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BUSINESS REGULATION

Export Controls and Economic Sanctions

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I. Introduction

Changes in U.S. export controls and economic sanctions during the year 2003 were largely a reflection of three main forces that shaped U.S. security policy: (1) the war in Iraq; (2) continued efforts to deny financial and logistical support to terrorist groups; and (3) a renewed emphasis on stemming the flow of sensitive products and technologies to proliferators of weapons of mass destruction. These three themes played out not only in new regulations and policies emanating from the three principal agencies that regulate activity in this area—the Departments of Commerce, State, and Treasury—but they were evident in more aggressive patterns of export enforcement activity.

In the sections that follow, we adopt the framework of previous year-end summaries in this journal to trace the highlights of regulatory developments that affected economic sanctions and export controls during 2003. While this brief survey does not offer a compendium of all of the developments in this area over the past year, the summaries below describe noteworthy developments that warrant the attention of practitioners in this field.

II. Trade and Economic Sanctions

A. IRAQ

As the United States and its coalition partners brought major hostilities to a close in Iraq, governments and international organizations strained to adjust the multinational embargo on Iraq to match the realities on the ground. A necessary predicate was achieved when the United Nations Security Council adopted Resolution 1483, which formally lifted all UN sanctions, except those that related to the sale and supply to Iraq of arms and material.¹ Immediately thereafter, the Treasury Department's Office of Foreign Assets Control (OFAC) issued a new General License on May 23, 2003, which substantially—although not completely—lifted the U.S. economic sanctions that had been imposed upon Iraq under

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1. G.A. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003).

the multilateral embargo. Issued as an amendment to the existing Iraqi Sanctions Regulations, the new General License was intended to facilitate reconstruction activities in Iraq although parties were still required to obtain a license from OFAC to export or re-export to Iraq items that were "controlled by the Department of Commerce."² Previously blocked Iraqi assets continued to be frozen, and trade with former members of the Saddam Hussein regime, who were listed on a fifty-five person watch list, remained prohibited. Later, the President issued Executive Order 13315, which blocked the property of the former Iraqi regime, its senior officials, and their family members.³

At the end of 2003, it remained unclear when licensing jurisdiction for exports to Iraq would be transferred from OFAC to the Department of Commerce, as numerous revisions in the Export Administration Regulations (EAR) were required to accommodate the new licensing regime for Iraq.

B. BURMA

On July 28, 2003, the President signed Executive Order 13310 implementing the Burmese Freedom and Democracy Act of 2003, which was enacted on that same date.⁴ The Burmese Sanctions Regulations, in place since the mid-1990s, mainly targeted new investment in that country. The new Executive Order and OFAC General License No. 1 for Burma blocked the assets of the Burmese government and prohibited all financial dealings with specifically identified financial institutions in Burma.⁵ The order also imposed a ban on the importation into the United States "of any article that is a product of Burma."⁶

C. CUBA

As part of the President's Initiative for a New Cuba, OFAC amended the Cuban Assets Control Regulations to limit the use of the regulations' general license for visits of close relatives in Cuba to only those close relatives who qualify as nationals of Cuba, excluding persons who merely engage in OFAC-authorized transactions in Cuba.⁷ The amendments also eliminated people-to-people exchanges from the list of activities that are eligible for a specific license from OFAC.

D. SYRIA

Congress enacted, and on December 12, 2003, the President signed into law, the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003.⁸ Absent a certification

2. 31 C.F.R. § 575.533 (2004).

3. Exec. Order No. 13,315, 68 Fed. Reg. 52,315 (Aug. 28, 2003).

4. Exec. Order No. 13,310, 68 Fed. Reg. 44,853 (July 28, 2003).

5. Burmese Sanctions Regulations, 31 C.F.R. pt. 537 (2004).

6. In an interpretive ruling released on November 5, 2003, OFAC indicated that the Customs Rules of Origin principle of "substantial transformation" in a third country was the criterion to be used in determining whether an item was a "product of Burma."

