New End-use Controls for Items Intended for a Military End-use* (August 9, 2005) (on file with author) [hereinafter August 2005 Draft Regulations]. The SOU also provides that Wassenaar members "may adopt and implement national measures to restrict exports for other reasons of public policy, taking into consideration the principles and objectives of the Wassenaar Arrangement." *Id.* The SOU provides additional guidance regarding the term "military end-use," stating that "in this context the phrase military end-use refers to use in conjunction with an item controlled on the military list of the respective Wassenaar member country." *Id.*

11. The nineteen countries are: Afghanistan, Belarus, Burma, China, Ivory Coast (exceptions), Cuba, Congo, Haiti, Iran, Iraq (except government), Liberia, North Korea, Rwanda (exceptions), Sierra Leone (exceptions), Somalia, Sudan, Syria, Vietnam, and Zimbabwe. *See id.*

12. The United States Munitions List, 22 C.F.R. § 121.1 (2006).

13. *See* August 2005 Draft Regulations, supra note 10.

14. Revision of Export and Reexport Restrictions on Libya, 69 Fed. Reg. 23,626 (Apr. 29, 2004).

15. On April 23, 2004, the U.S. Department of the Treasury, Office of Foreign Assets Control issued a general license permitting most transactions with Libya that previously had been prohibited pursuant to the U.S. embargo on Libya.

16. *See, e.g.*, Comments of USAEngage to US Bureau of Industry & Security (Nov. 18, 2004), http://www.usaengage.org/literature/2004/ (last visited Nov. 21, 2005) [hereinafter USAEngage Comments].

17. Revision of Export and Reexport Restrictions on Libya, 70 Fed. Reg. 14,387 (Mar. 22, 2005) [hereinafter Libya Revision].

ment under General Prohibition 10 of the EAR.[18] The term installed base refers to items imported illegally into Libya during the U.S. embargo. Section 764.2(e) and General Prohibition 10 collectively prohibit parties from ordering, buying, removing, concealing, storing, using, selling loaning, disposing of, transferring, financing, forwarding, or otherwise servicing such items, when they have knowledge that such items have been originally illegally exported or reexported to Libya by third parties. Many U.S.-based companies viewed the application of General Prohibition 10 as overly burdensome and unwieldy in the context of Libya.[19] U.S. companies also have suggested that application of General Prohibition 10 to Libya would, to a large extent, undermine the intent behind lifting sanctions against Libya and would impede U.S. businesses lawfully seeking to enter into business in Libya.

As a result, BIS promulgated a final rule establishing a procedure applicable to installed base items. Under this procedure, installed base items fall into two categories: items that must be reported to BIS, but are not subject to a license requirement; or items for which reporting is not sufficient and for which a license must be obtained. Installed base items that can simply be reported to BIS include those: (1) subject to the EAR, but not on the Commerce Control List (CCL); (2) on the CCL and eligible for a license exception; and (3) on the CCL, but controlled only for National Security (NS) or Anti-Terrorism (AT) purposes and not on the Wassenaar Sensitive or Very Sensitive List. All other installed base items fall within the ambit of General Prohibition 10 and are subject to the license requirement.[20]

2. *License Exception USPL*

On November 16, 2005, BIS promulgated an interim rule establishing a new License Exception under the EAR for certain exports and reexports to U.S. persons in Libya (USPL). USPL is a narrow License Exception that only covers exports and reexports to Libya of certain items controlled for AT purposes.[21] In addition, because USPL status only applies to use in Libya by U.S. persons, subject items exported under the Exception may not be transferred to non-U.S. persons in Libya. The U.S. person may allow non-U.S. persons to use the items in Libya, provided that such persons are employed by the U.S. person and are acting within the scope of their employment. If the items are not consumed or destroyed in the ordinary course of business after export to Libya, they must either be returned to the United States or reexported to a third country consistent with the EAR. Items that could potentially benefit from USPL include portable generator sets, encryption hardware, certain information-security software, and diesel engines.

D. Non-Proliferation Controls

In November 2004, BIS expanded the license requirements on exports of certain items when the exporter or reexporter knows the items will be used in or with rockets, missiles, or unmanned aerial vehicles.[22] End-use and end-user controls are no longer limited to

18. *See* General Prohibitions and Determination of Applicability, 15 C.F.R. § 736.2 (10) (2006).

19. *See* USAEngage Comments, *supra* note 16.

20. *See* Libya Revision, *supra* note 17.

