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Former, Current BIS Officials Defend Export Control System

At two hearings, House committees heard testimony on pending reform legislation: export controls and the Committee on Foreign Investment in the U.S. (CFIUS). At both hearings, former and current Bureau of Industry and Security (BIS) officials argued for maintaining two separate robust systems to prevent illegal technology transfer.

> House Foreign Affairs Committee Chairman Ed Royce (R-Calif.) and Ranking Member Eliot Engel (D-N.Y.) Feb. 15 introduced legislation (H.R. 5040) to provide Commerce with permanent statutory authority to regulate the export of dual-use items (see **WTTL**, Feb. 19, page 1). At the same time, legislation is moving through Congress to update and expand CFIUS jurisdiction (H.R.4311/S. 2098).

Former BIS Assistant Secretary Kevin Wolf told the Foreign Affairs Committee hearing on export controls March 14: "What really needs to be spent is a lot of very clever thinking, the addition of new resources to the existing system to reach outside the box, to identify what those technologies are that are not now controlled, but are emerging but should be, and to list and regulate them to the end-uses and end-users of concern." Wolf pointed to Section 109 of Royce's bill, which would require a "regular, ongoing interagency process to identify emerging critical technologies that are not identified" under U.S. law, but that "could be essential for maintaining or increasing the technological advantage" of the U.S.

At a House Financial Services Committee hearing the next day, BIS Assistant Secretary Richard Ashooh argued against overlapping systems. "As we strengthen both…, it is important that they remain complementary and not overlap unnecessarily, as that has the potential to overburden the CFIUS process and partially duplicate the more comprehensive coverage of technology transfer under the export control system," Ashooh said.

Treasury Sanctions Russians for Election Meddling, Cyber Attacks

Better late than never. Six weeks after the deadline, Treasury's Office of Foreign Assets Control (OFAC) March 15 designated five entities and 19 individuals under the Count-

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ering America's Adversaries Through Sanctions Act (CAATSA) for interfering in the 2016 presidential election and other cyber attacks. Of those, 13 were indicted by special counsel Robert Mueller in February on related charges. Others were already sanctioned under other authorities.

"The Administration is confronting and countering malign Russian cyber activity, including their attempted interference in U.S. elections, destructive cyber-attacks, and intrusions targeting critical infrastructure," Treasury Secretary Steven Mnuchin said in a statement. "These targeted sanctions are part of a broader effort to address the ongoing nefarious attacks emanating from Russia," he added.

> Three days before the OFAC announcement, 140 Democratic House members called on President Trump to impose sanctions under CAATSA, which passed both houses almost unanimously. "The State Department's explanation that the mere threat of sanctions will stop Russia from interfering in our elections is naive and unacceptable. Those responsible for meddling in our democracy—in the past and going forward—must face consequences," they wrote. In January, State and Treasury backed off imposing new sanctions on any guilty party, but rather offered guidance about potential future sanctions (see **WTTL**, Feb. 5, page 1).

Among those sanctioned (and indicted) are the Internet Research Agency, its head Yevgeniy Viktorovich Prigozhin and 12 other employees. The Internet Research Agency is accused of tampering or altering information to interfere with the presidential election by creating fake online personas posing as U.S. persons and entities and organizing political rallies while hiding its Russian identities. Prigozhin and two entities, Concord Management and Consulting and Concord Catering, were previously designated in December 2016 and June 2017. Russia's Federal Security Service (FSB) and Main Intelligence Directorate (GRU), both intelligence organizations, were designated along with several officials.

In addition to interfering with the 2016 U.S. election, the sanctions are meant to punish Russia for the NotPetya cyber attack that resulted in billions of dollars in damage across Europe, Asia and the U.S. American entities and critical infrastructure have been subject to Russian cyber attacks since at least March 2016, Treasury noted in its press release.

Lawmakers from both parties welcomed the sanctions, but many want even more. "Today's long overdue sanctions are just a first step. The Administration must use the broad range of sanctions required by Congress to hold Russia accountable and protect U.S. elections, energy, nuclear, water, aviation and manufacturing infrastructure from cyber-attacks," said Sen. Sherrod Brown (D-Ohio) in a statement. "Unless we impose a real price, Russia will continue to try to undermine our democracy and threaten our critical infrastructure," he added.

The sanctions came in the wake of the attempted murder of Russian ex-spy Sergei Kripal and his daughter, both citizens of the United Kingdom (UK). The UK believes that the two were poisoned by a nerve agent developed in Russia and accuses the Kremlin of the crime.