7. Cuban Assets Control Regulations: Family and Educational Travel-Related Transactions, Remittances of Inherited Funds, Activities of Cuban Nationals in the United States, Support for the Cuban People, Humanitarian Projects, and Technical Amendments, 68 Fed. Reg. 14,141 (Mar. 24, 2003) (to be codified at 31 C.F.R. pt. 515).

8. Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Pub. L. No. 108-175, 117 Stat. 2482.

from the President that Syria has ceased its support of terrorism, ended its occupation of Lebanon, and halted its development of missiles and weapons of mass destruction, the Act requires the President to impose various sanctions on Syria. Among the sanctions mandated by the Act is a prohibition on exports of U.S. Munitions List or Commerce Control List items to Syria. In addition, the President is required to impose at least two additional sanctions on Syria from a list that includes, for example, a ban on investment in Syria and a blocking of Syrian government assets. The White House released a statement indicating that the President would "construe and implement [the Act] in a manner consistent with the President's constitutional authority to conduct the Nation's foreign affairs and as Commander in Chief."⁹ The President did not announce the new Syrian sanctions policy until May 2004.¹⁰

E. OFAC CIVIL PENALTY GUIDELINES AND ENFORCEMENT ACTIVITY

In a move the agency said was intended to achieve greater consistency in penalty cases and to promote transparency in the enforcement process, OFAC published as a proposed rule an updated version of its internal Economic Sanctions Enforcement Guidelines.¹¹ In addition to civil penalties, the guidelines indicated that OFAC would consider license suspensions or revocations for the most serious violations, *e.g.*, those that were willful or that involved false or misleading statements in the application process. OFAC also indicated that it would consider warning letters for less serious violations, such as exports of less than \$500 value or unauthorized financial transactions resulting from clerical error. In addition, OFAC could issue cautionary letters regarding transactions that raised concerns but where OFAC lacked sufficient evidence to conclude that a violation had occurred.

With respect to civil penalties for exports and other transactions that violated any of the OFAC sanctions programs, the guidelines indicated that the proposed penalty amount would generally be equal to the U.S. domestic value of the goods, services, or technology, although that amount could be increased or decreased according to a series of mitigating or aggravating factors set out in the guidelines. A proposed penalty normally would be reduced by fifty percent if voluntarily disclosed to the agency. If the violation were a first offense, a proposed penalty amount could be mitigated by twenty-five percent, absent other aggravating circumstances. Further reductions in a penalty amount might be possible depending upon the presence of other mitigating factors, for example, whether the company had an export compliance program in place, provided other useful enforcement information during the investigation, or lacked experience in exporting activities.

In a departure from OFAC's past reticence to release public information regarding its enforcement activities, the agency published a final rule in 2003 indicating that it would publish on a weekly (later changed to monthly) basis information about civil penalties imposed and informal settlements.¹² Beginning in April 2003, OFAC began to publish on its

9. The White House, *Statement by the President of H.R. 1828* (Dec. 12, 2003), available at <http://www.whitehouse.gov/news/releases/2003/12/20031213-3.html>.

10. Exec. Order No. 13,338, 69 Fed. Reg. 26,751 (May 13, 2004) (which will be discussed in the 2004 Year in Review).

11. Publication of Economic Sanctions Enforcement Guidelines, 68 Fed. Reg. 4,422 (proposed Jan. 29, 2003) (to be codified at 31 C.F.R. pts. 501 & 515).

12. Rules Governing Availability of Information, 68 Fed. Reg. 6,820 (Feb. 11, 2003) (to be codified at 31 C.F.R. pt. 501).

website information regarding civil penalties that states the name of the company, the sanctions program involved, the nature of the violation, and the amount of the penalty imposed, but not the amount of the proposed penalty.¹³

The release of this civil penalty information made clear that OFAC has been aggressive in enforcing its sanctions regulations. More than 150 companies received civil fines last year for violations of OFAC's sanctions programs. The largest penalties included a \$250,000 fine on Zim American Israeli Shipping Co. for violations of the Cuba embargo; a \$225,000 penalty on IGI, Inc. for illegal exports to Iran; and a \$158,000 fine on Bank of America for unauthorized financial transactions involving Iran.