21. Establishment of New License Exception for the Export or Reexport to U.S. Persons in Libya of Certain Items Controlled for Anti-Terrorism Reasons Only on the Commerce Control List, 70 Fed. Reg. 69,432 (Nov. 16, 2005).

22. *See* Revisions to the Export Administration Regulations: Removal of the List of Missile Projects and Expansion of Missile-Related End-Use and End-User Controls, 69 Fed. Reg. 64,657 (Nov. 8, 2004).

intercontinental ballistic missiles, but apply also to rockets and unmanned aerial vehicles. In addition, end-use and end-user controls have been expanded to apply, at least in part, worldwide, and also apply not only to exports and reexports, but also to in-country transfers.

In April 2005, BIS similarly expanded license requirements on certain chemical processing equipment controlled for chemical and biological weapons non-proliferation reasons.[23] BIS also expanded the end-use and end-user licensing requirements[24] to apply worldwide (rather than only to certain countries of concern) and also to cover in-country transfers (as well as exports and reexports).[25]

Under these revisions, BIS is permitted to inform exporters of specific licensing requirements or restrictions by specific notice or through an amendment to the EAR that indicates a license is required for a specific export reexport, or transfer to a particular end-user. The designating entities on the Entity List maintained by BIS constitutes BIS informing exporters as to these enhanced licensing requirements. Even if not so informed, an exporter must obtain a license if it has knowledge its export will be used for such proliferation end-uses.

E. Enforcement Activity

Increasing enforcement activity by the Office of Export Enforcement (OEE) remains the trend following the events of September 11, 2001. The new OEE Director recently reported that in fiscal year 2005, to date, sixty-nine administrative cases have been resolved (resulting in payment of monetary fines of roughly US $6.8 million).[26] In comparison, sixty-three administrative cases were resolved in 2004 (US $6.2 million),[27] thirty-four cases in 2003 (US $4.1 million),[28] and twenty-five cases in 2002 (US $3.4 million).[29] Criminal convictions also increased during the same period. According to the OEE Director, in fiscal year 2005, to date, there have been thirty-one criminal convictions and US $7.7 million in criminal fines,[30] compared with twenty-eight convictions and US $2.9 million in fines during 2004,[31] twenty-seven convictions and US $3.4 million in fines during 2003,[32] and two criminal convictions and US $15,000 in fines during 2002.[33]

23. *See* Expansion of the Country Scope of License Requirements that Apply to Chemical/Biological (CB) Equipment and Related Technology; Amendments to CB-Related End-User/End-Use and U.S. Person Controls, 70 Fed. Reg. 19,688 (Apr. 14, 2005).

24. Restrictions on Certain Chemical and Biological Weapons End-Uses, 15 C.F.R. § 744.4 (2006).

25. *Id.*

26. *See, e.g.*, Posting of Scott Gearity, feedback@exportcontrolblog.com, to Update Day Two: Enforcement Plenary, http://www.exportcontrolblog.com/blog/2005/10/update_day_two_.html (Oct. 25, 2005, 8:43 EST) [hereinafter Update Day Two].

27. U.S. Dep't of Commerce, Bureau of Indus. and Sec., Bureau of Industry and Security Annual Report for Fiscal Year 2004, Ch. 3, at 12, *available at* http://www.bis.doc.gov/news/2005/04AnnualRept/P_1-31_04BIS_Chap1-7.pdf [hereinafter BIS 2004 Annual Report].

28. *Id.*

29. U.S. Dep't of Commerce, Bureau of Indus. and Sec., Bureau of Industry and Security Annual Report for Fiscal Year 2002, app. D, at 57-62, *available at* http://www.bis.doc.gov/news/2003/AnnualReport/appendixd_p.pdf [hereinafter BIS 2002 Annual Report].

30. *See* Update Day Two, *supra* note 26.

31. *See* BIS 2004 Annual Report, *supra* note 27, at 6.

32. *Id.*

33. BIS 2002 Annual Report, *supra* note 29, at 63.

One recent settlement is indicative of the current enforcement environment. On October 4, 2005, Pro345 Distribution (Proprietary) Limited and ProChem (Proprietary) Ltd., both divisions of a South African entity known as Omnia Group, agreed to pay US $1.54 million to settle 220 charges related to the resale of cyanide.[34] The charges stemmed from alleged violations of license conditions that authorized the export of chemicals from the United States and authorized ProChem to re-sell the chemicals only to end-users designated on the licenses. The settlement is yet another example of BIS's willingness to use its enforcement power against foreign entities whose operations are reliant on exports from the United States.[35] In this case, the US $1.54 million penalty represented over 7 percent of ProChem's annual operating profit.[36]

