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China May Break 2004 Pledge on Encryption Standard

China may be close to breaking a 2004 pledge it made to postpone indefinitely the imposition of its own encryption standard for mobile telephones and hand-held devices while international standards are developed, according to a new report on foreign Technical Barriers to Trade (TBT) the U.S. Trade Representative's office released March 31. "During bilateral talks in September 2009, the United States learned from officials from China's Ministry of Industry and Information Technology (MIIT) that China would approve hand-held devices that employ the widely-used WiFi standard, but only if those devices are also enabled with the Chinese standard – the WAPI (WLAN authentication and privacy infrastructure) encryption algorithm for secure communications," the report says.

> "MIIT officials acknowledged that there is no published or written measure setting out this requirement, and that China had not notified this requirement to the WTO" [World Trade Organization], it adds. "Thus, WTO members and private sector stakeholders were unable to comment on the technical merits of the measure," the report advises.

Since those talks in September, the U.S. "continues to press China to publish the measure in draft form and notify it to the WTO, and to explain why it believes that the WiFi standard is not relevant, effective or appropriate to achieve China's objectives," a U.S. trade official told WTTL in an e-mail. "The United States continues to be concerned about China's WAPI requirements, when its 2004 commitment was to work within the international standards process in the development of wireless computing standards, and the existing internationally recognized standard, an ISO/IEC standard, is commercially ubiquitous across the globe," the official said. In April 2004, then-USTR Robert Zoellick won a commitment from the Chinese to hold off imposition of the WAPI standard during a meeting of the U.S.-China Joint Commission on Commerce and Trade (see **WTTL**, April 26, 2004, page 3).

Obama Fills Trade Posts with Recess Appointments

Among the 15 recess appointments President Obama announced March 27 were five for top trade officials at Commerce, Customs and the USTR's office. Some of those named have had their nominations pending for a year, while others have been the subject of "holds" imposed by several senators to block Senate confirmation votes. Obama named Eric Hirschhorn to be under secretary of the Bureau of Industry and Security (BIS); Frank Sanchez to be under secretary of Commerce for international trade; Alan D. Bersin to be commissioner of U.S. Customs and

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Border Protection; Michael Punke to be deputy USTR in Geneva; and Islam Siddiqui to be chief USTR agricultural negotiator. A Senate vote on Hirschhorn has been blocked since December by Sen. Jon Kyl (R-Ariz.), who has raised concerns about the potential changes the Obama administration intends to make to U.S. export controls. Confirmation of Punke and Siddiqui has been delayed by a hold placed on them by Sen. Jim Bunning (R-Ky.), who wanted the USTR's office to act against Canadian restrictions on so-called flavored tobacco.

> The Constitution gives the president authority to make appointments while Congress is in recess, which it is in until mid-April, but such appointments can only last until the end of the next term of Congress, which is likely to be the fall of 2011. Obama could still renominate these appointed officials and seek Senate confirmation again. Presidents in the past have done that and had their nominees approved for a regular term. The quandary for Obama would occur, if senators continue to block his appointments for the next two years.

Sanchez's nomination was held up by questions that were addressed at his confirmation hearing about loans made by a community development group on whose board he served to a company that he later headed (see **WTTL,** March 8, page 3). With his appointment, Commerce's International Trade Administration (ITA) now has three of its five top posts filled. In addition to Sanchez, Suresh Kumar has been confirmed as director general of the U.S. and Foreign Commercial Service and Nicole Lamb-Hale for assistant secretary for manufacturing and services. The nomination of Michael Camunez to be assistant secretary for market access and compliance is still pending in the Senate. After more than a year in office, Obama has still not nominated anyone to fill the key post of assistant secretary for import administration, which oversees enforcement of the antidumping and countervailing duty laws.

"While the president respects the critical role the Senate plays in the appointment process, he was no longer willing to let another month go by with key economic positions unfilled, especially at a time when our country is recovering from the worst economic crisis since the Great Depression," the White House press office said. "This opposition got so out of hand at one point that one senator put a blanket hold on all of the president's nominees in an attempt to win concessions on two projects that would benefit his state," the statement continued. "Another nominee's confirmation was delayed by one senator for more than eight months because of a disagreement over a proposed federal building in his home state," it said.

