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Locke Wants to Eliminate Export Licenses for Closest Allies

Commerce Secretary Gary Locke Oct. 1 leaped ahead of the White House-directed review of U.S. export controls with a proposal that could decontrol most items on the Commerce Control List (CCL) when they are exported to close U.S. allies and friends. Locke offered no details on his proposal, which he presented to the Bureau of Industry and Security's (BIS) annual Update conference, but industry representatives at the conference said the proposal could eliminate the need for as much as 50% of the export license applications now filed with BIS and much of the administrative costs companies incur meeting licensing requirements.

Locke said he has told BIS to "consider eliminating most dual-use export license requirements for closest allies and partner nations – some 40 to 60 nations – consistent with statutory and international obligations." He also wants BIS "to develop a fast-track process for the review of dual-use export licenses for other key countries that do not pose a significant threat and have a strong history of export control compliance."

In July, Locke directed BIS to come up with an export control reform plan as part of his five-part initiative to enhance U.S. exports (see **WTTL**, July 27, page 1). "As a general rule, many of the items that would be covered by this change do not now even require a license for export within the European Union," Locke told Update. "This is a low-risk and high impact change that we at the Department of Commerce could implement quickly and a change that will immediately help our exports become more competitive," he said.

The list of eligible countries is likely to start with the members of the Wassenaar Arrangement, which has 39 members, not counting the U.S. Other possible beneficiaries could be Hong Kong, Singapore, Mexico and some Latin American nations. Most items on the CCL would be eligible except those subject to the Missile Technology Control Regime, for which licenses are required by statute. Ending license requirements for most Wassenaar members would also eliminate the need for the proposed but controversial Intra-Company Transfer (ICT) mechanism, since most of the trade that would have been covered by the ICT would be license-free.

U.S, China Will Develop Plan to Increase High-Tech Trade

BIS and Chinese Ministry of Commerce (MofCom) officials participating in the Sept. 30 meeting of the U.S.-China High Technology Working Group (HTWG) agreed to develop an action plan by the end of October to enhance high-tech U.S. exports to China. The plan will be



on the agenda for the late October meeting of the Joint Commission on Commerce and Trade. One of the goals of the plan will be to convince U.S. and Chinese firms that export controls are not an impediment to trade. “There is still a lot of misconceptions, I would say, about the effect of U.S. export controls as it relates to China,” BIS Acting Assistant Secretary for Export Administration Matt Borman told WTTL in an exclusive interview.

The plan also will aim to publicize the benefits of the Voluntary End-User (VEU) program to more Chinese firms and to encourage them to apply for eligibility. There are currently “a handful” of new applications for Chinese firms pending at BIS, Borman reported. “They are pretty close” to approval, he said.

For the first time, the government-level HTWG meeting was preceded by a one-day meeting between U.S. and Chinese officials with representatives from American and Chinese firms. Business presentations at the meeting provided recommendation on how to improve exports of controlled goods to China. “We certainly felt that the industry panels provided both governments with quite a lot of useful input into ways to deal with the issue of secure high-tech trade between the U.S. and China,” Borman said. He said part of the action plan will address those recommendations.

Industry speakers identified problems both on the U.S. and Chinese sides, including controls that don’t reflect current technology, license conditions that are often “denial by proviso,” and MofCom’s slowness in issuing end-use certificates. Speakers included executives from Applied Materials, Boeing, GE, Honeywell and Sun, as well as Chinese speakers from China Great Wall Corporation, China National Aero-Technology Import & Export Corporations (CATIC) and Shanghai Hua Hong NEC Corporation.

Report Reveals Strong Disagreements over BITs

The Obama administration is likely to delay any decision to amend the current model Bilateral Investment Treaty (BIT) in the wake of a report it received Sept. 30 from an advisory group that found little common ground on what changes to make to the model. The report, prepared by a subcommittee of State’s private-sector Advisory Committee on International Economic Policy (ACIEP), revealed deep divisions among subcommittee members representing the business community and those representing nongovernment organizations (NGOs) and unions.