F. NEW OFAC INTERPRETIVE RULINGS

In a further effort to pull back the curtain that for years has shielded the agency's decision-making processes, OFAC began to make a series of interpretive rulings on key aspects of the sanctions regulations available on its website.¹⁴ In the form of redacted responses to requests for Advisory Opinions on specific transactions, OFAC published rulings on issues ranging from the application of the *de minimis* rule in the Iranian Transaction Regulations (in interpreting the meaning of "substantially transformed or incorporated" into a foreign-made product under 31 C.F.R. 560.511, OFAC applies a different, more stringent standard than the Customs rule),¹⁵ to participation by U.S. persons in a joint venture project that included a Libyan ownership interest (the percentage of Libyan ownership interest was deemed insufficient to meet the "owned or controlled" criteria of 31 C.F.R. 550.304).¹⁶

OFAC offered its most detailed interpretive guidance, however, in a series of letter rulings on the scope of the "informational materials" exemption in the Iran (and other) sanctions programs.¹⁷ The agency determined, for example, that providing a person in Iran access to an electronic database of otherwise exempt materials was permissible provided that the electronic "search function . . . does no more than search and sort" the materials in the database.¹⁸ In a ruling on whether U.S. publishers could accept manuscripts from persons in Iran, OFAC concluded that the "editing of manuscripts submitted by persons in Iran, including activities such as the reordering of paragraphs or sentences, correction of syntax, grammar, and replacement of inappropriate words by U.S. persons, prior to publication, [is prohibited because it] may result in a substantively altered or enhanced product . . ."¹⁹

III. Export Controls

A. CONTINUATION OF THE EAA UNDER IEEPA AND DIMMED PROSPECTS FOR NEW LEGISLATION

In 2003, Congress once again failed to renew the Export Administration Act of 1979, which expired in 1994, or to create a new statutory basis for the system of export controls

13. OFAC's website, at <http://www.treas.gov/offices/eotffc/ofac/index.html> (last visited June 1, 2004).

14. Rules Governing Availability of Information, 68 Fed. Reg. 6,820 (Feb. 11, 2003) (to be codified at 31 C.F.R. pt. 501).

15. OFAC Rul. 030331-FACRL-IA-02 (Mar. 31, 2003).

16. OFAC Rul. 030428-FACRL-LI-01 (Apr. 28, 2003).

17. 31 C.F.R. § 560.210(c) (2004).

18. OFAC Rul. 030203-FACRL-IA-01 (Feb. 3, 2003).

19. OFAC Rul. 031002-FACRL-IA-11 (Sept. 30, 2003).

administered by the Department of Commerce. Thus, exercising his authority under the International Emergency Economic Powers Act, the President again continued the state emergency he had declared in 2001 under Executive Order 13222.²⁰

In the previous year, the White House had supported a new Export Administration Act (EAA) co-sponsored by Senator Enzi (R-Wyo.), and there appeared to be at least modest prospects that new statutory authority for export controls might be achieved. That effort faltered in 2003, however, when key members of the Senate made clear that they would block the Enzi-sponsored bill (S.149) if the proposed legislation did not strengthen national security controls on exports and give the Department of Defense a larger voice in the licensing process.²¹ As prospects for new legislation dimmed, the Commerce Department appeared less willing to invest political capital in the effort and, instead, began to place greater emphasis on various administrative means of strengthening the existing export-control regime. Addressing an agency advisory committee, Kenneth Juster, Undersecretary of Commerce for the Export Administration, said:

[A]s we look at legislative action in this area, we also want to do what we can internally on the administrative side. That is why we are undertaking such initiatives as our penalty guidelines and why we are going to look at the whole area carefully of knowledge controls and deemed exports.²²

B. NEW CONTROLS ON MICROPROCESSORS

The Commerce Department's Bureau of Industry and Security (BIS) amended the Export Administration Regulations to implement revisions to national security controls for general purpose microprocessors agreed to at the February 2002 meeting of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (Wassenaar Arrangement).²³ By moving most general purpose microprocessors to a less restrictive category on the Commerce Control List, the rule removed license requirements for exports and re-exports of such microprocessors to most destinations in order to conform with changes to the List of Dual-Use Goods and Technologies agreed to by members of the Wassenaar Arrangement. License requirements remained, however, for exports and re-exports to designated terrorist-supporting countries.