The UK expelled 23 Russian diplomats in response. At a background briefing, a U.S. national security official, told reporters, "The recent use of a military-grade nerve agent in an attempt to murder two United Kingdom citizens further demonstrates the reckless and irresponsible conduct of its government. This, as we already mentioned, is part of our ongoing campaign to date."

Steel, Aluminum Tariffs Likely to Hurt Allies, Not China

In an informal poll of experts at a Washington trade event March 13, not a single one raised their hands when asked if the administration's new steel and aluminum tariffs will meaningfully impact China's overcapacity. The move has angered American allies and could soon bring on retaliatory measures if further exemptions aren't added (see **WTTL**, March 12, page 1).

Which isn't to say that a stepped up trade enforcement agenda isn't welcome; however, Wendy Cutler, who worked for nine U.S. Trade Representatives (USTRs) and now serves as VP of the Asia Society Policy Institute, noted that the administration's trade agenda needs to be in accordance with World Trade Organization (WTO) obligations, that the measures get at the heart of the overcapacity problem and that the U.S. works with allies.

> Other trade experts agreed that China's overcapacity is a problem. Heidi Brock, president and CEO of the Aluminum Association, put China's excess capacity - the difference between what it needs domestically and what it produces - at 11 million metric tons. But as Rufus Yerxa, president of the National Foreign Trade Council (NFTC), pointed out, the U.S. is "shooting at a lot of the wrong targets and we're inflicting as much damage on ourselves as on the intended targets."

NFTC members are worried that the tariffs will lower the costs for competitors in other countries to produce the same products made domestically using imported steel and aluminum. They're also concerned about retaliatory tariffs on U.S. exports. The tariffs were announced under the guise of national security, an unprecedented move that could be challenged at the WTO. Yes, overcapacity is a problem, argued Yerxa, but the best way to address it is to work with U.S. allies, not penalize them.

In a Department of Defense (DoD) memo published on Commerce's website as part of the report to the president, Defense Secretary James Mattis wrote that "systematic use of unfair trade practices to intentionally erode our innovation and manufacturing industrial base poses a risk to our national security. … however, the U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production. Therefore, DoD does not believe that the findings in the reports impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements."

"DoD continues to be concerned about the negative impact on our key allies regarding the recommended options within the reports. However, DoD recognizes that among these reports' alternatives, targeted tariffs are more preferable than a global quota or global tariff. ...It is critical that we reinforce to our key allies that these actions are focused on correcting Chinese overproduction and countering their attempts to circumvent existing antidumping tariffs - not the bilateral U.S. relationship," Mattis added.

> Should countries impacted by the tariffs choose to take up their case with the WTO, they will no doubt point to DoD's own assessment to disprove the U.S.'s national security claims. In such a scenario, the U.S. likely will claim the measures are protected under safeguard categories. At press time, the U.S. has not formally notified the WTO of its tariffs nor have other countries sought WTO consultations.

Congressional efforts to stymie the tariffs are unlikely to succeed, but that didn't stop Sen. Jeff Flake (R-Ariz.) from trying. As promised, he introduced a bill to prohibit the duties on steel and aluminum imports (S.2538) March 12. It was referred to the Finance Committee. "You can be pro-growth or pro-tariff, but you can't be both. Those who have reservations about these tariffs ought to support this legislation I'm introducing today to nullify these tariffs," Flake said from the Senate floor. "I would urge my colleagues to join me in exercising our constitutional oversight to invalidate these irresponsible tariffs."

Countries Flock to Washington Seeking Tariff Exemptions

Former Deputy USTR Wendy Cutler predicted that plenty of foreign officials would wind their way to Washington in the days following the tariff announcements to plead their case to Commerce Secretary Wilbur Ross and USTR Robert Lighthizer. Her assessment immediately proved correct.

> Though Canada and Mexico were exempted from the tariff announcement, Canadian Prime Minister Justin Trudeau continues to press his case. President Trump received a call from Trudeau March 12 wherein the prime minister emphasized the integrated economies of the two countries. Trudeau is on a cross-country trip visiting steel and aluminum plants.

Liam Fox, United Kingdom's (UK) international trade secretary, met with Lighthizer March 14. Before making the transatlantic trek, Fox assured parliament that he would take up the UK's strong disagreement with "universal trade measures [that] have weak foundations in international law." No indication was made in the joint statement following the meeting that the UK, as part of the European Union (EU), would be exempt from tariffs. [The EU has taken steps toward retaliation (see related story, page 8).]

