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Concerns Raised about Future of BIS

Although Obama administration officials have offered few new details about their export control reform plans since Defense Secretary Gates outlined their goals in April, there is growing concern among some in the exporting community that the end result will be the dismantling of the Bureau of Industry and Security (BIS). BIS Assistant Secretary for Export Administration Kevin Wolf didn't calm those fears when he addressed an industry group June 21 and merely said Commerce would continue to have a role economic security issues.

Industry executives say they are worried about reports from some government sources that suggest all export licensing would be shifted to State's Directorate of Defense Trade Controls (DDTC) under the reform plan. In addition, there have been rumors that Immigration and Customs Enforcement (ICE) and the Justice Department are haggling over which would take over export enforcement.

The reform plan calls for the establishment of "four singles": a single control list, a single export enforcement organization, a single licensing agency and a single information technology (IT) platform. It apparently has already been decided that the single IT platform will be based on the Defense Department's existing USExport system (see **WTTL**, June 14, page 2). The idea of consolidating licensing at State and enforcement at either Justice or ICE would appease hawks in Congress who would be likely to oppose any plan that would put these activities in BIS. Such a shift, however, is certain to evoke equal opposition from the business community.

Exporters say the shift of all licensing to DDTC would undermine the basic goals of the reform program. While it would create a simpler one-stop-shop for all licenses, they warn that the licensing process would be worse because of DDTC's attitude toward exporters, its opaque policies and procedures and its unresponsiveness to licensing questions. Former compliance officials also question the move of enforcement to either ICE or Justice which are focused on criminal enforcement and have no interest or expertise in administrative enforcement which is the main compliance tool used by both BIS and DDTC.

Fear of Legal Challenge Delays CVD Currency Decision

Commerce's International Trade Administration (ITA) has delayed reaching a decision on whether to investigate China's alleged currency manipulation as an export subsidy in pending countervailing duty (CVD) cases because it is worried that its ruling could be overturned by the Court of International Trade (CIT) or the World Trade Organization (WTO), Commerce Secre-



tary Gary Locke told the Senate Finance Committee June 23. Pending cases on coated paper and extruded aluminum include requests to ITA to consider China's exchange rate policy a countervailable subsidy. "Given the scrutiny that our decision within the department will face on judicial review, the general counsel's office, my office and the career people in the department of international administration are taking a hard look at the facts and the law of these specific cases, and if they warrant a decision to investigate, we will investigate," Locke said.

According to Locke, the cases raise legal issues that have not been addressed before where exchange rates were an issue. "We have considered the issue of whether certain currency practices involving multiple exchange rates constitute a countervailable subsidy in the past," Locke explained. "In some cases, we have ruled that where there are multiple exchange rates specifically geared toward exports that is an offense we would rule against," he said. "But none of these cases involved an allegation of an undervalued unified exchange rate such as that in China," the Commerce chief added.

Past cases involving allegations about China's unified exchange rate "did not meet the specific requirements of U.S. law," Locke stated. "In the two cases that are now before us, the allegations have been amended. We are taking a very hard look at this very specific issue," he said. In response to an ITA request for more information on China's exchange rates, attorneys at King & Spalding, who represent the coated paper petitioners, filed research showing that 70% of currency transactions in China are conducted for exporters. They claimed that this high-level on exchange shows the specificity of the benefit of the undervalued currency to exports.

Baucus to Introduce Bill to Add Penalties to Special 301

Frustrate with the annual Special 301 process for naming countries that are not protecting intellectual property rights but with no action taken against them, Senate Finance Committee Chairman Max Baucus (D-Mont.) said he will introduce legislation to impose trade sanctions against nations that consistently fail to mend their ways. The sanctions would apply to programs the U.S. provides unilaterally so there would be no violation of WTO rules.

