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BIS, State Aim for Common “Specially Designed” Definition

As part of the effort to come up with common definitions for both the Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR), State’s Directorate of Defense Trade Controls (DDTC) and the Bureau of Industry and Security (BIS) have drafted a new definition for the term “specially designed,” DDTC Managing Director Robert Kovac told the Defense Trade Advisory Group (DTAG) May 3. The two-part definition covers end products and parts and components and aims to avoid controls on commonly available items, such as nuts, bolts, wires and screws, just because they are part of a military product.

Kovac stressed that the definition is still in the drafting stage and he was presenting it to DTAG to get industry reactions. Industry members of the advisory group peppered the DDTC official with questions about how the definition would work in various situations and whether they understood the definition the same way the drafters intended. Afterward, several industry representatives told WTTL the proposed definition is still confusing and needs more work.

The draft proposal tries to differentiate between “enumerated” and “nonenumerated” items on the U.S. Munitions List (USML), Kovac explained. The new definition appears to follow closely the definition of specially designed under the Missile Technology Control Regime (MTCR). A specially designed end item would be controlled if it is listed on the USML and has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions of the item identified in the USML (see **WTTL**, March 7, page 4).

The second part of the definition for parts would be stated in the negative, saying parts won’t be considered specially designed unless they are identified in the category of the end item or elsewhere on the USML. While Kovac didn’t say how nonenumerated parts would be controlled, industry sources say they expect them to be moved to the Commerce Control List.

Mini-Omnibus Trade Bill Could Include AD/CVD Provisions

Lawmakers backing legislation to increase the power of federal authorities to crack down on the circumvention and evasion of antidumping (AD) and countervailing duty (CVD) orders may try to attach such a measure to a mini-omnibus trade bill that could accompany congressional approval of pending free trade agreements (FTAs) with Korea, Colombia and Panama (see story page 3). At a May 5 hearing, Senate Finance Committee trade subcommittee chairman Ron Wyden (D-Ore.) said he wants to re-introduce soon a modified version of legislation (S. 3725)



he sponsored in 2010 to give new powers to Commerce to investigate the evasion of duties and to impose deadlines on Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) to investigate and prosecute AD/CVD violations.

The mini-omnibus trade bill that is expected to emerge in Congress could comprise several measures, including renewal of Trade Adjustment Assistance, the Andean Trade Preference Act, and the Generalized System of Preferences. Another potential addition could be China currency legislation. A new version of Wyden's ENFORCE Act already has bipartisan support from senators who want to see tougher enforcement of U.S. trade laws as part of any approval of new FTAs.

At his hearing, Wyden gave a tongue-lashing to officials from CBP, ICE and the International Trade Administration (ITA) for their failure to prevent AD/CVD evasion and act against perpetrators. Witnesses from industries that have won AD/CVD orders complained that they haven't benefitted from the orders because of evasion. This evasion takes place "under the very sleepy eyes of Customs and Border Protection," Wyden charged. "Corrupt suppliers are driving what amounts to a Mac Truck through the enforcement loopholes of the federal government," he asserted.

CBP Assistant Commission Allen Gina told the subcommittee that 85% of the \$1 billion (\$878 million) in uncollected duties in the last five years were accounted for by five products from China: crawfish, fresh garlic, honey, mushrooms and bedroom furniture. He complained that Beijing has been uncooperative in allowing onsite verifications of facilities in China. CBP is working with the World Customs Organization to address the issue and also has reached out to the USTR's office to see if new World Trade Organization rules could include provisions to allow for inspections to verify production in evasion investigations, Gina reported.

ITAR Controls on Foreign Nationals to Be Eased in Final Rule

A final order – to be published in the Federal Register the week of May 9 – will ease ITAR controls on foreign and third-country nationals working as "embedded contractors" working for licensed end-users and for "out of area" operations. As in the proposal published in August 2010, certain foreign and dual nationals could be exempt from licensing requirements if they hold a security clearance from the host nation or their employers have screened them to determine if they have had "substantive contacts" with restricted or prohibited destinations.

In issuing the final rule, State has rejected objections that Sen. Jon Kyl (R-Ariz.) and Rep. Ileana Ros-Lehtinen (R-Fla.) raised against the proposal. The two lawmakers complained that the proposed changes would allow the diversion of controlled technology, citing criminal prosecutions for violations of U.S. export controls. State officials contend that most prosecutions involve either native-born or naturalized U.S. citizens who were not covered by old rules.