III. Arms Export Controls

A. U.S. Court of Appeals Brokering Opinion

On January 5, 2005, the U.S. Court of Appeals for the D.C. Circuit issued an opinion[37] upholding the U.S. District Court's dismissal[38] of the criminal indictment against Sabri Yakou for unlicensed munitions brokering activities under the Arms Export Control Act (AECA)[39] and the International Traffic in Arms Regulations (ITAR).[40] The Court of Appeals agreed with the District Court that because defendant Yakou had abandoned his U.S. lawful permanent resident (LPR) status, he was not a U.S. person[41] subject to the jurisdiction of the ITAR.[42] Yakou, an Iraqi-born U.K. citizen who became an LPR of the United States, argued that he had relinquished his U.S. LPR status and left the United States in 1993,

34. Limited Settlement Agreement between Pro 345 Distribution (Proprietary) Limited and Prochem (Proprietary) Limited (Oct. 5, 2005), *available at* http://efoia.bis.doc.gov/ExportControlViolations/E924.pdf.

35. The same day BIS announced the ProChem settlement, BIS issued a press release stating that it was denying the export privileges of Australian company Performance Medical Supplies for five years for "violating and conspiring to violate" the EAR in connection with the unauthorized export of physical therapy equipment from the United States to Iran via Australia. *See* Press Release, U.S. Dep't of Commerce, Bureau of Indus. and Sec., Performance Medical Supplies Denied Export Privileges for Aiding In Unauthorized Exports to Iran (Nov. 17, 2005), *available at* http://www.bis.doc.gov/News/2005/Performance.htm.

36. *See* Omnia 2004 Earnings Report, *available at* http://www.omnia.co.za/download/divisional_reviews.pdf. The operating profit for the division in 2004 is reported at R133 million, about US $20.43 million at the date of this article.

37. United States v. Yakou, 393 F.3d 231 (D.C. Cir. 2005).

38. United States v. Yakou, No. 03-449, 2004 U.S. Dist. LEXIS 8585 (D.C. Cir. Apr. 9, 2004).

39. 22 U.S.C. § 2771 (1996).

40. 22 C.F.R. § 120 (2005).

41. The ITAR's brokering registration requirement provides that "[a]ny U.S. person, wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States" engaged in munitions brokering activities is required to register with the U.S. Department of State, Directorate of Defense Trade Controls (DDTC). 22 C.F.R. § 129.3(a) (2006).

> The term "U.S. person" is defined as:A person who is a lawful permanent resident as defined by 8 U.S.C. §1101(a)(20) or who is a protected individual as defined by 8 U.S.C. §1324b(a)(3). It also means any corporation, business association, partnership, society, trust, or any other entity, organization or group that is incorporated to do business in the United States. It also includes any governmental (federal, state or local) entity.

22 C.F.R. § 120.15 (2005).

42. *Yakou*, 393 F.3d at 242.

prior to committing acts for which he was indicted. The court upheld the dismissal of the indictment, holding that even though Yakou had reentered the United States multiple times after 1993, at times using his Green Card, which he had never formally surrendered, as an immigration document, his informal renunciation of his LPR status in 1993 was valid. Therefore, Yakou could not be charged as a U.S. person under the ITAR.[43]

On May 9, 2005, the Court of Appeals for the D.C. Circuit issued an order amending its January 5, 2005, opinion in *United States v. Yakou*.[44] The May 9, 2005, amended opinion added new language stating that the United States had not contended that defendant Yakou was "otherwise subject" to U.S. jurisdiction under section 129.3 of the ITAR. Thus, the principal holding of the amended *Yakou* opinion is that a person who has relinquished his or her LPR status may not be charged with a violation of the ITAR unless the person is otherwise subject to U.S. law under the ITAR.[45]

B. Increased Regulator Scrutiny of Brokering Activities

In 2004 and 2005, the U.S. Department of State, Directorate of Defense Trade Controls (DDTC), began issuing form letters to certain ITAR license applicants requesting further information regarding the activities of U.S. and non-U.S. third parties involved in licensed export transactions. The letters state that DDTC needs further information to be able to determine whether the third party is required to register as a broker under Part 129 of the ITAR.[46]

C. Democratic Republic of the Congo: Arms Embargo Strengthened

On August 29, 2005, DDTC issued a notice strengthening the arms embargo against the Democratic Republic of Congo (DRC).[47] According to DDTC, this action was taken in

43. *Id.*

44. *Id.*

45. *Id.* Another, perhaps unintended, consequence of the Yakou holding is that if LPR status may be relinquished without formal action by the government or by the LPR, then exporters may now find it more difficult to comply with the ITAR's technical data export provisions, which allow unlicensed technical data exports to U.S. citizens and LPRs. *See* 22 C.F.R. § 120.17(a)(4) (2006) (Export defined to include, inter alia, "disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad"). In such circumstances, U.S. exporters must beware of technical data exports to LPRs, and must not assume that LPR status is permanent until revoked by formal proceeding.