"We are committed to maintaining momentum during next week's UK-U.S. Trade and Investment Group meeting in Washington, D.C. The Working Group discussions have agreed new measures to benefit small businesses in both our countries with the launch of SME [small and medium-size enterprise] Dialogue and the Toolkit on IP Protection for SMEs," said Fox. "We also spoke about the United States' planned imposition of tariffs on steel and aluminum," the minister added rather anticlimactically.

Also in town were delegations from South Korea and Japan that met with Deputy Secretary of State John Sullivan, who has taken on day-to-day department operations (see Briefs, page 9). A separate Korean delegation traveled to Washington for a third round of Korea-U.S. Free Trade Agreement (KORUS) renegotiation talks.

It's not just American allies who are arguing against tariffs. Farmers for Free Trade kicked off a cable news campaign. "Voice of the Farmer" 30-second ad spots will run for at least four weeks on CNN, MSNBC, and Fox, most notably during "Morning Joe" and "Fox and Friends" morning shows, which the president is known to watch. "Mr. President, protect free trade and keep our agriculture economy strong," fourth-generation Montana farmer and rancher Michelle Erickson-Jones says in the commercial.

Transport Firm Settles Justice Bribery Charges

Nuclear cargo delivery firm Transport Logistics International Inc. (TLI) of Fulton, Md., agreed March 12 to pay a $2 million criminal penalty under a three-year deferred prosecution agreement (DPA) to settle Justice charges of conspiracy to violate the Foreign Corrupt Practices Act (FCPA) by bribing an official at a subsidiary of Russia's State Atomic Energy Corporation to obtain and retain business.

> JSC Techsnabexport (TENEX) supplied uranium and uranium enrichment services to nuclear power companies throughout the world on behalf of the Russian government, according to the information filed in Greenbelt, Md. U.S. District Court. In addition, TENEX was indirectly owned and controlled by, and performed functions of, the Russian government, it noted.

In order to conceal and further the scheme, TLI and others "used terms such as 'remuneration' and 'commission' when documenting the corrupt and fraudulent payments on an internal **TLI** spreadsheet and when communicating with unknowing **TLI** employees who unwittingly processed the corrupt and fraudulent payments to offshore accounts," the information said.

In the settlement, TLI "received full credit for its substantial cooperation with the Department's investigation and for engaging in remedial measures, including terminating the employment of all employees engaged in the misconduct," Justice noted in a press release.

In January 2018, an 11-count indictment was unsealed against TLI co-president Mark Lambert for his alleged role in the scheme. He pleaded not guilty. TLI co-president Daren Condrey pleaded guilty in June 2015 to conspiracy to violate the FCPA and commit wire fraud and awaits sentencing. In August 2015, TENEX official Vadim Mikerin pleaded guilty to conspiracy to commit money laundering involving violations of the FCPA, and was sentenced to 48 months in prison in December 2015.

U.S. Challenges Indian Export Programs at WTO

The U.S. requested WTO dispute settlement consultations with India challenging that country's export subsidy programs, USTR Robert Lighthizer announced March 14. Citing Indian documents, the U.S. alleged that thousands of companies receive benefits totaling more than $7 billion annually from subsidy programs that provide exemptions from certain duties, taxes and fees.

> Specifically, the programs at issue are: the Merchandise Exports from India Scheme; Export Oriented Units Scheme and sector-specific schemes, including Electronics Hardware Technology Parks Scheme; Special Economic Zones; Export Promotion Capital Goods Scheme; and a duty-free imports for exporters program.

"These export subsidy programs harm American workers by creating an uneven playing field on which they must compete," Lighthizer said in a statement. "USTR will continue to hold our trading partners accountable by vigorously enforcing U.S. rights under our trade agreements and by promoting fair and reciprocal trade through all available tools, including the WTO," he added.

India was initially exempt from rules governing export subsidies as a developing economy, but surpassed the economic benchmark for that exemption in 2015, the U.S. claimed. "In fact, India has increased the size and scope of these programs. For example, India introduced the Merchandise Exports from India Scheme in 2015, which has rapidly expanded to include more than 8,000 eligible products, nearly double the number of products covered at its inception," noted the USTR request.

President Blocks Qualcomm Sale to Singapore Firm

After months of negotiations and offer rejections, Broadcom's proposed takeover of mobile technology company Qualcomm seems to be on hold for now. However, long-standing company plans to "redomicile" in the U.S. could bring the acquisition back into play. The administration March 12 blocked the sale of U.S.-based Qualcomm to Singapore firm Broadcom, citing "credible evidence" that Broadcom "might take action that threatens to impair the national security of the United States" through exercising control of Qualcomm.