Perhaps the most interesting feature of this new rule, however, was the establishment of a new license requirement for the export or re-export of general purpose microprocessors if, at the time of the export or re-export, the exporter or re-exporter knows, has reason to know, or is informed by BIS that the item will be or is intended to be used for a "military end-use" in a country that is of concern for national security reasons or by a "military end-user" in such a country.²⁴ License applications to export or re-export general purpose

20. Notice, Continuation of Emergency Regarding Export Control Regulations, 68 Fed. Reg. 47,833 (Aug. 7, 2003).

21. *President Bush Keeps IEEPA Controls in Place With No EAA in Sight*, EXP. PRAC. 17 (Sept. 2003).

22. *Without EAA, BIS Is Taking Administrative Approach to Reforming Controls*, EXP. PRAC. 19 (June 2003).

23. Revision of Export Controls for General Purpose Microprocessors, 68 Fed. Reg. 1796 (Jan. 14, 2003) (to be codified at 15 C.F.R. pts. 744 & 774).

24. See 15 C.F.R. § 744.17. The new rule defines "military end-user" to include the national armed services, as well as the National Guard and national police, government intelligence or reconnaissance organizations, or any person or entity whose actions or functions are intended to support military end-users.

microprocessors subject to this new license requirement are to be reviewed under a presumption of denial.

C. FURTHER RESTRICTIONS ON EXPORTS TO SDGTs

In conjunction with OFAC's publication of new terrorism-sanctions regulations, BIS also issued new regulations imposing a license requirement on exports and re-exports of items subject to the EAR by any U.S. or non-U.S. person to parties designated as "Specially Designated Global Terrorists" (SDGTs) pursuant to Executive Order 13224 of September 23, 2001.²⁵ The interim final regulations broadened existing BIS export restrictions by requiring a license not only for exports, but also for re-exports to "Specially Designated Terrorists" (SDTs) or "Foreign Terrorist Organizations" (FTOs). The BIS rule states that a policy of denial will apply to license applications for exports to such designated parties.

D. CLARIFICATION OF THE ENCRYPTION EXPORT REGULATIONS

In a rule that BIS described as little more than "housekeeping," the Export Administration Regulations were amended to clarify when encryption commodities and software may be given *de minimis* treatment under the regulations, and to make certain short-range wireless encryption devices, which are not eligible for mass market or retail treatment under the regulations, eligible for an exception to the regulation's encryption licensing requirements. The rule also provided further guidance on when exporters are required to submit encryption review requests to BIS. Further, the amendment substantially eased controls on personalized "smart cards" with encryption, expanded the use of a license exception for temporary exports of encryption items, and clarified that specially designed medical equipment and software are not controlled as encryption or "information security" items under the Export Administration Regulations.²⁶

E. IMPLEMENTATION OF THE WASSENAAR 2002 CHANGES

To implement revisions to the Wassenaar List that were agreed upon at the February 2002 meeting of Wassenaar member states (and finalized in May 2002), BIS published a final rule in March 2003 that effected a series of changes to the Commerce Control List (specifically, certain entries controlled for national security reasons in Categories 2, 3, 4, 5 (Parts I and II), 6, 7, 8, and 9).²⁷ The changes agreed to by the Wassenaar arrangement also required certain other tracking revisions to be made to license exception GOV, and the Export Administration Regulation reporting requirements, definitions, and General Technology and Software Notes.