46. The letters demand information—which DDTC presumably will consider in determining whether the third party will be required to register under 22 C.F.R. § 129—regarding whether the third party is involved in certain situations, such as: promotion or marketing of the exporter's defense articles or services; making introductions between non-U.S. persons and the U.S. exporter's personnel; using influence with non-U.S. persons to persuade them to purchase the exporter's defense articles or services; receiving data on the negotiations; participation in negotiations; arranging contracts, purchases, sales, or transfers; involvement in financing of manufacture, export, or import of a defense article or defense service; or involvement in the transportation of the defense article or service. The letter to non-U.S. persons also includes the following additional factors: "[a]ny" facilitation of the manufacture, export, or import of a defense article or defense service; and whether the third party is owned or controlled by an entity in the United States or by a U.S. citizen.

47. Amendment to the International Traffic in Arms Regulations: Section 126.1(i), 70 Fed. Reg. 50,966 (Aug. 29, 2005). The revised rule amended the license denial policy regarding the DRC contained in 22 C.F.R. § 126.1 (2005). Under the new policy, ITAR licenses are denied for exports to the DRC, except as follows:

accordance with U.N. Security Council Resolution (UNSCR) 1596, which was adopted April 18, 2005. UNSCR 1596 imposed an arms embargo on the whole of the DRC, and constituted an expansion of the policy issued under UNSCR 1493. That resolution came into effect on July 28, 2003, and imposed an embargo on the sale of arms, related materials, and defense services in the provinces of North and South Kivu and the Ituri District in the DRC. The expanded U.S. embargo was announced on DDTC's website on May 6, 2005.[48]

D. Indonesia: Waiver of Conditionality

On November 22, 2005, the U.S. State Department announced[49] that it will waive conditionality pertaining to Foreign Military Financing and defense exports to Indonesia, in accordance with section 599F(b) of the FY 2006 Foreign Operations, Export Financing, and Related Programs Appropriations Act.[50] According to a Department of State press release, the decision will allow the United States to resume selected areas of military assistance for Indonesia, and continue the process of military re-engagement with Indonesia.[51]

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non-lethal equipment and training (lethal and non-lethal) to the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), the transitional National Unity Government of Democratic Republic of the Congo and the integrated Congolese national army and police forces, such units operating under the command of the etat-major integre of the Congolese Armed Forces or National Police, and such units in the process of being integrated outside the provinces of North and South Kivu and the Ituri district; and non-lethal equipment for humanitarian or protective use, and related assistance and training, as notified in advance to the UN.

48. *See* http://pmdtc.org/expanded_embargo.htm.

49. *See* Press Release, U.S. Dep't of State, Sean McCormack, Indonesia—National Security Waiver/Foreign Military Financing (Nov. 22, 2005), *available at* http://www.state.gov/r/pa/prs/ps/2005/57272.htm. As of the time this article went to press, no Federal Register notice had been issued concerning this announcement.

50. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006, Pub. L. No. 109-102 (HR 3057), 119 Stat. 2172 (2005). Section 599F(a) of the Act provides that funds appropriated under the Foreign Military Financing Program may be made available for assistance for Indonesia, and licenses may be issued for the export of lethal defense articles for the Indonesian Armed Forces, only if the Secretary of State certifies to the appropriate congressional committees that:

(1) the Indonesian Government is prosecuting and punishing, in a manner proportional to the crime, members of the Armed Forces who have been credibly alleged to have committed gross violations of human rights;
(2) at the direction of the President of Indonesia, the Armed Forces are cooperating with civilian judicial authorities and with international efforts to resolve cases of gross violations of human rights in East Timor and elsewhere; and
(3) at the direction of the President of Indonesia, the Government of Indonesia is implementing reforms to improve civilian control of the military.

Section 599F(b) provides that the "Secretary of State may waive subsection (a) if the Secretary determines and reports to the Committees on Appropriations that to do so is in the national security interests of the United States."