The subcommittee’s divisions echoed the sharply divided testimony at a joint State and USTR hearing July 29 on the model BIT, which was last revised in 2004 (see WTTL, Aug. 3, page 2). “The report demonstrates the complex nature of the issues and their importance to a wide range of stakeholders, and the administration will carefully consider the views set forth in the report in the course of its review,” said U.S. Trade Representative (USTR) Ron Kirk.

The report “reflected divergent views on the basic underlying value of foreign investment,” said one source. While offering a few findings and recommendations, which mostly called for clarification of the 2004 model BIT, the report mostly presented each of the different positions of members. “It shouldn’t surprise anyone that it came out the way it did,” the source noted. There was consensus, however, on a few points, including on need to strengthen the obligations of BIT signers to provide transparency in the laws and regulations governing foreign investment and to assure that the exceptions that allow restrictions for the purpose of “essential security” are not misused to protect economic interests.

The ACIEP subcommittee included members from industry, trade associations, unions, environmental groups, academia and developmental organizations, as well as members of investment arbitration panels. Due to the lack of agreement on most issues, subcommittee members filed separate comments in an annex to the report. The industry portion laid out arguments for why investment abroad by U.S. companies is good for the U.S. economy and fosters exports and why foreign rules that impede investment or impose onerous rules are bad. Labor, environment and

development groups criticized BITs for undermining worker and environmental protections in foreign countries and raised fears about foreign investors trying to do that in the U.S.

Obama Administration Purges Trade Advisory Panels of Lobbyists

Like the expulsion of the Jews from Spain in 1492, the Obama administration Sept. 30 told registered lobbyists who are members of Industry Trade Advisory Committees (ITACs) that they won't be allowed to remain on the panels after Feb. 17, 2010, when their current terms expire. An e-mail sent to ITAC members from the Commerce office that manages the 16 ITACs said members who are registered lobbyists won't have their memberships renewed as part of the Obama administration's policy of not having lobbyists serve on federal advisory committees.

One source estimated that about half of the 330 current ITAC members could be barred from membership under the new rules. Many listed ITAC members are registered lobbyists because they are trade association executives, government relations specialists for companies or lawyers and consultants.

"They will lose decades of experience" with this move, one ITAC member told WTTL. "They will lose people who understand the issues," the member said; noting that "hundreds and thousands of small companies will lose their representation on the committees because they are represented by their associations." Another member asked, "What's the value of doing this?" The major turnover of ITAC membership will come just as the U.S. supposedly will be entering the end-game in the Doha Round. One of the main tasks of ITACs is to advise U.S. officials on trade negotiations, including goals for the talks and reactions to offers from other countries.

The notice from the administration has sparked "outrage" among ITAC members, one member told WTTL. E-mails were flying among committee members after the notice went out. Some members have called for a joint effort to oppose the decision either through a meeting with Obama administration officials or a letter protesting the decision and explaining what the expelled members contribute to ITAC deliberations. Since the decision was part of President Obama's policy of barring registered lobbyists from appointments to his administration, it would appear that chances for getting the expulsion reversed are slim.

Tempers Flare Over EU Detentions of Generic Medicines

Developing countries and nongovernment organizations (NGOs) Sept. 30 called for the filing of a dispute-settlement complaint at the World Trade Organization (WTO) against the European Union's (EU) detention of generic drugs that the EU believes infringe drug patents held by European companies. Officials from India and Brazil, whose drug shipments have been the target of such seizures, have been in talks with the EU over the issue, but no decision has been announced yet on whether they will go forward with a formal complaint. Calls for filing the complaint came at a sometimes heated WTO-sponsored forum on access to medicines.

Although little trade is affected, the dispute has become a political and public relations mess for Europe and its pharmaceutical industry (see WTTL, March 9, page 3). India, Brazil and other developing countries have raised concerns with the 2008 customs detentions of generic medicines in transit through the EU at the WTO General Council, the Trade-Related Intellectual Property Rights (TRIPS) Council and other international groups.