These amendments also included a savings provision that permitted items that had previously been designated as eligible for shipment with "no license required" to continue to

25. Imposition and Expansion of Controls on Designated Terrorists, 68 Fed. Reg. 34,192 (June 6, 2003) (to be codified at 15 C.F.R. pts. 744 & 772). For the related Treasury Department regulations, *see also* Global Terrorism Sanctions Regulations, 68 Fed. Reg. 34,196 (June 6, 2003) (to be codified at 31 C.F.R. pt. 594).

26. Export Administration Regulations: Encryption Clarifications and Revisions, 68 Fed. Reg. 35,783 (June 17, 2003) (to be codified at 15 C.F.R. pts. 734, 740, 742, 748, 770, & 774).

27. Implementation of the 2002 Wassenaar Arrangement List of Dual-Use Items, 68 Fed. Reg. 10,586 (Mar. 5, 2003) (to be codified at 15 C.F.R. pts. 740, 743, 772, & 774).

be exported or re-exported without a license requirement within thirty days of the date the new regulations were published.

F. CHANGES RESULTING FROM THE AUSTRALIA GROUP CONTROLS ON CHEMICALS

Other changes to the Export Administration Regulations included revisions to implement the understandings reached at the June 2002 plenary meeting of the Australia Group (AG), a multilateral export control regime dedicated to controlling the proliferation of chemical and biological weapons.²⁸ These AG-related changes to the EAR included: (1) lowering the threshold for licensing requirements on fermenters from one-hundred liters to twenty liters; (2) adding eight new toxins to the list of AG-controlled pathogens and toxins requiring an export license; and (3) amending the AG-based licensing policy provisions of the export regulations to conform to AG guidelines for transfers of sensitive chemical or biological items. Under these guidelines, among the criteria now used by BIS to evaluate licenses for exports of chemical and biological items are the reliability of the parties, the risk of diversion, and the applicability of other multilateral controls.

G. REVIEW OF DEFENSE TRADE CONTROLS UNDER NSPD-19

A comprehensive assessment of the effectiveness of U.S. defense trade policies, initiated by the Bush Administration under NSPD-19 in late 2002, continued throughout the year amid continuing discussion and debate within the interagency arena. The review's objectives included, among other things, evaluating policies intended to maintain a viable U.S. defense industrial base; facilitating fundamental research and exploitation of commercial developments; realigning defense and industrial links with key U.S. allies; improving the military effectiveness of our alliances and coalitions; and increasing the number of allies and friends who can effectively operate with U.S. military forces.

While Administration officials would say little about specific policies that were being considered under the NSPD-19 review, they were less reticent about discussing on-going improvements in the defense trade licensing process that were being evaluated—or in some cases implemented—under the mandate of NSDP-19.²⁹ As part of these process improvements, the State Department's Directorate of Defense Trade Controls (DDTC) was re-organized and its personnel resources were substantially increased. Among other initiatives, the interagency review was said to be considering ways to expedite the adjudication of Commodity Jurisdiction cases, as well as procedures that might reduce the number of licensing cases referred outside of DDTC for interagency review.

Even as 2003 ended, the NSPD-19 review of defense trade policies and processes continued, despite its May 2003 scheduled completion date. The delay in reaching policy decisions reflected the difficulties inherent in achieving consensus within the interagency arena (and with the Congress) on defense trade policy and export controls.

28. Implementation of the Understandings Reached at the June 2002 Australia Group (AG) Plenary Meeting, 68 Fed. Reg. 34,526 (June 10, 2003) (to be codified at 15 C.F.R. pts. 742, 745, & 774).

29. See Lincoln P. Bloomfield, Jr., Status of U.S. Interagency Review of U.S. Export Licensing and Technology Transfer Policy, Remarks at the Conference on "Transatlantic Defense Industrial Cooperation: Challenges and Prospects" (July 18, 2003), at www.state.gov/t/pm/rls/rm/22537.htm.