51. *See* Press Release, U.S. Dep't of State, *supra* note 49. Previously, the United States had allowed non-lethal FMS sales to Indonesia, and in 2004 the two countries completed a Trade and Investment Framework Agreement. *See* Press Release, Office of the U.S. Trade Representative, United States and Indonesia Meet Under Trade and Investment Framework Agreement (June 22, 2005) *available at* http://www.ustr.gov/Document_Library/Press_Releases/2005/June/United_States_Indonesia_Meet_Under_Trade_Investment_Framework_Agreement.html.

E. ITAR Record Keeping Amendments

On August 29, 2005, DDTC issued a notice that (among other actions) amended important ITAR recordkeeping requirements.[52] Specifically, section 122.3 of the Code of Federal Regulations, chapter 22, was amended to require a registrant renewing its registration to submit the renewal request at least thirty days prior to the expiration date. Additionally, section 122.5 was amended to require registrants that maintain records in an electronic format to keep the information in a format that is capable of being reproduced legibly on paper. If alterations are made, registrants must keep track of all changes, who made them, and when they were made. Section 126.10, regarding the disclosure of information, was amended to provide that registration documents may not generally be disclosed to the public under section 38(e) of the Arms Export Control Act.

F. DSP-5 Application Documentary Requirements

On September 1, 2005, DDTC posted a notice on its website[53] regarding export license application requirements for the permanent export of defense articles. The notice states that "[c]onsistent with our longstanding practice, in addition to requiring a purchase order, letter of intent, or other documentation, DDTC's Office of Defense Trade Controls Licensing (DTCL) may require a signed contract be submitted with any application for the permanent export of defense articles." According to DDTC, the purpose of this requirement is to confirm the legitimacy of the transaction, including the roles and responsibilities of all the parties. DTCL stated that it 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. In these instances, the applications have been returned without action, advising the applicants of the ITAR requirements.

G. Canadian Exemption / U.K. Amendments

On July 12, 2005, DDTC amended the ITAR to clarify the range of defense articles, related technical data, and defense services that will continue to require a license issued by DDTC for export to, or temporary import from, Canada, notwithstanding the Canadian Exemption contained in section 126.5, volume 22, of The Code of Federal Regulations. The same notice also created a new section of the ITAR to implement section 1225 of Public Law 108-375 regarding *Bilateral Exchanges and Trade in Defense Articles and Defense Services Between the United States and the United Kingdom and Australia.* This section, to be designated 126.15, calls for the expeditious processing of license applications for the export of defense articles and services to Australia or the United Kingdom, consistent with national security and the requirements of the Arms Export Control Act.[54]

52. Amendments to the International Traffic in Arms Regulations: Port Directors Definition, NATO Definition, Major Non-NATO Ally Definition, Recordkeeping Requirements, Supporting Documentation for Electronic License Applications, Disclosure of Registration Documents, 70 Fed. Reg. 50,958 (Aug. 29, 2005).

53. *See* U.S. Dep't of State, Directorate of Defense Trade Controls, Notice on License Support Documentation, *available at* http://pmdtc.org/license_support.htm (last updated Sept. 10, 2005).

54. Amendments to the International Traffic in Arms Regulations: Part 126, 70 Fed. Reg. 39,919 (July 12, 2005). Specific procedures for expedited processing had not been established as of the time this article went to press. *See* Arms Export Controls Act, 22 U.S.C. 2751 (2005).

IV. Economic Sanctions

With a background that includes service as a federal prosecutor and several senior legal positions in the Department of the Treasury and the Department of Justice, Robert Werner assumed his responsibilities as the new Director of the Office of Foreign Assets Control of the U.S. Department of the Treasury (OFAC) on October 1, 2004, and promptly vowed to improve public guidance on the regulations that OFAC administers.[55] In the first full year of his leadership, OFAC appears to have followed that pledge. With less substantive changes than in most recent years, new developments in U.S. economic sanctions programs in 2005 focused on retrenching and clarifying pre-existing policies and executive orders through the issuance and amendment of the regulations administered by OFAC.

