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BIS Resumes Licensing after Government Shutdown Ends

With the end of the government shutdown Oct. 17, the Bureau of Industry and Security (BIS) posted a notice that it was back in business. "BIS again is accepting and processing license applications, commodity classification requests, advisory opinion requests, and other filings," it said.

> "Given the 16 day shutdown, which included the October 15 startup date for Export Control Reform filings, we anticipate that more than the usual number of filings will occur. We and our sister agencies will do our best to process them as quickly as possible but normal processing times likely will be exceeded for a while. We apologize for any inconvenience and appreciate your patience," BIS said.

Commerce Reshuffles ITA Organization

Commerce's International Trade Administration (ITA) reorganized its offices into three major divisions from four Oct. 17, consolidating some functions and shifting others under different headings. The agency claimed this is its "first major reorganization in more than 30 years," but at least two big previous reshuffles have occurred in that time.

> The three new major subunits will be global markets, industry and analysis, and enforcement and compliance. The goal of the reorganization is to "capitalize on our strengths and identify opportunities for innovation and to reduce inefficiencies and improve communication across the organization," said ITA Under Secretary Francisco Sánchez in a statement.

Global markets will comprise the current U.S. and Foreign Commercial Service (US/FCS) and trade promotion staff plus the country and regional offices that formerly were under the assistant secretary for market access and compliance, a post that is being eliminated. Arun Madhavan Kumar, who was nominated by President Obama Oct. 7 to head the US/FCS, will lead this office (see **WTTL**, Oct. 14, page 10). The country and regional divisions now under this office include the Western Hemisphere, Asia, Europe and the Middle East, and China. The new office of industry and analysis replaces what had been

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the office of manufacturing and services, with Maureen Smith now serving as its acting chief. In addition to the manufacturing and services staffs, this division will comprise offices dealing with industry sectors such as textiles, machinery and tourism, plus investment, negotiations and intellectual property rights.

> Enforcement and compliance includes what had been import administration, which enforces antidumping and countervailing duty laws, plus the staff of the office of trade agreements and compliance. It continues to house the Foreign Trade Zone office. Paul Piquado remains head of this organization.

China Seeks Lengthy Phase-Ins for Sensitive ITA Products

China isn't totally cutting the list of products it wants excluded for World Trade Organization (WTO) talks on expanding the Information Technology Agreement (ITA), according to sources that have seen the new offer Beijing circulated Oct. 14. While it is offering to reduce the number of items it wants completely excluded from the talk, it is shifting most of its original exclusion list to a list of items that would enjoy a longer period for the phase-in of tariff cuts (see **WTTL**, Oct. 14, page 5).

> China did just enough to restart talks, one source in Geneva said. Another diplomat called the proposal "positive," but people aren't "extremely ecstatic" about it. These sources say Beijing's offer is not close to a final deal and its total list is still long.

For example, while the Chinese put some semiconductors and medical devices back onto the table, they maintained their interest in protecting multi-component semiconductors, one source reported. Only four products were offered for negotiations with no strings attached. Other shifted categories include electrical products, some medical gear and raw materials. China hasn't specified what phase-in periods it's looking for.

Although China cut the list of items it wants excluded from a deal by one-third, it requested a change in status for 37 sensitive products, leaving its sensitive list still at 141 products, the source said. An exact tally on product coverage, however, is difficult to figure because some items being negotiated are defined by Harmonized Tariff Schedule numbers and others by product descriptions.

Talks on the majority of the 33 products that were off the list entirely or in part before, and now back on the table for a discussion, will focus on staging, one source said. China is looking for longer implementation periods for the majority of these products, he said. China's demands aren't as egregious now in terms of removing things but negotiators will have to hammer down implementation periods, sources said.

It is still not clear whether China will try to put the items under the general three or five-year phase-in period or go for "super special" phase-ins of seven years or more. It appears to be asking for too much time in areas that are moving fast, one source said, referring to Beijing's request for a seven-year phase-in for some products and ten or more years for others.

Chinese negotiators likely know quite well how far they can go in negotiations, but they don't know where the U.S. and European Union (EU) red lines are, a source said. The

U.S. and EU have been quite clear that improvements are expected, he said. ITA negotiations are set to resume in Geneva the week of Oct. 21.

> Meanwhile, 34 senior executives of semiconductor companies, including Advanced Micro Devices, IBM and Intel, wrote a letter Oct. 16 to Chinese Vice Premiers Wang Yang and Ma Kai, urging China to cut tariffs on multi-component integrated circuits (MCOs).