H. U.S. MUNITIONS LIST REVIEW

As part of the NSPD-19 review process, the National Security Council continued to manage an interagency review of the U.S. Munitions List. During 2003, reviews of Categories VII (Tanks and Other Military Vehicles), IX (Training Equipment), and XIII (Auxiliary Equipment) were completed. Other categories still under review included Categories IV (Missiles, Bombs, Rockets), VI (Naval Vessels), VIII (Aircraft), X (Protective Equipment), XI (Electronics), XII (Optics and Guidance), and XV (Space). While the completed reviews did result in some movement of items between the Departments of State and Commerce; in general, the changes in agency licensing jurisdiction failed to yield the degree of relaxation in controls on certain items that some had anticipated.

I. CUSTOMS PROMULGATES ADVANCE-NOTICE REQUIREMENTS FOR EXPORTS

Section 343 of the Trade Act of 2002, part of the legislative legacy of 9-11, requires advance notification to the Bureau of Customs and Border Protection of export transaction information prior to the time of export. Customs issued a final rule on December 5, 2003, adding section 192.14 to the Customs Regulations, requiring advance presentation in most cases.³⁰ For exports, air shipments generally require notice two hours prior to the aircraft's scheduled departure from the United States; for truck shipments, the advance notice requirement is one hour prior to the arrival of the truck at the border; for vessels, twenty-four hours prior to departure; and for rail shipments, two hours prior to the arrival of the train at the border. Customs preserved some options for post-export reporting, and tied compliance to the completion and implementation by Commerce (and Census) of the AES, or Automated Export System. This advance electronic notice requirement for outbound shipments ushers in a new era for exporters in which the filing of Shippers Export Declarations will become a thing of the past.

J. BIS ISSUES NEW PENALTY GUIDANCE

In a welcome and important development, and following on the heels of OFAC's newly released penalty guidance, BIS also opened its enforcement process to scrutiny and public comment in 2003. Previously, practitioners had only the Export Administration Regulations' limited guidance and anecdotal information, gleaned from monitoring of routine and special enforcement actions, to guide them through that agency's enforcement process. In a Proposed Rule on Penalty Guidance in the Settlement of Administrative Enforcement Cases, BIS set out a number of enforcement processes for the first time, including the process by which the agency responds to violations, what charges it would consider bringing, and when it would refer cases for criminal prosecution.³¹

Among the most valuable aspects of the proposed rule was the listing of factors that BIS would employ in determining what sanctions are appropriate in a settlement, which is by far the most common means of resolving export enforcement cases. BIS's proposed penalty

30. Required Advance Electronic Presentation of Cargo Information, 68 Fed. Reg. 68,140 (Dec. 5, 2003) (to be codified at 19 C.F.R. pts. 4, 103, 113, 122-23, 178, & 192).

31. Penalty Guidance in the Settlement of Administrative Enforcement Cases, 68 Fed. Reg. 54,402 (Sept. 17, 2003) (to be codified at 15 C.F.R. pts. 764 & 766).

guidance set out a series of six general factors that it would consider in deciding what to charge and how to respond to alleged export violations, including: (1) the degree of willfulness; (2) the destination involved; (3) any related violations; (4) multiple unrelated violations; (5) the timing of a settlement; and (6) other related criminal or civil violations. In addition, BIS proposed a series of mitigating and aggravating factors that would influence any penalty decision. The mitigating factors were: (1) the filing of a voluntary self-disclosure; and (2) the presence of an effective export compliance program within the company, factors BIS said would receive great weight in its consideration of any case. The aggravating factors BIS said it would consider included any effort by a party to deliberately hide or conceal a violation, or conduct by the party that demonstrated a serious disregard for export compliance responsibilities. While the Proposed Guidelines did generate significant comment from the public, they also marked a step toward greater transparency in BIS's enforcement processes.