In response to industry comments, DDTC will leave unchanged ITAR Part 126.14, which allows exporters to obtain comprehensive authorizations for exports to NATO countries, Australia, Japan and Sweden. The new rules for embedded contractors and out-of-area operations will require foreign nationals working in such situations to work at the place of the licensed end-user and be supervised by the licensed end-user or work under the direct supervision of a licensed end-user (see **WTTL**, Aug. 16, 2010, page 3).

Locke Lashes out at China's Failure to Meet Commitments

A week before the next meeting of the U.S.-China Strategic and Economic Dialogue (S&ED) May 9-10 in Washington, Commerce Secretary Gary Locke hit Beijing for its failure to meet past commitments to open China to more foreign direct investment (FDI), to protect intellectual property rights (IPR) and end restrictions on procurement of foreign products that compete

with Chinese “indigenous innovation” goals. Locke, who is slated to be the next U.S. ambassador to China, could not have made such harsh comments about China without clearance from top levels of the Obama administration, which suggests the White House has decided to take a tougher stand against China. The speech also comes at a time when U.S. business is also complaining more about Beijing’s policies and practices as seen in new reports from the American Chamber of Commerce in China and the Asia Society.

Locke noted that China just released a draft of its Foreign Investment Catalogue, the first revision since 2007. “The Chinese pledged – at the S&ED two years ago and at last year’s JCCT – that they would lift prohibitions in the revised catalogue on many industries in which U.S. firms are world leaders and have much to offer the Chinese economy,” Locke said in a May 4 speech. “Well, the new Foreign Investment Catalogue falls far short of that promise,” he said in his prepared remarks to a joint meeting of the Asia Society and Woodrow Wilson Center.

“China has also recently announced a new review system to vet foreign investments based on vague national security parameters,” Locke said. He complained that the Chinese are preventing U.S. and other foreign companies from investing or operating freely in China through a “review system that allows for competitors and others outside of the Chinese government to influence the process by proposing to the Chinese authorities that a particular transaction be reviewed.”

Locke said it can be tempting to write regulations in a way that tilts the competitive playing field in favor of domestic companies. “But this just cannot continue if the United States and China want to capture the full promise of our commercial relationship,” he declared. “A recent US-China Business Council report found that, over the last year, less than 3% of proposed regulatory measures have been published as promised. That’s not close to good enough,” he said.

“When it comes to market access problems for foreign companies, the issues may be different, but the fundamental problem often boils down to the distance between the promises of China’s government and action,” he added. “Perhaps an agreement is made in Beijing, but it never gets put into practice. Or perhaps there’s a well-written law or regulation at the national level, but there’s lax enforcement in the provinces or cities. Whatever the case, we don’t often see enough real impact on the ground,” Locke complained.

House Democrats Play It Cool on Colombia FTA

House Democrats don’t want to say yes too soon to supporting the U.S.-Colombia FTA. They are remaining noncommittal to the deal, insisting they want to see actual results from Bogota’s steps to improve labor and human rights protections. After U.S. Trade Representative (USTR) Ron Kirk sent congressional committees a letter May 4 saying the administration is ready to start technical talks on legislation to implement the accord and on a Statement of Administrative Action, Reps. Sander Levin (D-Mich.) and Jim McDermott (D-Wash.) issued a statement complaining that important commitments Colombia made are yet to be realized.

“We must fully ensure that there is ‘Action’ in the Action Plan,” they said. “The question raised by the U.S.-Colombia FTA is will workers be able to exercise their basic internationally-recognized rights and be free from the threat of violence? That question has not been answered yet and we intend to continue aggressively focusing on strengthening and implementing the Action Plan,” the two Democrats said (see **WTTL**, April 25, page 3).

While Colombia “still has important work to accomplish to address the objectives of the Action Plan before the President will formally submit this Agreement to Congress for consideration,” Kirk told the House Ways and Means and Senate Finance Committees, “we have determined that Colombia has taken the steps necessary, consistent with the April 22 mile-stones, to move to the next stage in the process.” Kirk said his office is ready to begin technical discussions

on implementing legislation. Ways and Means Chairman Dave Camp (R-Mich.) issued a statement saying he looked forward to beginning technical discussions immediately so all three FTAs can be ready for congressional consideration by July 1. "I also look forward to continuing to work with the administration to advance the other elements of the U.S. trade agenda, among them our preferences programs, trade adjustment assistance, WTO accessions, and ongoing and new trade negotiations," he added.