"We respectfully request that the Chinese government support duty-free treatment for all MCOs, irrespective of end-application, and the inclusion of other global semiconductor industry related priorities in the ITA. These positive actions will act as a catalyst for bringing this important initiative to a strong conclusion this year and establish further confidence in the World Trade Organization," they wrote.

Court Upholds Presumption of State Control in NME Case

Commerce's four-prong test for whether a company in a non-market economy (NME) is state controlled remains viable in antidumping cases, and respondents in those cases bear the burden of overcoming the presumption that they are state controlled, Court of International Trade (CIT) Senior Judge R. Kenton Musgrave ruled Oct. 11 (slip op. 13-129). Musgrave upheld Commerce's decision to apply a People's Republic of China (PRC)-wide rate to a Chinese exporter of certain diamond sawblades and parts from China because the firm had not shown that it acted independently from the state-owned enterprise (SOE) that held a majority interest in it.

> Musgrave sustained a second remand determination that Commerce had reached "under protest" because it disagreed with his first remand order. "In the Second Remand Redetermination, Commerce's *de facto* analysis concluded that the AT&M entity did not rebut the presumption of state control and is therefore not eligible for a separate rate," Musgrave wrote.

The respondents, collectively known as AT&M, had claimed Commerce failed to provide evidence that they were controlled by a SOE. "This argument, however, seems to invert the burden of proof on the presumption," he ruled. "However, the court finds the discussion to be based on a lack of evidence of record to rebut the presumption of government control, which is in accordance with the purported separate rate test, and therefore logical," he added.

"The court can agree with AT&M that Commerce has not been more forthcoming in offering a fuller explanation its test and policy, but calling for paying proper attention to the process by which corporate management is chosen is rather the point this aspect of the DSMC's claims, and the analogy to direct U.S. government involvement in U.S. corporations does not persuade that Commerce's presumption of state control in NME economies, and its burdening of respondents with demonstrating the absence of such control, can be concluded unreasonable, at least on the basis of that factually distinguishable analogy," he continued.

"Finally, AT&M makes a sweeping objection to the presumption of control applied to NME countries, arguing that Commerce should have eliminated its separate rates practice altogether in light of its application of countervailing duties to the PRC," he said. "The

court expresses no opinion at this point on whether AT&M's arguments are valid, since, as the defendant points out, this claim appears beyond the scope of the remand," he ruled.

First USML-CCL Transfers Take Effect after Shutdown Ends

Oct. 15 marked the effective date for the first transfers of U.S. Munitions List (USML) items to the Commerce Control List (CCL). Although the two-week government shutdown interrupted BIS handling of new licenses, the agency was ready to approve a few licenses for items newly moved to the 600 series on CCL from USML categories VIII (aircraft) and XIX (gas turbine engines). Additional licenses are in the pipeline nearing approval, according to BIS sources.

> Aircraft firms appear to be ready to deal with the transition without too much disruption. "We've worked hard to update our tools and conduct training to get ready for the transfer," one aircraft industry executive told WTTL. "So far, export control reforms have gone pretty smoothly," the executive said. As more categories get transferred, it may become more complicated and more issues may arise. "A big question will be which license do I need and do I go to State or BIS," the executive added.

If the shutdown had continued, many transferred items that were in categories XIII and XIX before of Oct. 15 could have fallen under the heading of emergency licenses that BIS would have handled, the source suggested. This would include aircraft parts intended to support U.S. or allied armed forces conducting military operations or commercial aircraft on the ground that need replacement parts to take off.

Aerospace Industries Association President and CEO Marion C. Blakey welcomed the effective date for the first transfers. "Completing the revisions to the USML and moving forward with further licensing caseload management reforms are critical to sustain and grow the global competitiveness of the U.S. defense industrial base," she said in a statement. "Licensed exports of these two USML categories currently amount to $21 billion a year, a number that will likely increase as 75 percent of these licenses are for exports of parts and components that may transition to the CCL," Blakey added.

The next set of revised categories, military vehicles, vessels, submarines, and auxiliary military equipment, will become effective Jan. 6, 2014. Work continues on the remaining categories and they will similarly be notified to Congress and published over the coming months.

Export Control Reform Critics Push for BIS Enforcement

While the Obama administration and industry groups are highlighting the Oct. 15 effective date of the first tranche of transfers from the U.S. Munitions List (USML) to the Commerce Control List (CCL), critics of export control reform continued to claim reforms will make it harder to enforce arms embargoes and human rights abuses.

"The United States is loosening controls over military exports, in a shift that former U.S. officials and human rights advocates say could increase the flow of American-made military parts to the world's conflicts and make it harder to enforce arms sanctions,"

Cora Currier wrote in ProPublica, a independent, nonprofit news organization, Oct. 16. Her views echoed those of William D. Hartung, director of the arms and security project at the Center for International Policy (CIP), a public policy think tank.