A. Burma

On August 16, 2005, OFAC amended and reissued the Burmese Sanctions Regulations in their entirety.[56] The revised regulations were necessary to fully implement Executive Order 13310 and the Burmese Freedom and Democracy Act of 2003, which (1) prohibit the importation of products of Burma into the United States, (2) block all property and interests in property of specified persons associated with Burma's ruling military junta, and (3) ban the exportation or reexportation to Burma of financial services from the United States or by U.S. persons.[57] Previously, the regulations only reflected the implementation of Executive Order 13047, which primarily prohibited U.S. persons from participating in, or facilitating, any new investment in Burma.[58] While the new regulations may have slightly modified the definition of new investment and given more prominence to the prohibition on facilitation by U.S. persons, they nevertheless preserve the unique exceptions previously solely associated with the Burmese sanctions program under the Executive Orders, such as those permitting U.S. persons to perform certain subcontracted services.[59]

B. Cuba

On February 25, 2005, OFAC amended the Cuban Assets Control Regulations to clarify its policy of issuing specific licenses to permit certain payments in connection with authorized sales of agricultural exports to Cuba.[60] The revision to the regulations defines payment of cash in advance to mean payments "received by the seller or the seller's agent prior to shipment of the goods from the U.S. port at which they are loaded."[61] This revision has the effect of requiring payment for licensed shipments to be made prior to the embar-

55. Robert Werner, Speech to the American Bar Association, International Law Section, Committee on Export Controls and Economic Sanctions (Dec. 20, 2004, Washington, D.C.).

56. Burmese Sanctions Regulations, 70 Fed. Reg. 48,240 (Aug. 16, 2005) (to be codified at 31 C.F.R. pt. 537); Amendments to the International Traffic in Arms Regulations: Port Directors Definition, NATO Definition, Major Non-Ally Definition, Recordkeeping Requirements, Supporting Documentation for Electronic License Applications, Disclosure of Regulation Documents, 70 Fed. Reg. 50,958 (Aug. 29, 2005).

57. Exec. Order No. 13,310, 68 Fed. Reg. 44,853 (July 30, 2003); 50 U.S.C.A. § 1701 (2006).

58. Exec. Order No. 13,047, 62 Fed. Reg. 28,301 (May 22, 1997).

59. *See* Burmese Sanctions Regulations, *supra* note 56.

60. Cuban Assets Control Regulations, 70 Fed. Reg. 9,225 (Feb. 25, 2005) (to be codified at 31 C.F.R. pt. 515).

61. *Id.*

kation of the shipment. Although OFAC asserts that the amendment reflects a common understanding of "cash in advance" in international trade finance terminology,[62] this revision appears to have had the effect of creating a more complicated export process for properly licensed shipments to Cuba.[63]

C. Iran

On March 28, 2005, OFAC amended the Iranian Transactions Regulations to clarify that U.S. brokers and dealers may facilitate certain funds transfers to and from Iran and administer Iranian accounts.[64] These revisions authorize certain dollar clearing transactions involving Iran, certain Iranian account maintenance activities (such as administering dividends and stock splits), certain transactions incidental to the closing of Iranian accounts, and certain transactions related to foreign diplomatic missions in Iran or Iranian diplomatic missions in the United States.[65]

D. Publishing activities—Cuba, Iran, and Sudan

On December 17, 2004, OFAC amended the Cuban Assets Control Regulations, the Iranian Transactions Regulations, and the Sudanese Sanctions Regulations to permit, subject to certain exceptions, transactions that directly support the publication and marketing of non-governmental manuscripts, books, journals, and newspapers.[66]

E. Sudan

On June 13, 2005, OFAC amended the Sudanese Sanctions Regulations to clarify that, subject to any specific authorization required from the Department of Commerce, non-U.S. persons could reexport U.S. goods, software, or technologies to Sudan or the Government of Sudan, provided that the U.S. goods, software, or technologies (1) have been incorporated into another item in a third country (not including Sudan or any other country against which the United States imposes an embargo) and constitute 10 percent or less by value of that item, (2) have been substantially transformed outside the United States, or (3) are not subject to export license application requirements under other U.S. regulations.[67]

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62. *Id.*

63. For example, certain agricultural and medical items to Cuba may be licensed for export to Cuba under amendments of the Cuban Assets Control Regulations, made pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000. *See* 31 C.F.R. §515.533 (2005); *see also*, Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. No. 106-387, 114 Stat. 1549 (2005).

64. Iranian Transactions Regulations, 70 Fed. Reg. 15,583 (Mar. 29, 2005) (to be codified at 31 C.F.R. pt. 560).

65. *Id.*

66. Cuban Assets Control Regulations, 69 Fed. Reg. 75,468 (Dec. 17, 2004) (to be codified at 31 C.F.R. pt. 515); Iranian Transactions Regulations, 69 Fed. Reg. 75,468 (Dec. 17, 2004) (to be codified at 31 C.F.R. pt. 560); Sudanese Sanctions Regulations, 69 Fed. Reg. 75,468 (Dec. 17, 2004) (to be codified at 31 C.F.R. § 538).