CIT Rejects Suit to Get Byrd Money from Sureties

Court of International Trade Judge Timothy Stanceu rejected a multi-pronged suit March 26 that could have won millions of extra Byrd Amendment dollars for U.S. producers of fresh garlic, preserved mushrooms, freshwater catfish tail meat and pure honey (slip op. 10-31). The suit claimed that U.S. agencies and a host of insurance companies that provided surety bonds for Chinese "new shipper" importers of these products had denied "affected domestic producers" (ADPs) of these products certain rights due them under the antidumping laws and money they could have received under Byrd. Although he dismissed the case against the insurers, Stanceu declined to rule for now on the claims against Commerce and Customs.

> The suit claimed Commerce and Customs had cancelled bonds posted by Chinese importers from 1995 to 2006 and had not given ADPs a chance to protect their interests. Hundreds of millions of dollars in uncollected bonds were at issue. The U.S. producers said "surety defendants issued, negligently, single-transaction customs bonds to importers of the merchandise at issue in the new shipper reviews and, on an unjust enrichment theory, [they] claim a right to restitution of certain premiums that these importers paid to the sureties," the ruling noted.

"There is no basis in law to support plaintiffs' argument that the surety defendants owed a duty of care to plaintiffs with respect to the issuance of bonds to importers with less than perfect creditworthiness," Stanceu ruled. "The court concludes, therefore, that plaintiffs' negligence

claims against the sureties, though creatively formulated, must be dismissed according to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted," he wrote. "The court, even when assuming all factual allegations made in Count Five are true, cannot conclude that plaintiffs have any right to relief on these claims," he stated.

> "The court is aware of no authority or principle under which it could conclude that the surety defendants, on the facts plaintiffs allege, owed plaintiffs a duty of care and thereby assumed liability for 'negligently' issuing customs bonds to importers of subject merchandise involved in new shipper reviews," Stanceu wrote. "The injuries plaintiffs allege to have suffered, are the very types of injuries to domestic industries that the antidumping duty laws are intended to redress through the administration of an antidumping duty order," he added. "Plaintiffs appear to be inventing a new tort that would provide them a private remedy for claimed injurious effects caused by the presence in the U.S. market of unfairly traded imports," Stanceu declared.

Report Highlights U.S., EU Standards Rivalry

While the development of unique standards in developing countries such as China has gotten much of the publicity generated by the new report on foreign technical barriers to trade (TBT) that the USTR's office issued March 31, an equally broad concern in the report focuses on the long-term rivalry between the U.S. and European Union (EU) over standards setting and conformity assessment. Because each of the EU's 27 member states gets an individual vote in international standards-setting organizations, the EU has often been able to promote European standards as international standards to the detriment of U.S. manufacturers, the report says.

> "The United States raises concerns with the EU's standards-related activities as they arise in the context of particular market access issues, including as they affect SMEs [small- and medium-size enterprises] which, because of their more limited resources may be less able to manage the problems presented by the EU's approach," the report states. "In 2010, U.S. officials intend to work to develop a more comprehensive strategy for addressing the negative impact of the EU's approach on standards and conformance on U.S. exports to the EU as well as third countries," it adds.

The report details how the EU has embarked on a policy aimed at using its standards "as a global standard setter to enhance the competitiveness of European industry." It quotes from an EU paper which recommended that the EU "promote greater global regulatory convergence – including where appropriate the adoption of European standards – internationally through international organizations and bilateral agreements." The goal of its New Approach Directive is to have standards developed by European groups, such as the European Committee on Standardization (CEN) and the European Committee on Electrotechnical Standardization (CENELEC), adopted by international bodies such as the International Standards Organization (ISO) and International Electrotechnical Standards Committee (IEC).

"While the New Approach allows other standards to be used to meet essential requirements, U.S. producers report that in practice the costs and uncertainty associated with not using a CEN or CENELEC standard and attempting to demonstrate that their use of alternative standards will fulfill the essential requirements can be prohibitive," the USTR report notes. "As a result, U.S. producers often feel compelled to use the relevant CEN or CENELEC standard for products they seek to sell on the EU market," it says.