> "It is generally agreed that existing export control laws and regulations need to be simplified and updated, but human rights groups and the Government Accountability Office (GAO) have raised serious concerns over the potential for the Obama administration's reforms to undercut current laws designed to keep U.S. defense articles out of the hands of terrorists, human rights abusers, or countries or groups seeking to develop nuclear weapons," Hartung wrote in a CIP report in August 2013.

The report also took issue with administration and industry claims of an economic boost from the reform effort. "The administration's claims of major economic benefits from export control reform have not been substantiated. In fact, there is strong evidence to suggest that export reform is unlikely to significantly increase U.S. sales of military-related technology. The United States already accounts for nearly 80 percent of the global market for items currently covered by the USML. Even a radical reform of arms export controls is unlikely to push that figure much higher," the CIP paper asserted.

BIS and State officials have repeatedly rejected these claims and argued that reforms will increase enforcement of export control laws (see **WTTL**, June 10, page 1). But the criticism appears to have prompted a stepped-up enforcement attitude at BIS to the consternation of some exporters who question why tougher enforcement is needed for the less critical items being transferred to the CCL. Other enforcement agencies also say they are increasing enforcement aimed at transferred items.

In a media note Oct. 15, a State spokesperson highlighted the increased enforcement of export laws. "Export Control Reform will move less sensitive items that no longer merit controls under the USML, such as certain parts and components, to the CCL, to allow for more flexible licensing authorizations to allies and partners while increasing the number of enforcement officials available to safeguard against illicit attempts to procure sensitive defense technologies," the spokesperson noted.

A White House factsheet noted the increased oversight from the Department of Homeland Security and FBI, which "will continue their robust enforcement of U.S. export controls for items on both control lists." It said "the easing of export licensing requirements for many items moved to the CCL is balanced by the increased oversight from Department of Commerce Export Enforcement Special Agents and analysts dedicated exclusively to export enforcement for items on the CCL."

TTIP Talks Need to Set Priorities, Article Suggests

To avoid getting caught in a negotiating quagmire in Transatlantic Trade and Investment Partnership (TTIP) talks, the U.S. and European Union (EU) need to establish "a procedural roadmap for managing the negotiations in an orderly, constructive, politically digestible manner," suggests Daniel J. Ikenson, director of the Cato Institute's Herbert A. Stiefel Center for Trade Policy Studies. "Managing with forethought and determination a process that could otherwise descend into an intractable quagmire is essential to ensuring that negotiators deliver most of what they promise," he wrote in the Free Trade Bulletin

published by Cato, a libertarian think tank in Washington. "Too daunting an enterprise will render success elusive and cause negotiators to lose focus, interest, and, ultimately, the opportunity to achieve meaningful reforms," he wrote.

> "From the outset, negotiators erred by setting a 2014 completion date for the negotiations. There is absolutely no plausibility to that deadline and, frankly, failure to amend the timetable with realistic deadlines will only undermine the credibility of the undertaking with a public already skeptical of trade negotiations," Ikenson argued.

To make negotiations more manageable and realistic, Ikenson recommended: "(1) Negotiators identify and announce a discrete set of specific, achievable goals with realistic deadlines; (2) The negotiations over regulatory processes and regulatory standards be better defined and made more manageable by employing a 'negative list' approach, where issues deemed 'off limits' to negotiation are specified at the outset so that they do not obscure what is achievable; (3) The negotiators abandon the single undertaking principle and, instead, aim to produce three successive biennial agreements by harvesting the lowest hanging fruit once every two years."

"There seem to be vague and perhaps disparate understandings of what regulatory reform entails," Ikenson wrote. He suggested adoption of a "negative list" approach that would identify subjects that are off limits to negotiation. "Creating a negative list for regulatory issues will help negotiators, and the public, obtain a better sense of the contours of this otherwise amorphous blob of issues, revealing a more useful diagnosis of the regulatory incoherence problem," he opined.

Ikenson acknowledged that getting negotiators to abandon the "single undertaking" approach, which involves all agreements to be part of one package, "will require convincing traditionalists wed to the idea that liberalization of barriers requires cross-sector trading of concessions," he wrote. He also urged the U.S. and EU to consider how Canada, Mexico and Turkey might become part of the deal eventually. "A TTIP that does not include clear and reasonable accession provisions for Canada, Mexico, and Turkey (which is highly integrated with the EU) would be trade diverting and would represent an enormous opportunity cost," Ikenson contended.