A 2003 EU regulation provides the basis for member states to apply IPR rules extraterritorially and to goods in transit, said Sanjay Sudhir, counselor at India's permanent mission to the WTO. He complained that nothing has been done to correct the EU regulation. India is in bilateral talks with the EU and has sent a number of letters, Sudhir said. "Regrettably, we have received very few responses," Sudhir claimed. The European rationale vacillates between trying to stem the flow of fake drugs and enforcing IPRs, Sudhir asserted. "There seems to be

an orchestrated campaign of deliberately confusing quality issues with IPRs,” Sudhir said. An EU official rebutted Sudhir’s complaint. Meetings as high as the ambassador level gave “absolutely full details,” said Luc Devigne, head of the intellectual property unit in the trade division of the European Commission. “Since some countries in this room have threatened us with WTO litigation, I will abstain from legal nature argument because I prefer to reserve these for a WTO panel that might be held at their request,” Devigne said. “We’re talking about a very few limited cases in 2008,” he added.

Uncertainty about customs’ powers regarding in-transit goods exists all over Europe, said Arnout Gieske, a lawyer with Van Diepen Van der Kroef. U.K. customs authorities, for instance, were sued because they wouldn’t detain infringing goods in transit, Gieske said. Uncertainty also surrounds French, Swedish, Belgian and German customs practices, he said. Current case law supports the idea that goods in transit, and not infringing IPR in the countries of origin and destination, can violate a Dutch patent according to a Dutch supreme court ruling, said Gieske, who has been involved in some of the detainments.

Committee Closer to Deemed Export Methodology

The methodology to create a Deemed Export Control List (DECL) moved closer to adoption Oct. 1 at the latest meeting of the BIS Emerging Technology and Research Advisory Committee (ETRAC). The committee is now focused on a draft three-tier screening method that would determine whether a specific technology should be subject to the deemed export licensing requirements for foreign nationals in the U.S. The committee’s goal is to start with zero entries and then review all current and potential technology controls to see whether they meet the criteria in the screen (see **WTTL**, June 15, page 2). A formal recommendation on a methodology probably won’t be presented to BIS until next year, members say.

* * * Briefs * * *

SOFTWOOD LUMBER: London arbitration tribunal Sept. 28 ruled that Canada hasn’t offered U.S. enough compensation for its breach of U.S.-Canada Softwood Lumber Agreement. “The tribunal’s decision confirms the view of the United States that the Softwood Lumber Agreement is enforceable. Canada failed to cure its breach, and the tribunal has upheld the ability of the United States to take action in response,” said USTR Ron Kirk. Canadian Trade Minister Stockwell Day said Ottawa was disappointed with decision. “The government will comply with the tribunal’s decision,” he stated.

MISCELLANEOUS TARIFFS: Senate Finance Committee Chairman Max Baucus (D-Mont.) and Ranking Republican Charles Grassely (R-Iowa) Oct. 1 issued detailed rules and procedures for senators to file bills for temporarily suspending or reducing tariffs. Rules include requirements for identifying which companies would benefit for tariff changes. Senate action on tariff bill has been stalled for over two years. Last miscellaneous bill was passed in 109th Congress and covered some 680 products. Those suspensions expire Dec. 31, 2009. In 110th Congress, bills for about 800 products were introduced but never passed.

BYRD AMENDMENT: Court of Appeals for Federal Circuit Sept. 29 denied motions for rehearing and en banc review of its February ruling overturning CIT decision that Byrd Amendment was unconstitutional (see **WTTL**, Feb. 23, page 2). There are 41 cases related to Byrd that have been stayed by CIT awaiting final appeals. Customs, as of Oct. 1, 2008, was holding \$1billion in funds that could be distributed to firms that supported successful antidumping and countervailing duty petitions.

CUBA: GAO report released Oct. 1 claims president has more discretion than he has used to liberalize trade and travel with Cuba.

COPPER TUBE: Cerro Flow Products, Inc., KobeWieland Copper Products, LLC, Mueller Copper Tube Products, Inc. and Mueller Copper Tube Company, Inc., Sept. 30 filed antidumping petitions at ITA and ITC against imports of refined copper pipe and tube from China and Mexico.

COMMODITY JURISDICTION: DDTTC has posted on its website and called for public comments on new form it wants exporters to use when filing Commodity Jurisdiction requests.