K. SIGNIFICANT EXPORT ENFORCEMENT CASES

Patterns of export enforcement throughout 2003 clearly reflected a trend toward more aggressive enforcement by the agencies. Enforcement patterns at the Commerce Department displayed an increased emphasis on "strategic targeting" of significant violations. Notable cases were brought and settled or decided involving successor liability, freight forwarder liability, and transshipment.³² Enforcement of export license conditions also was a top priority. BIS enforcement cases increased during the year both in numbers and in the penalties imposed. During the fiscal year that ended on September 30, \$3.5 million in criminal penalties had been imposed for various export violations (compared to \$93,000 in the previous fiscal year). In addition, the agency obtained twenty-one criminal convictions and imposed roughly \$4 million in civil fines as part of nearly thirty-four administrative settlements (compared to twenty-one settlements in 2002). Julie Myers, Assistant Secretary of Commerce for Export Enforcement, commented that, "Export enforcement had a great year!"³³

1. *Successor liability.* One of the most significant enforcement cases during 2003 emerged from BIS's pursuit of Sigma-Aldrich for export violations committed by a company it had acquired and for violations that occurred following the acquisition. The \$1.76 million civil fine is one of the largest ever from BIS and easily the largest in the biological toxin area. But the Sigma-Aldrich case is noteworthy more for the Administrative Law Judge's (ALJ) finding that Sigma-Aldrich was liable for the conduct of the acquired company. The ALJ relied upon the doctrine of "substantial continuity" between the old business and the operations of Sigma-Aldrich to conclude that Sigma-Aldrich, as the successor entity, could be liable even if the predecessor company was still in existence, and even if BIS declined to pursue the predecessor. The Sigma-Aldrich case came at a time of increased awareness of the need for due diligence and the effective structuring of acquisitions.
2. *Forwarder liability.* DSV Samson Transport, a freight forwarding company, was sentenced to a \$250,000 criminal fine and five years corporate probation for thirty illegal exports

32. These and other cases and materials are available on the BIS web site, at www.bxa.doc.gov/Enforcement/CaseSummaries/default.htm (last visited May 31, 2004).

33. *New OEE Chief Myers Aims at Enforcement of License Conditions*, EXPORT PRAC. 10 (Nov. 2003).

to India. In addition, the company paid a \$399,000 civil penalty to settle administrative charges related to the exports. The company was charged, among other things, with forwarding items to organizations on the BIS Entities List despite knowing that an export license was required. The DSV Samson case was an important demonstration of BIS's willingness to impose liability not only on exporters but on freight forwarders as well.

3. *Transshipment*. During 2003 BIS also issued a statement of "best practices" for companies involved in transactions through "hubs" or known transshipment points.³⁴ Part of BIS's Transshipment Export Control Initiative (TECI), the best practices reflect BIS's recommended procedures aimed at combating diversion. The statement of best practices came too late, however, for one company, which became the target of a BIS enforcement action aimed at transshipments and diversions. Bio Check, a California exporter of health and medical diagnostic kits, agreed to pay a \$22,500 civil penalty to settle allegations that it had made fifteen shipments of items to Iran through Italy and the UAE, a reputed transshipment "hub."

DDTC also appeared to expand the range of its enforcement action to include smaller exporters. While the enforcement cases from DDTC were fewer in number, that agency also imposed significant fines and penalties. Edo Corporation, for example, which had purchased the assets of Condor Systems, Inc., received a civil penalty of \$2.5 million plus remedial compliance measures.³⁵ Of that amount, however, \$750,000 was suspended on the condition that Edo use the funds over a three-year period to strengthen its internal compliance procedures (reflecting, perhaps, a measure of the costs DDTC associates with compliance under the ITAR). Other DDTC enforcement cases also reflected this emphasis on compliance, including Multigen-Paradigm, Inc., which received a \$2 million civil penalty for selling defense articles and services to China in violation of the arms embargo on the country. In addition, while not a "small" company, Agilent was fined \$225,000 for exports to Singapore and Israel. Continuing another theme of 2003, Agilent's violations arose from the activities of a company it acquired, SAFCO Technologies, in 2000.