The EU also has sought to include its standards in bilateral trade agreements. Similar efforts have been made for food standards set by the Codex Alimentarius and in international bodies that set rules for conformity assessment testing and certification, such as the International Laboratory Accreditation Cooperation (ILAC) and the International Accreditation Forum (IAF). "As a result, the United States is concerned that U.S. accreditation bodies may no longer be

recognized in the European Union, irrespective of their competence and status under ILAC or IAF," the TBT report says. The release of the 114-page TBT report along with a new 101-page report on sanitary and phytosanitary (SPS) trade barriers and the 25th annual National Trade Estimate (NTE) of Foreign Trade Barriers, which ran 404 pages this year, is supposed to mark the USTR's new more aggressive trade enforcement stance. Despite the small size of the USTR staff, trade officials claim they have adequate personnel, with aid from other agencies, to address the barriers they have identified in the three reports. The USTR's office issued fact sheets touting its success in eliminating many of barriers targeted in the last year. Nonetheless, the length and breath of the NTE report has not changed much in the last two decades.

* * * Briefs * * *

ANTIDUMPING: In response to provisions of appropriations legislation enacted in December, ITA in March 31 Federal Register asked for public comment on possible elimination of retrospective adjustment of antidumping and countervailing duty orders through administrative reviews and use only of prospective margins, which is way most countries handle trade cases. Congress asked for review to determine if change would help minimize government's failure to collect duties retrospectively from importers who go out of business or otherwise evade payment. Use of zeroing in administrative reviews also has been major cause of trade disputes, mostly lost by U.S., in WTO. "Replacement of the retrospective system would entail a significant change in the way in which duty liability has been determined in the United States since antidumping law was first enacted in 1921, which could engender uncertainty and confusion during a transition period," lawyers at Sidley Austin told clients in an alert. They said ramifications need to be considered and "companies involved in importation or facing import competition should carefully evaluate where their interests lie and consider the benefits of submitting comments."

ITAR: In Federal Register March 29 DDTC proposed amendment to ITAR to remove requirements for prior approval or prior notification for certain proposals that U.S. companies plan to make to foreign persons relating to significant military equipment at ITAR Section 126.8.

FCPA: Three Daimler subsidiaries reached agreements April 1 with U.S. government for their roles in charges that German automaker settled with Justice and SEC in March (see **WTTL**, March 29, page 1). DaimlerChrysler Automotive Russia SAO (DCAR), now known as Mercedes-Benz Russia SAO, and Export and Trade Finance GmbH (ETF) each pleaded guilty in D.C. U.S. District Court to criminal informations charging them with one count of conspiracy to violate FCPA and one count of violating FCPA. As part of plea agreements, DCAR and ETF agreed to pay criminal fines of $27.26 million and $29.12 million, respectively, with fines covered by $93.6 million fine Daimler previously agreed to pay. Daimler's Chinese subsidiary, DaimlerChrysler China Ltd. (DCCL), now known as Daimler North East Asia Ltd., entered deferred prosecution agreement with Justice with no additional fine imposed.

MORE FCPA: Robert Antoine, former international affairs director of Haiti's government-controlled Telecommunications D'Haiti (Haiti Teleco), pleaded guilty March 12 to laundering money and accepting bribes from three U.S.-based companies seeking to obtain favorable contracts. He had been indicted in December along with another Haitian official and three Florida business executives for their roles in FCPA violations.

GLYCOSATE: Albaugh, Inc., March 31 filed antidumping petitions at ITC and ITA against imports of glyphosate from China.

ALUMINUM EXTRUSIONS: Aluminum Extrusions Fair Trade Committee and the United Steelworkers Union March 31 filed antidumping and countervailing duty complaints at ITA and ITC against aluminum extrusions from China.

EXPORT ENFORCEMENT: G&W International Forwarders of Buffalo, N.Y., reached agreement with BIS March 18 to settle charges that it aided and abetted export of stack sizer screening machine to Indian Rare Earths, Ltd., which was on BIS Entity List. Firm will pay $20,000 civil fine in five monthly payments of $4,000 each and also will conduct audit of its export compliance program and send BIS copy of results.

MORE EXPORT ENFORCEMENT: Aqua-Loop Cooling Towers, Inc., of Folsom, Calif., and its representative, Bob Rahimzadeh, each reached separate settlements with BIS March 25 for alleged exports in 2004 of hog hair filter media to Iran through United Arab Emirates. BIS imposed $100,000 civil fine on firm and Rahimzadeh, but agreed to suspend and then waive fine if they remain in compliance with export control rules for 10 years. They were also placed on denied party list for 10 years. Address in UAE to which goods were shipped, Parto Abgardan, was placed on BIS Unverified List in 2006.