House Speaker John Boehner (R-Ohio) also issued a statement supporting action on the three FTAs. "I look forward to working with the administration to pass these trade agreements in tandem with one another, as well as engaging in a broader discussion about America's trade and workforce policies," Boehner said. The reference to "a broader discussion about America's trade and workforce policies" might be a not-so-vague hint of support for Obama's trade agenda and Trade Adjustment Assistance. A press release from Finance Chairman Max Baucus' (D-Mont.) office said he was eager to start work on implementing legislation.

Promised Talks on Beef Win Baucus Backing for Korea FTA

Obama administration promises May 4 to request consultations with Korea on restrictions on U.S. beef imports and to increase funding to promote U.S. beef in Korea have been enough to win Senate Finance Committee Chairman Max Baucus' support for the U.S.-Korea Free Trade Agreement. "As a result of today's announcement on funding and consultations, Senator Baucus will support the Korea FTA as it moves through the Senate and will work with the Administration on a package of trade measures including the pending FTAs with Korea, Colombia and Panama, as well as renewal of Trade Adjustment Assistance and key trade preference programs," a Baucus press release stated.

A letter from USTR Ron Kirk to Baucus said the administration would seek consultations with Korea under an April 2008 bilateral protocol on health requirements for U.S. beef. "Once the U.S.-Korea Free Trade Agreement (KORUS) enters into force, and in accordance with Article 25 of the Protocol, the United States will request consultations with Korea with regard to the full application of the Protocol, recognizing that KORUS and the Protocol are separate agreements," Kirk wrote (see **WTTL**, May 2, page 3).

State Reviewing Clinton-Era Arms Export Policy

The State Department has begun to review the Clinton-era Conventional Arms Transfer Policy for sales in the Middle East to determine whether changes in the policy are needed in light of what is taking place in the region, Andrew Shapiro, assistant secretary of state for political-military affairs, told the DTAG May 3. "In the current dynamic geopolitical environment, it is natural that we take a look at our policies and approaches. For instance, we in PM are taking a close look at the Conventional Arms Transfer policy. This policy has suited the United States well since it was enacted just after the end of the Cold War," Shapiro said.

"But it is time to dust off its pages and make sure that it reflects the reality of today," Shapiro said. "We don't know yet what specific changes, if any, are needed," he added. "We simply cannot operate as if it's business as usual. U.S. foreign policy is not immune to geopolitical change and therefore neither is U.S. arms transfer policy," he told DTAG.

At the same time, Shapiro emphasized that any change in U.S. arms sales policies for the Middle East will not undermine statutory requirements to maintain Israel's Qualitative Military Edge. "We remain committed as ever to Israel's security and ensuring that Israel maintains its Qualitative Military Edge. We also remain committed to Gulf security, which was borne out last year, when we signed the largest defense trade deal in history with Saudi Arabia," Shapiro

said. President Clinton established the arms transfer policy in 1995 to promote restraint by the U.S. and other suppliers in the transfer of weapons systems that could destabilize or endanger international peace, while supporting sales to allies. One objective was to promote regional stability in areas critical to U.S. interests and prevent the proliferation of weapons of mass destruction and their missile delivery systems. It also aimed to promote peaceful conflict resolution and arms control, human rights, democratization and other U.S. foreign policy objectives.

The new look at defense export policies is also being driven by the impact the global economic slowdown has had on defense spending. “But global budgetary constraints in the years ahead may continue to put downward pressure on defense spending,” Shapiro said. For now, however, demand for U.S. military products remains strong. “In fact, Foreign Military Sales, or FMS, have actually increased dramatically over the last several years,” he noted.

Despite global economic challenges, fiscal year 2010, which ended Sept. 30, 2010, was State’s biggest year for licensing “and FY 2011 should be even bigger in light of recent agreements,” he said. “For the past several years DDTC has been averaging 80,000 to 85,000 licenses each year, and we are projecting 84,000 licenses for 2011. The export of defense articles also makes up a significant portion of the U.S. economy. The total value of authorized Direct Commercial Sales is approximately \$145 billion or about one percent of GDP,” Shapiro reported.

In addition to the Middle East, the Obama administration is looking at increased sales to emerging markets. “Upon coming to office, President Obama made it a priority to strengthen ties with large emerging powers like India and Brazil that are making concerted efforts to modernize their defense sectors,” he said; while expressing disappointment, however, at India’s decision not to include U.S. jet fighters in the final round of competitions for new aircraft procurement. “These efforts around the world are paying off, as we are seeing an increasing share of U.S. defense sales going to developing countries and emerging powers,” he said; adding that is true especially in the Middle East and South Asia.