Demand for Aid Hinders WTO Deal on Trade Facilitation

Progress toward a WTO agreement on trade facilitation at the Bali ministerial conference in December is being hindered by demands from developing countries for financial aid to implement any deal. Promises made by the World Bank, the International Monetary Fund (IMF) and other development banks Oct. 13 to support implementation of a trade facilitation accord apparently didn't satisfy those countries, according to discussions at the Oct. 16-17 meeting of the negotiating group on trade facilitation in Geneva.

Developing countries are making financial aid a "conditionality" to their agreeing to any deal, according to sources attending the meeting. While progress has also been slow on the technical aspects of an agreement, it has been even smaller on the section that would provide "special and differential treatment" to poorer countries. Washington's favorite countries in Latin America, Argentina, Bolivia, Cuba, Ecuador, Nicaragua and Venezuela, circulated a draft proposal that would link financial aid, technical assistance and capacity

building to any facilitation commitments. Their proposal would also give developing members and least developed countries an opportunity to "opt out" of the agreement if this support wasn't provided.

> An EU representative reportedly told the meeting the EU wants a binding commitment by everybody without second thoughts or opt-outs. The official said the EU was not prepared to give a "blank check" if there is no clear commitment on implementation. Those views were echoed by a Swiss diplomat who said Switzerland could not give a binding commitment on providing technical assistance. A New Zealand representative also opposed any opt-out provision or conditional acceptance of a deal.

Progress on the technical aspects of a trade facilitation agreement has been "very small and rather cosmetic," one source said. Large parts of the draft text remain in brackets indicating a lack of agreement. Some brackets reportedly have been removed in sections dealing with the publication and availability of information, formalities and documentation requirements, acceptance of copies, single window, rejected goods, fees and charges, goods in transit and expedited shipments, sources report.

Obstacles remain, however, because of the variety of legal systems governing customs in different countries, disagreement over whether commitments should be binding or only require a "best endeavor" and a lack of common ground in the language to be used.

At the end of the World Bank and IMF annual meeting in Washington Oct. 13, development banks issued a joint statement reiterating their strong collective commitment to support trade facilitation. "We recognize that concerns persist in the negotiations about access to and coherence of assistance. We will work with the WTO and its members to help ensure that the new commitments that a trade facilitation agreement would bring are supported," they said in a statement.

Questions Remain on WTO Agriculture Restraint Agreement

Negotiators in Geneva remain far apart on an agreement that would exempt developing countries from WTO restrictions on farm subsidies for food security reasons, the chairman of agriculture negotiations reported. John Adank, New Zealand's ambassador to the WTO, told an Oct. 11 meeting of farm negotiators that countries appear ready to discuss what is being called a "due restraint" agreement, but he also identified numerous details that are yet to be settled (see **WTTL**, Sept. 30, page 6).

> One unresolved issue is the legal form a due-restraint agreeent would take. A similar due-restraint clause, which expired several years ago, was attached to the final Uruguay Round agreement. The WTO legal staff has offered four different options, including: a waiver, a ministerial decision (other than waiver), a ministerial declaration, and a chairperson's statement.

"While there is no convergence for the time being on the precise legal or political form an interim solution should have, many members have recognized that by discussing in some details transparency requirements, conditionality and safeguards, members had already taken steps towards elaborating quite specific requirements on which the flexibility will be dependent," Adank said. "The final legal weight of any decision will,

however, depend in the minds of many on the final conditions and safeguards and the terms in which any Decision is drafted," he added.

> The due-restraint mechanism was proposed as an alternative to a much more wide-sweeping proposal from 33 least developing countries (G33) for permission to subsidize their farmers and stockpile food to assure food security. The unresolved issues that Adank identified include which crops could be covered, how long the mechanism would last, what transparency and reporting requirements and what safeguards would be available to prevent the subsidies from overflowing an hurting international trade.

Adank also noted that the goal of eliminating all farm export subsidies, which was adopted at the WTO ministerial in Hong Kong in 2005, still remains elusive. Although countries have reduced use of export subsidies, "a number of members also pointed out that this should not be seen as a replacement in any way for the attainment of the objective which still eludes us and which is the parallel elimination of all forms of export subsidies and disciplines on all export measures with equivalent effect," he stated.

More progress is being made in coming up with a way to improve the administration of tariff-rate quotas (TRQs) on agriculture imports, he reported. Members appear ready to agree on provisions to assure more transparency in the application of TRQs, but divisions remain over proposals that would give developing countries special and differential treatment in having access to unfilled quotas.

