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BIS Fires Back in FedEx Suit Against Export Regulations

The Bureau of Industry and Security (BIS) fought back Sept. 10 against claims that delivery services do not need to comply with the agency's Export Administration Regulations (EAR). Specifically, BIS argued that FedEx's claims "fall well short of what is required to get past the pleading stage or invoke this Court's jurisdiction."

While the delivery service did not name Huawei in its complaint, FedEx in June sued Commerce and BIS in D.C. U.S. District Court to enjoin the agency from enforcing the EAR (see **WTTL**, July 1, page 3). FedEx claims the regulations, without exemptions for common carriers, impose "such a substantial burden that it deprives FedEx of substantive due process under the Fifth Amendment."

"At the outset, FedEx's substantive due process claim does not involve a fundamental right," the agency said in its motion to dismiss. The regulations "are rationally related to the Government's legitimate national security and foreign policy interests, and the same is true for applying the EAR to entities like FedEx," it added. "Requiring FedEx and similar companies to comply with the EAR incentivizes such companies to monitor their shipments, thus making it less likely that violations of the EAR will occur. FedEx has failed to state a colorable claim under the Fifth Amendment, and its substantive due process claim should be dismissed," BIS said.

"FedEx's complaint is a policy preference in search of a legal claim. The company believes that it should be exempt from the EAR based on the apparent premise that Congress should have shielded it from certain potential liabilities, as Congress allegedly has done with regard to internet services providers under the telecommunications laws," it added.

White House Delays China Tariff Increase

First there was the telegram, then the daily paper, then the nightly network broadcast, or perhaps the regular White House press briefing, where citizens and trading partners

heard the latest news. With this administration, trade observers and other governments need to follow Twitter. The president announced Sept. 11 on the social media platform he was delaying the increase on tariffs on \$250 billion of Chinese goods for two weeks “as a gesture of good will.”

After some ups and downs in trade talks, the two sides Sept. 5 agreed to hold another round of high-level economic and trade talks in Washington in early October (see **WTTL**, Sept. 9, page 1). The day before, China requested World Trade Organization (WTO) dispute consultations with the U.S. over previous tariffs.

The third tranche of tariffs, which were supposed to jump from 25% to 30% Oct. 1, will now go into effect Oct. 15. The president made the decision “at the request of the Vice Premier of China, Liu He, and due to the fact that the People’s Republic of China will be celebrating their 70th Anniversary,” he tweeted. The next day he added: “It is expected that China will be buying large amounts of our agricultural products!”

Chinese state media Sept. 13 reported that Beijing will exclude some agricultural products, such as soybeans and pork, from additional tariffs on U.S. goods in response to the U.S. goodwill gesture. This is in addition to an exclusion list of 16 items the Chinese government previously announced.

“If media reports are accurate, this is a most welcome development. The Chinese have placed punitive tariffs of 60% on most U.S. pork products, bringing the effective tariff rate on most U.S. pork to 72%,” National Pork Producers Council (NPPC) President David Herring said in a statement.

“U.S. pork exports could single handedly make a huge dent in the trade imbalance with China. We are hopeful that this apparent gesture of goodwill by China leads not only to more sales of U.S. pork, but that it contributes to a resolution of U.S.-China trade restrictions,” he added. China is the world’s largest producer and consumer of pork.

Congress Urges Review of Hong Kong Export Controls

Amid months of protests in Hong Kong, a bipartisan group of 10 senators Sept. 10 requested State and Commerce assess the adequacy of the U.S. export regime in controlling shipment of items to the territory. At the same time, Rep. Jim McGovern (D-Mass.) introduced a bill to prohibit commercial exports of certain nonlethal crowd control items and defense articles and services to the Hong Kong Disciplined Services (H.R. 4270).

The senators raised two specific concerns: whether current export controls are sufficient to prevent the diversion of sensitive technologies to China; and whether current controls are sufficient to prevent the inappropriate supply of crowd control equipment to Hong Kong’s police force, they wrote to Secretary of State Mike Pompeo and Commerce Secretary Wilbur Ross.