> The action is only the fifth time in 30 years that the executive branch has blocked the sale of a U.S. company, the second in the Trump administration. In September 2017, President Trump blocked a Chinese firm from acquiring an Oregon-based semiconductor manufacturer (see **WTTL**, Sept. 18, 2017, page 3).

The action could be moot as Broadcom previously announced plans to "redomicile" in the U.S. to avoid the jurisdiction of the Committee for Foreign Investment in the U.S. (CFIUS), which reviewed the transaction. Two days after the White House announcement, Broadcom said that it had withdrawn and terminated its offer to acquire Qualcomm. "Although we are disappointed with this outcome, Broadcom will comply with the Order. Broadcom will continue to move forward with its redomiciliation process," it said.

A week prior, CFIUS issued an interim order to Qualcomm "directing it to postpone its annual stockholders meeting and election of directors by 30 days. This measure will afford CFIUS the ability to investigate fully Broadcom's proposed acquisition of Qualcomm."

> The next day, March 5, Broadcom said: "Broadcom continues to pursue the redomiciliation process as expeditiously as possible. Upon completion of the redomiciliation, Broadcom's proposed acquisition of Qualcomm will not be a CFIUS covered transaction." In another statement a week later, the company noted, "U.S. national security concerns are not a risk to closing, as Broadcom never plans to acquire Qualcomm before it completes redomiciliation."

"This decision is based on the facts and national security sensitivities related to this particular transaction only and is not intended to make any other statement about Broadcom or its employees, including its thousands of hard working and highly skilled U.S. employees," Treasury Secretary Steven Mnuchin said in a statement March 12 on the president's order.

Qualcomm Inc. agreed in March 2016 to pay the Securities and Exchange Commission (SEC) a $7.5 million civil penalty to settle charges of violating the Foreign Corrupt Practices Act (FCPA) by hiring relatives of Chinese telecom officials to win contracts (see **WTTL**, March 7, 2016, page 7).

U.S., EU, Japan Pledge to Work Together on Steel Overcapacity

At a meeting in Brussels March 10, trade leaders representing the U.S., European Union (EU) and Japan agreed on a number of joint objectives on global steel overcapacity. The group convened to continue a discussion that began on the sidelines of the WTO Ministerial Conference in December and will meet again on the sidelines of the Organization for Economic Cooperation and Development (OECD) ministerial meeting in Paris.

USTR Robert Lighthizer, EU Trade Commissioner Cecilia Malmstrom and Japanese Economy Minister Hiroshige Seko "confirmed their shared objective to address non market-oriented policies and practices that lead to severe overcapacity, create unfair competitive conditions for our workers and businesses, hinder the development and use of innovative technologies, and undermine the proper functioning of international trade, including where existing rules are not effective," according to a joint statement.

The trio agreed to define the basis for stronger rules on industrial subsidies, enforce existing rules by working on current and new WTO disputes, further the work of the International Working Group on Export Credits' new set of guidelines, intensify information-sharing on trade-distortive practices, and coordinate closely in the international arena.

Both Malmstrom and Seko raised the issue of U.S. tariffs on steel and aluminum and voiced their expectations that as long-standing allies, the EU and Japan will be exempted (see **WTTL**, March 12, page 1). A week later, the EU released a ten-page document outlining hundreds of items up for potential retaliatory tariffs, including bourbon, tobacco, orange juice, and certain stainless steel products. The list is divided into two categories; the first could be hit with immediate tariffs of 25% and the second group would be subject to duties if the WTO declares the U.S. tariffs illegal or after three years.

CBP Needs to Look Beyond Core ACE Functions, Report Says

Beyond simply implementing the core functions of Automated Commercial Environment (ACE), U.S. Customs and Border Protection (CBP) needs to finalize an interagency process to manage and prioritize system enhancements and share system costs, the Government Accountability Office (GAO) noted in its report published March 14 (GAO-18-271).

> "According to CBP officials, funding constraints, as well as the effort required to complete deployment of core ACE capabilities within established time frames, largely precluded efforts to address enhancements over the last year. CBP officials stated that, because ACE is not funded to support enhancements, funding for enhancements suggested by CBP or the trade community must be provided by a CBP unit and funding for enhancements suggested by a partner agency must be provided by that agency" the report said.

GAO identified seven prioritized enhancements including: updating truck manifest capability; integrating with Court of International Trade; developing electronic drawback claims; expanding importer data submissions; allowing de minimis shipments: incorporating foreign-trade zones data and processing data for ocean shipments.