The legislation would require sanctions to be imposed on countries that fail to improve their IPR protections after repeatedly being cited by the U.S. Trade Representative (USTR) in the "name and shame" Section 301 reports annually, Baucus said June 23. The legislation "would prohibit federal government procurement from that foreign country, prohibit financing by OPIC [Overseas Private Investment Corp.] and Ex-Im and also withdraw preferential treatment for which the foreign country qualifies under GSP" [Generalized System of Preferences], he told a hearing. "I'm going to introduce it soon," Baucus later told reporters.

Obama Makes New Promise to Bring Russia into WTO

At the "Hamburger Summit" with Russian President Medvedev June 24, President Obama renewed a pledge to help Russia join the WTO, and both leaders agreed to set Sept. 30 as the goal for concluding bilateral accession talks. Although the chances for concluding a deal were helped by Moscow's agreement to reopen its market to U.S. poultry, Russia will still need to approve legislation tightening its intellectual property rights and other trade rules, steps that are still not certain. "I told President Medvedev that our teams should accelerate their efforts to work together to complete this process in the very near future," Obama said at a joint press conference. "Russia belongs in the WTO. That's good for Russia, it's good for America, and it's good for the world economy," he said.

A White House fact sheet on the talks noted the delay in accession negotiations after Russia announced that it wanted to join the WTO as part of a customs union with Belarus and Kazakhstan. At a bilateral meeting in April the U.S. pledged to help Russia revise its WTO

Working Party report to take into account the new customs union (see **WTTL**, May 3, page 4). “On June 24, based on the significant progress achieved, including agreement on the treatment of state-owned enterprises, and provided that Russia fully implements the mutually agreed upon action plan for bringing Russian legislation into compliance with WTO requirements, the presidents agreed to aim to settle remaining issues by September 30,” the fact sheet said.

Under the poultry agreement announced June 24, the U.S. “will publish information on USDA's website about which disinfectants/pathogen reductions treatments are known to be approved by Russia for use on processing poultry and on food generally,” the USTR’s office said. “The United States will provide information to Russia on the solutions that companies use on poultry shipped to Russia. In addition, the United States will give Russia an updated list of poultry processing facilities authorized to ship poultry to Russia,” it added.

China’s Currency Announcement Not Stopping Legislation Drive

China’s June 19 announcement that it will let the renminbi resume floating has not satisfied the demand for legislation to offer trade remedies to counter the currency’s undervaluation. At a June 23 Senate Finance Committee hearing, Sen. Charles Schumer (D-N.Y.) said he still intends to bring his China bill (S. 3134) to the Senate for a vote, and committee chairman Max Baucus (D-Mont.) jumped on the bandwagon to say he plans to reintroduce and mark up a China measure similar to one he sponsored in 2007 (see **WTTL**, June 21, page 1). “We are not placated by these public pronouncements,” Schumer declared. “The Chinese will keep treating us like they have us on a yo-yo, unless we make a serious push for our legislation,” he said.

The Baucus bill will be similar to one (S. 1607) he sponsored in 2007 and Finance reported out in July 2007 by a 20-1 vote. As the Schumer bill, Baucus’ legislation would have imposed sharper requirements on Treasury to identify foreign currencies that are “fundamentally misaligned” and required Commerce to adjust export prices in antidumping cases to remedy currency undervaluation.

“In order to advance the ball here, I am going to reintroduce a bill I introduced before,” Baucus said. “It’s one that Senator Schumer and I have worked on with Senator Grassley and with other senators,” he said. “I think we need to start moving more aggressively in respect to currency,” Baucus stated. “We need to show some self-respect,” he added. “I plan to reintroduce that bill and start marking up that bill,” he said. Later he told reporters he will talk to other members of the committee about the content of the bill. “We will work with the Banking Committee. Treasury has jurisdiction on currency issues,” he said.

Existing FTA Agreements to Remain after Trans-Pacific Pact

Free trade agreements (FTAs) that the U.S. has already negotiated and implemented with countries participating in Trans-Pacific Partnership (TPP) talks will remain in place even after a TPP accord has been adopted, negotiators agreed at the second round of TPP talk in San Francisco the week of June 14. Schedules for eliminating tariffs and liberalizing trade under those FTAs would also remain in place. If the TPP calls for any greater commitments or concessions than in the FTAs, then the higher standards in the TTP would have to be met, they concluded.