“We believe it is critical that the United States take appropriate measures to ensure China does not abuse Hong Kong’s special status under U.S. law to steal or otherwise acquire critical or sensitive U.S. equipment and technologies in support of its strategic objectives or to infringe on the rights of people in Mainland China, Hong Kong, and elsewhere,” the senators noted.

“A related concern is whether current export control laws allow U.S. persons to inappropriately export police equipment to Hong Kong, which may be used to suppress legitimate civil dissent,” they wrote.

In response, the Chinese Foreign Ministry Spokesperson Hua Chunying quipped, “I wonder if the U.S. Congressmen want to save [this] anti-riot equipment to deal with problems at home?” More seriously, she added, “Hong Kong affairs are purely China’s internal affairs. No foreign government, organization or individual has any right to interfere. Those playing with fire on this issue will end up getting burned themselves.”

The U.S.-Hong Kong Policy Act of 1992 allows the U.S. to continue to treat Hong Kong separately from China for matters concerning trade and export control, according to the BIS website. “Hong Kong administers its own import and export systems and, owing to its status as a cooperating country with multilateral export control regimes, receives favorable treatment with regard to U.S. export licensing and regulations,” BIS noted.

Privacy Shield Review Shows Progress, Sunshine

Third time’s a charm. The third annual review of the U.S.-E.U. Privacy Shield Sept. 12-13 ended on a much brighter note than previous reviews, as a key administration position has been filled and more companies are signing up for the program. Dimming the party atmosphere was news a week prior that several companies settled charges of false claiming certification.

The second annual review a year ago revealed two major fissures in the program: the lack of a permanent U.S. official as an ombudsperson and the fallout from recent privacy breaches by firms that are certified under the program. Since then, the Senate in June confirmed by a voice vote former DocuSign CEO Keith Krach to be under secretary of State for economics and Privacy Shield ombudsperson (see **WTTL**, June 24, page 6).

In a joint statement after the third review, Commerce Secretary Wilbur Ross and Justice Commissioner Věra Jourová said, “EU and U.S. officials both stressed the need for strong and credible enforcement of privacy rules to protect our citizens and ensure trust in the digital economy.” The European Commission will publish a report of its findings by the end of the year, the officials noted.

In remarks opening the review, Ross highlighted the more than 5,000 participating organizations, up from 4,000 in 2018. “These organizations range from startups to

multinationals in virtually every industry sector — and over 70% of these companies are small- and medium-sized enterprises,” he said. “Privacy Shield-certified businesses support millions of jobs on both sides of the Atlantic,” Ross added.

Just a week before the review, the Federal Trade Commission (FTC) Sept. 3 announced that five companies reached separate settlements with the agency over allegations that they falsely claimed certification under the EU-U.S. Privacy Shield framework. The settlements involve statistical analysis and support services provider EmpiriStat; management software provider DCR Workforce; cloud-based file transfer software provider Thru; LotaData, which provides analysis of mobile users' data; and facial recognition software provider 214 Technologies.

Under the proposed settlements, “all five companies are prohibited from misrepresenting the extent to which they participate in any privacy or data security program sponsored by the government or any self-regulatory or standard-setting organization and must comply with FTC reporting requirements,” the agency said.

Agencies Clarify Huawei Entity Listing, General License

As companies wait for export licenses to be approved, the administration attempted to clarify its reasoning on putting Huawei and dozens of its non-U.S. affiliates on the BIS Entity List and provide specific details on the listing and the temporary General License (GL) that accompanied it.

Most recently, the Chinese telecom giant has accused the U.S. government of breaking into its Intranet and the FBI of coercing its employees to provide dirt on the company (see **WTTL**, Sept. 9, page 6). Two weeks earlier the White House added another 46 Huawei affiliates to the Entity List and extended the GL for an additional 90 days, expiring in November.