L. SIGNIFICANT JUDICIAL CASES AFFECTING EXPORT CONTROLS

Perhaps the most significant judicial ruling in an export enforcement case turned on the meaning of "specially designed" in the context of the export regulations. In a case involving an unlicensed export to India of a control panel for a hot isostatic press, a federal district court granted the defendants' motion for judgment notwithstanding the verdict.³⁶ Whether the control panel required a license depended on whether it was a component "specially designed" for a hot isostatic press.

34. Best Practices for Exporters/Re-Exporters and Trade Facilitation/Freight Forwarding Companies Regarding the Transit, Transshipment, and Reexport of Dual-Use Items, 68 Fed. Reg. 26,567 (May 16, 2003). Following public comment, BIS revised the Best Practices and published the amended version on Nov. 24, 2003, available at http://www.bxa.doc.gov/ComplianceAndEnforcement/TECI_BestPractices_Nov03.htm#Amended.

35. Earlier, on February 10, 2003, Condor Systems pleaded guilty to a two-count information charging the making of false statements in connection with ITAR license requests. It received a \$1 million fine. See *United States v. Condor Systems, Inc.*, Cr. No. 03-20002, Information (Jan. 8, 2003).

36. *United States v. Lachman*, 278 F. Supp. 2d 68 (D. Mass. 2003), *appeal docketed*, Nos. 03-2274 and 03-2275 (1st Cir.).

At trial, the judge accepted the government's argument and instructed the jury that it could find the control panel was "specially designed" even if the control panel had other purposes, so long as the jury found that the control panel was designed to control a hot isostatic press and that it was capable of doing so.³⁷ After a guilty verdict was returned, the defendants sought to convince the court that the agency's alleged interpretation of "specially designed" to which the court had deferred was not as firmly established as the government's evidence had led the court to believe.

Eight years of discovery and hearings followed that exposed a range of interpretations that Commerce and other government agencies had for the phrase "specially designed" in various export control settings. Ultimately, the court concluded Commerce had not in fact adopted a settled definition for "specially designed"—or at least not one discernable from the regulations by a reasonable person involved in exporting capital goods.³⁸ Accordingly, while emphasizing the defendants' reprehensible conduct in facilitating nuclear weaponry in South Asia, the court ultimately concluded that the void-for-vagueness doctrine barred prosecution. The United States has appealed.

Another significant case related to the confidentiality of data provided by exporters, *Came* from a divided panel of the U.S. Court of Appeals for the D.C. Circuit. Here, the Court upheld a lower court's ruling that Exemption 3 of the Freedom of Information Act (FOIA), which applies to records protected by a statutory exemption, permits the Commerce Department to withhold from public disclosure information exporters submitted with license applications, even during periods (as now) when the Export Administration Act (EAA) has lapsed.³⁹ The case arose when Commerce denied a FOIA request from the Wisconsin Project for detailed information on applications for export licenses from Commerce involving exports to China, Hong Kong, India, Israel, Pakistan, and Russia over a four-year period. The Appellate Court ruled that Commerce has sufficient authority under the International Emergency Economic Powers Act to protect the confidentiality of information submitted by export license applicants. While this conclusion perhaps reflects congressional intent, public policy, and other homeland security concerns, the dissent branded as "Alice in Wonderland" logic the finding that a statutory exemption exists despite the EAA's expiration. In welcoming the decision, however, Commerce officials noted that public disclosure of export information could assist proliferating countries of terrorists in the development of weapons of mass destruction, as well as harm the competitiveness of U.S. businesses.

37. *Id.* at 76.

38. As noted by the court, in 1997, Commerce sought comments on establishing a definition of "specially designed" but to date has not established a definition for the phrase. Request for Comments on the Definition of "Specially Designed," 62 Fed. Reg. 56,138 (Oct. 29, 1997) (to be codified at 15 C.F.R. ch. VII); *Lachman*, 278 F. Supp. 2d. at 91, n.40. The phrase is used in some 300 entries on the Commodity Control List.

39. *Wis. Project on Nuclear Arms Control v. Dep't of Commerce*, 317 F.3d 275 (D.C. Cir. 2003).