67. Reporting, Procedures and Penalties Regulations and Sudanese Sanctions Regulations, 70 Fed. Reg. 34,060 (June 13, 2005) (to be codified at 31 C.F.R. pts. 501, 538); Security Zone; Duluth Harbor, Duluth, Minn., 70 Fed. Reg. 34,064 (June 13, 2005) (to be codified at 33 C.F.R. pt. 165).

In addition, the revisions introduced a new procedure for imposing or settling civil penalties, as well as new guidelines for responding to a pre-penalty notice.[68]

Despite these changes, the revisions specifically preserved provisions involving certain non-commercial transactions. First, U.S. financial institutions may continue to operate certain non-commercial, personal accounts for Sudanese residents, U.S. depository institutions, and U.S.-registered brokers and dealers in securities. In addition, U.S.-registered money transmitters may continue to process certain noncommercial, personal remittances to or from Sudan, or for or on behalf of Sudanese residents.[69] Furthermore, on the same date, OFAC amended its Reporting, Procedures and Penalties Regulations to clarify that U.S. financial institutions are required to block, and not simply reject, unlicensed funds transfers involving the Government of Sudan.[70]

F. Syria

On April 5, 2005, OFAC issued the new Syrian Sanctions Regulations to implement Executive Order 13338 and the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003.[71] These new regulations block, with certain exceptions, all property and interests in property of certain designated persons and prohibit the making of donations, including exports and reexports of donated goods, by, to, or for the benefit of these designated persons.[72] While donations of humanitarian articles still require OFAC approval or otherwise must be authorized by law; the importation and exportation of information or informational materials, certain personal communications, and certain transactions relating to travel may be exempt from these blocking requirements.[73]

G. Additional Blocking Of Zimbabwean Parties

On November 25, 2005, U.S. President George W. Bush issued Executive Order 13391, which identified approximately 150 Zimbabwean individuals and entities whose property is subject to blocking if it is within or comes within the jurisdiction of the United States.[74] This list of blocked parties is intended to supersede the list of Zimbabwean blocked parties

68. Reporting, Procedures and Penalties Regulations and Sudanese Sanctions Regulations, 70 Fed. Reg. 34,060 (June 13, 2005) (to be codified at 31 C.F.R. pts. 501, 538); Security Zone; Duluth Harbor, Duluth, Minn., 70 Fed. Reg. 34,064 (June 13, 2005) (to be codified at 33 C.F.R. pt. 165).

69. Reporting, Procedures and Penalties Regulations and Sudanese Sanctions Regulations, 70 Fed. Reg. 34,060 (June 13, 2005) (to be codified at 31 C.F.R. pts. 501, 538); Security Zone; Duluth Harbor, Duluth, Minn., 70 Fed. Reg. 34,064 (June 13, 2005) (to be codified at 33 C.F.R. pt. 165).

70. Reporting, Procedures and Penalties Regulations and Sudanese Sanctions Regulations, 70 Fed. Reg. 34,060 (June 13, 2005) (to be codified at 31 C.F.R. pts. 501, 538); Security Zone; Duluth Harbor, Duluth, Minn., 70 Fed. Reg. 34,064 (June 13, 2005) (to be codified at 33 C.F.R. pt. 165).

71. Exec. Order No. 13,338, 69 Fed. Reg. 26,751 (May 13, 2004); Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Pub. L. No. 108-175, 117 Stat. 2482 (2003).

72. Syrian Sanctions Regulations, 70 Fed. Reg. 17,201 (Apr. 5, 2001) (to be codified at 31 C.F.R. pt. 542); Threatened Marine and Anadromous Species, 70 Fed. Reg. 17, 211 (Apr. 5, 2001) (to be codified at 50 C.F.R. pt. 223).

73. Syrian Sanctions Regulations, 70 Fed. Reg. 17,201 (Apr. 5, 2001) (to be codified at 31 C.F.R. pt. 542); Threatened Marine and Anadromous Species, 70 Fed. Reg. 17, 211 (Apr. 5, 2001) (to be codified at 50 C.F.R. pt. 223). As of the time this article went to press, only two individuals have been designated for blocking under the Syrian Sanctions Regulations.