"Until CBP, in collaboration with its partner agencies, finalizes an approach to post-core management of ACE that includes such processes, as well as time frames for implementing them, CBP, its partner agencies, and the trade community will not realize the full potential benefits of the substantial investment ACE represents," the report said.

In response to the report, Department of Homeland Security (DHS) concurred with the recommendation. DHS also reported that "some steps toward developing an interagency approach to post-core management of ACE had been taken" after the draft report had been distributed for agency comment, GAO said. The department estimated that the process would be completed by the end of October 2018, it added.

* * * Briefs * * *

<u>RUBBER BANDS</u>: In 4-0 preliminary vote March 15, ITC found U.S. industry may be injured by allegedly dumped and subsidized imports of rubber bands from China and Thailand. Commission further found that imports from Sri Lanka are negligible.

<u>ALUMINUM FOIL</u>: In 4-0 final vote March 15, ITC found U.S. industry is materially injured by dumped and subsidized imports of aluminum foil from China.

IRAN: Reza Olangian, dual citizen of U.S. and Iran, was sentenced March 14 in Manhattan U.S. District Court to 25 years in prison for conspiring and attempting to send surface-to-air missiles and military aircraft parts to government of Iran. He was found guilty after two-week trial in November 2016 (see **WTTL**, Dec. 5, 2016, page 5). In 2012, Olangian worked to negotiate missile deal with confidential source who was working with Drug Enforcement Administration and who purported to be weapons and aircraft broker. He was arrested in Estonia in October 2012 and was extradited to U.S. in March 2013. He also was sentenced to 5 years' supervised release.

FCPA: Eberhard Reichert, former Siemens AG executive, pleaded guilty March 15 in Manhattan U.S. District Court to conspiracy to violate Foreign Corrupt Practices Act (FCPA) for his role in bribery scheme to retain $1 billion government contract to produce national identity cards for Argentine citizens. He was arrested in Croatia in September and extradited to U.S. in December. Andres Truppel, former chief financial officer of Siemens Argentina, pleaded guilty in September 2015 in Manhattan federal court to related charges for his role in scheme (see **WTTL**, Oct. 5, 2015, page 6). He previously agreed to pay SEC $80,000 civil penalty for role in scheme.

MORE FCPA: Israel-based Elbit Imaging Ltd. agreed March 9 to pay SEC $500,000 civil penalty to settle charges of violating FCPA. According to SEC order, Elbit and Plaza Centers NV, indirect Elbit subsidiary, paid millions of dollars to third-party offshore consultants and sales agent purportedly for services related to Romanian real estate development project and sale of U.S. real estate assets. "Elbit and Plaza made these payments even though they had no evidence that the consultants and sales agents had actually provided the contracted for services," SEC noted.

FOREIGN TRADE REGULATIONS: Census March 16 published Foreign Trade Regulations (FTR) Letter No. 10 "to provide guidance on the appropriate annotations to be used when submitting export manifest data electronically." CBP is conducting pilot to test functionality regarding electronic filing of export manifest data for air, rail and ocean cargo (see **WTTL**, Dec. 18, page 7).

CIVIL PENALTIES: In Federal Register March 19, OFAC adjusted for inflation maximum civil monetary penalties (CMPs) under relevant regulations. These include: Iran, Sudan, Zimbabwe, Syrian, Darfur, Congo, Belarus, Lebanon, Magnitsky Act and Hizballah sanctions programs.

NOMINATIONS: Senate confirmed Gilbert Kaplan, nominee for Commerce under secretary for international trade, by voice vote March 13 (see **WTTL**, March 5, page 3)… Nominee to be CBP commissioner Kevin McAleenan moved one step closer to confirmation March 14 as Senate passed cloture motion 79-19. Voice vote confirmation is expected March 19. McAleenan has served as acting commissioner since Jan. 20, 2017.

APPOINTMENT: Conservative commentator Larry Kudlow March 14 accepted offer to head White House National Economic Council. Kudlow replaces Gary Cohn, who resigned over opposition to steel and aluminum tariffs announced by administration March 8 (see **WTTL**, March 12, page 1).

STATE: In surprise move March 13, Rex Tillerson was fired as secretary of State. Day-to-day operations have been turned over to Deputy Secretary John Sullivan. Timeline of Tillerson's formal dismissal is unclear, but by Tuesday morning, President Trump made known his intent to nominate current CIA Director Mike Pompeo to lead State and Deputy Director Gina Haspel to replace Pompeo. Both require Senate confirmations. "Seems like same old same old. Same damage different secretary," former government official told WTTL.