Assistant Secretary of State Christopher Ashley Ford explained the security concerns around Huawei and attempted to debunk claims that the listing was only a ploy in the ongoing trade war with China. The U.S. put Huawei on the Entity List for “sound national security and foreign policy reasons,” he said.

“Nevertheless, there seems to have been some confusion on the part of those who imagine that our problems with that company are at root only economic or commercial, stemming merely from more general U.S. trade and tariff disputes with China,” Ford said in a speech Sept. 11. “This confusion is compounded by the Chinese and Huawei propaganda machine as well. But this is far from being the case: unfortunately, Huawei also presents deep national security and foreign policy problems,” he said.

Ford outlined the deep connections between the company and the Chinese government. “In light of all this, it seems to some of us to be nothing less than madness to allow Huawei to worm its way into one’s next-generation telecommunications networks – just as it seems

nothing less than madness to allow other Chinese technology giants to vacuum up and expatriate personal and consumer data and to control electronic commerce in free sovereign nations,” he said.

Two days before the speech, BIS published two sets of Frequently Asked Questions (FAQs) about the Huawei Entity List and GL. For example, the agency explained that the GL “was implemented to prevent the interruption of the existing global network communication system and allow time for companies and persons to shift to other sources of equipment, software and technology.”

BIS would not say if it would extend the GL again. “Any decision to renew the Temporary General License will be made at the sole discretion of the U.S. Government,” it said.

The FAQ also notes that “the listing of an entity on the Entity List does not impose limitations on payments between parties; therefore, Huawei or one of its affiliates can pay you for items lawfully shipped.” Companies can also pay Huawei for items previously shipped and can continue to import Huawei phones. However, firms “cannot return the phones to Huawei or a listed affiliate, including for any repairs, without a license from BIS, unless the items are eligible for export, reexport, or transfer (in-country) under the [GL],” it said.

The GL authorizes certain activities that “include support to operators (e.g., debugging, configuration, and other activities to maintain services); emergency and planned software updates necessary to maintain network operability; in-life upgrades of equipment and components to maintain (but not expand) capacity; and in-life replacements of defective hardware,” BIS noted.

Past, Present Arms Export Policies Show Similar Data, GAO Says

While it’s early yet, data shows that rates for approvals and denials for arms transfers were “fairly constant in recent years,” despite the administration’s highly touted Conventional Arms Transfer (CAT) export policy, according to a new Government Accountability Office (GAO) report released Sept. 9 (GAO-19-673R).

State in November 2018 highlighted its progress in implementing a new CAT policy to make it easier to export conventional arms (see **WTTL**, Nov. 12, 2018, page 1). At the same time, the department touted the fact that in fiscal year (FY) 2018, authorized arms exports rose 13% to \$192.3 billion.

“The Obama and Trump administrations’ CAT policies are broadly similar in content. While some differences exist in the organization and wording of the two documents—for example, the current policy discusses economic criteria more extensively than the prior policy and includes some new language on working with partners to reduce the risk of operations causing harm to civilians—both identify the same five general criteria for consideration when evaluating proposed arms transfers,” the GAO report noted.

In analyzing available data from fiscal years 2014 through 2018, GAO found that “these policies have broadly similar content and implementation processes and have produced fairly similar approval and denial rates,” it said. “In addition, none of the officials with whom we spoke ... identified any significant differences between the two policies, aside from the language related to economic security and civilian harm.”

The 2018 policy included a purpose statement that asserted that “where a proposed transfer is in the national security interest (defined as including economic security) and the U.S. foreign policy interest, the executive branch will ‘advocate strongly on behalf of U.S. companies,’” it said.

* * * **Briefs** * * *

EXPORT ENFORCEMENT: Parisa Mohamadi, dual U.S-Iran citizen, who operated Intelligent Solutions FZCO, import/export business registered in UAE, was sentenced Sept. 10 in Cleveland U.S. District Court to 24 months in prison on charges of exporting industrial goods to Iran without OFAC licenses. Goods included valves, air conditioner parts, and diaphragm meters. She pleaded guilty in July 2018. Federal indictment was unsealed in September 2017 against Canadian firm IC Link Industries, LTD. and two other Iranian or dual citizens (see **WTTL**, Sept. 25, 2017, page 7). All others are at large.