74. *See* Exec. Order No. 13391, 70 Fed. Reg. 71,201 (Nov. 22, 2005).

identified in Executive Order 13288 (March 6, 2003), by which the President first announced targeted sanctions on Zimbabwe.[75]

H. Court Cases Involving OFAC Programs

In 2005, the most significant federal court cases involving OFAC programs also generally reaffirmed pre-existing policies and practices and confirmed many widely held legal interpretations that had not yet been solidified in court rulings. Of particular importance, U.S. federal courts held that: (1) a reasonable jury may be able to find the requisite level of knowledge for a criminal violation of the Cuban Assets Control Regulations upon the presentation of favorable evidence related to corporate structure, billing practices, employee performance standards, and the use of code words for Cuba;[76] (2) the Cuban Assets Control Regulations may preclude the transfer of property to Cuban parties involved in U.S. litigation;[77] (3) serving as a human shield constituted an unlawful export of a service to Iraq under the former Iraqi sanctions program, and corresponding OFAC enforcement under those circumstances did not violate First Amendment or due process rights;[78] and (4) the

75. *See* Exec. Order No. 13288, 68 Fed. Reg. 11,457 (Mar. 6, 2003).

76. United States v. Brodie, 403 F.3d 123 (3d Cir. 2005) (Defendant Brodie was found guilty by a federal jury of conspiring to trade with Cuba in violation of the Trading with the Enemy Act (50 U.S.C. App. 1) and the Cuban Assets Control Regulations (CACR), 31 C.F.R. pt. 515. The United States District Court for the Eastern District of Pennsylvania thereafter acquitted the defendant pursuant to Fed. R. Crim. P. 29(b) after it found that there was insufficient evidence of defendant's knowing and willful participation in the conspiracy. United States v. Brodie, 268 F. Supp. 2d 408 (E.D. Pa. 2002). The district court held that the evidence showed that defendant did not know it was unlawful under the CACR for the defendant's British subsidiary entity to trade with Cuba. The Court of Appeals reversed, holding that a reasonable fact finder could have found that the defendant actually knew of, or was willfully blind to, the involvement of the U.S. entity in transactions with Cuba and, thus, fulfilled the knowledge standard under the conspiracy statute, 18 U.S.C. § 371, and under the CACR. The court cited evidence regarding the corporate structure of the defendant's company, its billing practices, certain aspects of its performance review of the employee responsible for sales to Cuba, and the pervasive use of code words for Cuba, as the basis for holding that a reasonable jury might find the defendant had the requisite intent.).

77. Empresa Cubana del Tabaco v. Culbro Corp., 399 F.3d 462 (2d Cir. 2005) (A U.S. company, General Cigar, appealed the judgment of the United States District Court for the Southern District of New York, which had held that Cubatabaco, a Cuban company, owned the U.S. trademark for COHIBA cigars under the famous marks doctrine. Although Cubatabaco never registered or used the COHIBA mark in the United States, the district court held that Cubatabaco's COHIBA mark was sufficiently famous in the United States by the time General Cigar, a U.S. company, began selling COHIBA cigars in the United States, and the mark was entitled to protection. The district court entered judgment for Cubatabaco against General Cigar on Cubatabaco's claim of trademark infringement under section 43(a) of the Lanham Act, cancelled General Cigar's registration for the mark, and enjoined General Cigar from using the mark. The district court dismissed all other claims brought by Cubatabaco. The Court of Appeals reversed, holding that, even if the famous marks doctrine were to be recognized, Cubatabaco is barred by CACR from acquiring property rights in U.S. trademarks via the famous marks doctrine.).

78. Karpova v. Snow, 402 F. Supp. 2d 459 (S.D.N.Y. 2005) (Judith Karpova, who traveled to Iraq in violation of U.S. economic sanctions against Iraq to act as a human shield prior to the U.S. invasion of Iraq, appealed OFAC's penalty against her for violations of the Iraqi Sanctions Regulations. The court, quoting Martin Luther King's *Letter From a Birmingham Jail* ("one who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the consequences") upheld the OFAC penalty and stated that serving as a human shield constituted an unlawful export of a service to Iraq and that the ISR did not violate Karpova's First Amendment or due process rights.).

listing of a party on OFAC's Specially Designated National list, which subjects that party to having its assets blocked, does not necessarily violate that party's due process, equal protection, takings, Fourth Amendment, or First Amendment rights.[79]

79. Islamic American Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34 (D.D.C. 2005) (In response to a challenge to this entity's listing on OFAC's Specially Designated Nationals List and the blocking of its assets, the court held that classified and unclassified evidence in the administrative record supported the blocking of the assets and rejected the entity's claim that asset blocking under IEEPA and relevant executive orders violated the entity's Fourth Amendment rights. The entity's due process, equal protection, takings, and First Amendment free expression claims were also rejected.).