Anti-NAFTA Activists Turn Attention to Asia, EU Talks

As the North American Free Trade Agreement (NAFTA) nears the 20th anniversary of its effective date in January, trade critics continue to complain about its impact and are warning that the trouble with NAFTA could be repeated in pending deals on a Trans-Pacific Partnership (TPP) and a Transatlantic Trade and Investment Partnership (TTIP). While labor and environmental groups acknowledge that the NAFTA train has long since left the station, they are now trying to prevent the NAFTA model from becoming the model for the next trade accords.

> In a conference call Oct. 17, the Sierra Club, along with advocates from the Council of Canadians and AFL-CIO, called for "a new model of trade and rejecting a model that leaves behind workers and the environment," said Ilana Solomon, director of Sierra Club's Responsible Trade Program.

Investor-state dispute provisions, which promise fair and equitable treatment to foreign investors, led the environmental organization to oppose NAFTA and all trade and investment agreements since then. "Under the guise of increasing foreign direct investment, NAFTA and the free trade agreements that have been signed since NAFTA have given expansive new rights to foreign investors," Solomon argued.

Solomon acknowledged that, unlike NAFTA, proposals for labor and environment chapters in TPP and TTIP would make those rules binding, but she said that would not balance the rights of investors. "The impact on agriculture, mining, investment, are all part of a much bigger model that is about taking away the tools of governments to be able to regulate in the public interest. Even a strong binding labor and environment

chapter, as important as that is, doesn't give the government all the tools that it needs," she noted. Complaints that NAFTA cost jobs in the U.S. and lowered labor standards in Mexico were raised by Cathy Feingold, director of international affairs, AFL-CIO. "NAFTA reduced demand for goods produced in every region of the U.S. and there was job displacement in all 50 states." she charged, citing estimates that the trade deficit with Mexico alone has displaced 682,000 U.S. jobs. "This model just continues to become the neoliberal model that we've been exporting for a long time," she declared.

> Thursday's call coincided with a meeting in Washington Oct. 17-18 of NAFTA's Commission for Environmental Cooperation (CEC), which oversees implementation of the accord's nonbinding environmental side agreement. CEC's Joint Public Advisory Committee (JPAC) invited the public "to debate whether environmental cooperation across our borders has been successful or has fallen short over the last 20 years, and what future collaboration should look like."

* * * Brief * * *

ITA: Enforcement and Compliance issued notice Oct. 18 that it is tolling all pending antidumping and countervailing duty cases and other deadlines for 16 days, reflecting time government was shutdown. If new deadline falls on weekend, deadline will be next business day.

FCPA: Alain Riedo, Swiss citizen and ex-general manager of Maxwell Technologies, was indicted Oct. 15 in San Diego U.S. District Court for violating FCPA by bribing Chinese utility officials. Maxwell, manufacturer of energy storage and power products, paid $14 million civil penalty to settle related SEC and Justice charges in 2011 (see **WTTL**, Feb. 14, 2011, page 4).

AGOA: USTR Oct. 17 asked ITC to conduct Section 332 investigation of Africa Growth and Opportunity Act (AGOA) "to (i) assess the impact AGOA has had on the economies of sub-Saharan Africa, and (ii) identify factors that have impacted trade, investment, and the economic climate in the region." Separately, six apparel and retailer trade associations wrote to congressional committees and Obama trade officials Oct. 17 urging immediate renewal of act. Groups called for legislation to extend provisions for at least 15 years, as well as long-term renewal of permission for use of third-country fabric, plus extension of third-country fabric rules to all AGOA beneficiaries. "Unequal application of this provision lessens the positive impact of AGOA and retards regional integration efforts," they wrote (see **WTTL**, Oct. 7, page 3).

EX-IM FRAUD: El Paso, Texas, U.S. District Court continued clearing docket of Ex-Im Bank fraud cases Oct. 17 with sentencing of Manuel Ernesto Ortiz-Barraza, independent financial consultant from Mexico, to 36 months in prison for his role in scheme to defraud bank of nearly $7.2 million. Ortiz-Barraza pleaded guilty June 20 to wire fraud conspiracy and bank fraud after being extradited to U.S. Jan. 25 (see **WTTL**, Feb. 4, page 7).

NON-ORIENTED ELECTRICAL STEEL: AK Steel Corporation filed antidumping and countervailing petitions at ITA and ITC Sept. 30 against imports of non-oriented electrical steel from China, Germany, Japan, Korea, Sweden and Taiwan.

TRADE PEOPLE: President Obama nominated Jeh Johnson to be secretary of Homeland Security Oct. 18, replacing Janet Napolitano, who resigned in July to become president of University of California. Johnson was previously general counsel of Defense Department from 2009-2012, leaving to rejoin law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP. Johnson received J.D. from Columbia Law School and B.A. from Morehouse College.