Commerce Ponders Handling of New FTZ Regulations

Due to the extensive comments it expects to receive on its proposal for revamping regulations governing Foreign Trade Zones (FTZ), Commerce’s FTZ Board is considering two options to address concerns being raised by FTZ operators. It may (1) publish an interim final rule with a request for additional comments or (2) publish a final rule covering some agreed upon changes and a new separate proposed rule for comment for provisions that need further work. Provisions of an interim final rule or a final rule would be effective upon publication, the FTZ Board said on its website. It has been 20 years since Commerce last amended the FTZ regulations and that process took two years, it noted. The board wants to make sure the regulations bring “the benefits of key revisions to program users (especially exporters) as soon as possible,” it explained.

After publishing the proposed rules in December, the board extended the original comment period to May 26 in response to a request from the National Association of Foreign-Trade Zones (NAFTZ) (see **WTTL**, Feb. 28, page 3). “The proposed sections and text of the regulations represent an increase of 1.6 times over the current sections and text of the regulations,” NAFTZ said. “The sheer numbers alone require significant time to review, analyze, understand and prepare necessary suggested changes,” it said.

In its 84-page final comments May 4, NAFTZ said any changes to the regulations must preserve the “prime directive” of the FTZ program, which is to encourage activity in the U.S. that could otherwise be done in other countries. The NAFTZ identified 11 major areas of concern with the proposal. It recommend adding new processes to expedite board approval of export production when still needed. In addition, it called for expedited approval of new imported materials in U.S. production, suggesting adding an entirely new and significantly simplified process to

the rules for approval of intermediate and finished goods. It also called for increased transparency by providing for the posting of information on intermediate and finished products, materials and components used in the production of intermediate/finished products that have been the subject of board restrictions, prohibitions or the withdrawals of applications.

“Advance review should be expedited as much as possible,” NAFTAZ said. “While it is clear that some applications will raise objections, it is vital to balance those objections, keeping the Prime Directive firmly in mind. Uncertainties should be minimized for applicants and FTZ users for the same reasons,” it added. Because zone procedures require significant investments in equipment, workers and inventory systems, advance approvals “should take the minimum amount of time possible, given the pace of change in the global economy,” the group contended.

The proposal to terminate the advance review requirement for zone manufacturing activities drew objections from the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS). APHIS “is concerned that grantees, operators and users operating in the FTZs do not understand that the agricultural regulations apply regardless of the commodities’ status while in transit to or within these zones,” its comment said. “Grantees, operators and users may then inadvertently by-pass agriculture import requirements for production materials containing animal products and by-products and plant products and by-products which present a risk to the U.S. agriculture and environment,” APHIS continued.

USTR Invites Countries to Draft IPR Action Plans

Previous Democrat and Republican administrations have been reluctant to impose Special 301 sanctions on countries that don’t provide intellectual property rights (IPR) protections for U.S. copyrights and trademarks. The Obama administration followed that same pattern May 2 with the release of the annual list of countries whose IPR practices aren’t adequate. To give the program a little boost, however, the U.S. Trade Representative’s (USTR) office said it is now inviting all 42 countries that are either on the Special 301 “Priority Watch List” or “Watch List” to “cooperatively develop action plans to resolve IPR issues of concern.”

USTR Ron Kirk said this year’s report comes with a call to action for our trading partners. “We are ready to work intensively with you to stop intellectual property theft that threatens IP-related jobs in the United States and other countries,” he said in a statement.

While the USTR has developed action plans in the past with select partners, this year’s open invitation is broadening the field to all concerned countries. “Our action plans have always included benchmarks such as legislative, policy, or regulatory action by which to measure progress,” one USTR official told WTTL in an e-mail. “This year, for the first time USTR has proactively invited trading partners to negotiate mutually acceptable action plans, both in the report and by requesting that U.S. embassies in relevant countries convey the offer directly,” he said. There were no additions, removals or status changes in the new report. The USTR’s office said it will conduct one “out-of-cycle review” for Italy.

* * * Briefs * * *

ITAR: State’s DTAG endorsed proposal May 3 to create new exemption that could eliminate license requirements for exports to NATO countries and other close U.S. allies after the USML is converted into three-tier, positive list as part of Obama administration’s export reform initiative. Exemption should apply to Tier 2 and 3 products, group recommended.

ANTIBOYCOTT: BIS issued warning April 29 to JLG Industries Inc. of Hagerstown, Md., for failing to report receipt of “request to engage in a restrictive trade practice or boycott.” Letter of credit from Gulf Bank KSC (Kuwait) on Jan. 27, 2005, included this language: “The carrying vessel is allowed to enter Kuwaiti ports. Shipment of Goods of Israeli origin and shipment from and/or transshipment at Israel is prohibited,” BIS noted.