How the U.S. would meld a TTP deal with existing FTAs has been a key questions raised by the TPP talks. The U.S. has FTAs with four of the seven other countries in the TPP negotiations: Australia, Chile, Peru and Singapore. The other countries participating are Brunei Darussalam, New Zealand and Vietnam.

The TPP negotiators failed to reach agreement on the structure of the market access component of an agreement and liberalization of trade in goods, agriculture and textiles. There was “good progress” but no agreement, one USTR official said. Before the next round of talks in Brunei

in October, participants promised to present draft proposals to deal with a set of new cross-cutting issues, including regional coherence, enhancing regional competitiveness and supply chain integration, facilitating trade for small and medium-size enterprises, development and transparency. Although eight countries have started the talks, each participant will still have the opportunity to bow out before a deal is reached. In addition, each member of the Asia-Pacific Economic Cooperation Forum (APEC) will be able to join the talks, although there is no formal procedure for inviting them in or letting them join.

BIS Publishes Obama's Promised Encryption Rules

BIS took the first step toward President Obama's promised reform of export controls June 25 with publication in the Federal Register of an interim final rule easing export requirements for most encryption products that qualify for mass-market classification or License Exception ENC-Unrestricted. Exporters will be able to self-classify most items that qualify under the new rules and export them without the previously required advance notification to BIS, a 30-day waiting period and semi-annual reports (see **WTTL**, April 26, page 1). Instead of advance notification, firms will need to register with BIS and submit an annual report on shipments.

Additional changes to the Export Administration Regulations (EAR) that are not covered by the new rules are still under review. "The administration will continue to review the encryption rules to further enhance national security and ensure the continued competitiveness of U.S. encryption products," said BIS Assistant Secretary for Export Administration Kevin Wolf. "This effort will include a review of the current controls on publicly available encryption software, integrated circuits with encryption functionality, high-speed routers and other types of restricted encryption products," he said in a statement.

For qualifying items under the new rules, "an exporter may now self-classify these items and export them following a company registration with BIS, answering seven questions using a new submission screen in BIS's on-line application system," a BIS fact sheet explained. "The exporter will receive an 'encryption registration number' upon submission of its registration. The exporter is required to file a report on an annual basis listing the items it has self-classified and exported," it stated. The new rules, which run 23 pages in the Federal Register, also implement changes the Wassenaar Arrangement adopted in December 2009 to decontrol "ancillary cryptographic" items under a new Note 4 to Category 5, Part 2.

Although billed as a simplification of encryption export controls, the new rules can be complicated, particularly for items that don't fall neatly under the included or excluded categories. "It is going to take some getting used to," says Ben Flowe, an attorney with Berliner, Corcoran & Rowe in Washington. "The rules move closer in the direction of self-classification, but it is not all the way there," he cautions.

The 30-day technical review requirements will remain for (1) "encryption components," (2) items that provide or perform "non-standard cryptography," (3) certain items providing or performing vulnerability analysis, network forensics or computer forensics, and (4) cryptographic enabling commodities and software, BIS explained. Restricted items also remain subject to 30-day technical review requirements and still require semi-annual sales reporting. These are mostly network infrastructure items that exceed certain technical performance parameters, such as routers and 3G wireless base stations, it said.

"Pending requests, including requests for items eligible for self-classification pursuant to the June 25th rule, will continue to be processed, and BIS will issue a CCATS [classification] under the amended provisions of the Export Administration Regulations," a BIS spokesman told **WTTL** in an e-mail. "A registration is not required to be submitted for pending requests; these are considered 'grandfathered' under the old regulations. Items eligible for self-classification may be exported immediately under the applicable provisions of the EAR following submission of an encryption registration request," he explained.