INNERSPRINGS: In 4-0 “sunset” votes Sept. 13, ITC said revoking antidumping duty orders on imports of uncovered innerspring units from China, South Africa and Vietnam would renew injury to U.S. industry. Commissioner Jason Kearns did not participate.

LINE PIPE: In 3-0 “sunset” vote Sept. 13, ITC said revoking antidumping duty order on imports of certain welded large diameter line pipe from Japan would renew injury to U.S. industry. Commissioners Randolph Stayin and Amy Karpel did not vote.

STEEL: In 3-0 “sunset” vote Sept. 10, ITC said revoking antidumping order on imports of diffusion-annealed, nickel-plated flat-rolled steel products from Japan would renew injury to U.S. industry. Commissioners Randolph Stayin and Amy Karpel did not participate in these votes.

PET SHEET: In 5-0 preliminary vote Sept. 10, ITC found U.S. industry may be injured by allegedly dumped imports of polyethylene terephthalate (PET) sheet from Korea and Oman. Commission further found that imports from Mexico are negligible.

ANTIBOYCOTT: Ekman & Co. received BIS warning letter Aug. 23 for failing to report receipt of request to engage in restrictive trade practice or boycott on three occasions from June 2016 through February 2018. Invoices regarding sales to Libya requested “declaration of shipping company or its agent stating that the carrying vessel is allowed to enter Libyan ports.”

TRADE PEOPLE: In parallel shake-ups in Japanese and EU cabinets Sept. 11, Isshu Sugawara was named Japanese economy, trade and industry minister, replacing Hiroshige Seko. Toshimitsu Motegi was appointed as foreign minister and Taro Kono as defense minister. In Brussels, former EU agriculture commissioner Phil Hogan was named trade commissioner, replacing **WTTL** favorite Cecilia Malmstrom.

EX-IM BANK: As use-by date nears, more than 200 companies and organizations Sept. 11 urged Congress to pass “robust and long-term reauthorization” of Export-Import (Ex-Im) Bank before its

charter expires Sept. 30. “Without quick action to secure a long-term and robust Ex-Im Bank reauthorization that fixes past quorum issues, thousands of American exporters and tens of thousands of American workers who rely on the Ex-Im Bank will be put at risk,” groups wrote. Sens. Kevin Cramer (R-N.D.), Kyrsten Sinema (D-Ariz.) and eight cosponsors in July introduced legislation (S. 2293) to reauthorize Ex-Im Bank for 10 years and modify quorum requirement (see **WTTL**, July 29, page 6)...President Sept. 10 announced his intent to nominate Peter Coniglio to be Ex-Im Bank inspector general. He has worked in General Services Administration (GSA) Office of Inspector General (OIG) since 2006.

VENEZUELA: OFAC Sept. 9 issued General License (GL) 34, which authorizes transactions with certain Venezuelan government individuals, including U.S. citizens; permanent resident aliens of U.S.; individuals in U.S. who have valid U.S. immigrant or nonimmigrant visa, “other than individuals in the United States as part of Venezuela’s mission to the United Nations; and former employees and contractors of the Government of Venezuela,” according to Frequently Asked Question (FAQ). White House issued executive order in August blocking Venezuelan government property and interests in property within U.S. jurisdiction (see **WTTL**, Aug. 12, page 1).

CFIUS: Senate Sept. 12 confirmed in 85-1 vote Thomas Peter Feddo to be assistant Treasury secretary for investment security, responsible for day-to-day operation of Committee on Foreign Investment in U.S. (CFIUS). Law firm Wiley Rein said it expects that one of Feddo’s first official acts will be to publish revised regulations “within days” to expand scope and jurisdiction of CFIUS reviews as authorized by Foreign Investment Risk Review Modernization Act (FIRRMA). Sen. Rand Paul (R-Ky.) was sole “no” vote.

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