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A Weekly Report for Business Executives on U.S. Trade Policies, Negotiations, Legislation, Trade Laws and Export Controls

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## NSC Issues Guidance to Speed Commodity Jurisdiction Decisions

President Obama's national security adviser, General Jim Jones, has issued new guidance aimed at shortening the deadline for State to issue Commodity Jurisdiction (CJ) decisions and creating an interagency process for resolving differences over CJ rulings. "There is now a new set of CJ procedural guidelines in place that General Jones signed about a month ago that compress the timelines" for CJ decisions, Bureau of Industry and Security (BIS) Acting Assistant Secretary Matthew Borman said July 28. "There is a regular weekly meeting between the agencies at a fairly senior level to look at CJs when there is still disagreement among the agencies," he told the BIS Sensors and Instrumentation Technical Advisory Committee (SITAC).

> The new guidance was issued June 18 to State's Directorate of Defense Trade Controls (DDTC), Defense's Defense Technology Security Administration (DTSA) and BIS. It implements one of the export control reforms President Bush initiated in a National Security Policy Directive (NSPD) in January 2008. It replaces CJ guidance last updated in 1996.

The new procedures cut the deadline for completing a CJ application to 60 days from 90 days. After the application is received by DDTC and sent out to the other agencies for review and comment, BIS and DTSA must give their responses in 20 days. If there is disagreement among the agencies, a meeting of officials from the three agencies will be held within 30 days. Officials at this meeting will be at the office director or deputy assistant secretary (DAS) level. After DDTC takes this advice, it will issue a preliminary decision. If there is still disagreement, the case will be escalated to a meeting of officials at the assistant secretary level. This Interagency Policy Committee (IPC) will be chaired by an official from the White House National Security Council. The final determination will still be up to DDTC.

So far, there have been two weekly meetings of DAS-level officials. The first meeting of the IPC is scheduled for the week of Aug. 3. At the first DAS-level meeting, five pending CJs were considered and 12 were reviewed at the second. In addition to new incoming applications, the process is also working on the backlog of older pending cases. DDTC is expected to roll out the new procedures publicly, along with a new CJ application form, in August.

## U.S.-China Talks Stress Close Economic Ties

That the U.S. and China are locked in an economic bear hug from which neither can let go was underscored by two days of bilateral talks July 27-28 of the newly renamed Strategic and



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Economic Dialogue (S&ED) in Washington. From the opening ceremony, at which President Obama spoke, until the closing press conference, neither side wanted to upset the balance that links U.S. dependence on the Chinese buying U.S. Treasurys and China's need for the U.S. market for its exports. U.S. Trade Representative (USTR) Ron Kirk sat in on the economic talks chaired by Treasury Secretary Timothy Geithner, and several trade topics, including the pending Section 421 case on tires, were mentioned briefly along with a laundry list of issues. The main forum for trade issues, however, will be the next meeting of the Joint Commission on Commerce and Trade (JCCT) that Kirk co-chairs with Commerce Secretary Gary Locke and their Chinese counterparts. That meeting is tentatively planned for October in China.

> Missing from the public statements of Secretary of State Hillary Clinton and Geithner, who co-led the U.S. side of the talks, was any public mention of last year's hot-button issue, the undervaluation of the Chinese currency. Although the topic reportedly was discussed in their closed-door meetings, the lack of public comment on the subject reflects reduced political interest in the exchange-rate issue in Congress and the greater need to assure the Chinese that their investment in U.S. bonds won't lose its value.

Instead of debating exchange rates, Chinese and American officials, including Obama, stressed the need for a more balanced economic relationship in which Americans save more and buy less and the Chinese expand domestic consumption and rely less on export-driven growth. "I think the most important thing we achieved today was to agree on this broad framework for policies and reform, both China and the United States, to help lay the foundation for a more sustainable, more balanced global recovery," Geithner told reporters July 28. "As part of that – again, this is the critical thing – that as we move to raise private savings in the United States, as we move to bring down our fiscal deficit in the future, as we move to put in place a more stable, more resilient financial system in the United States, we need to see actions in China and in other countries to shift the source of growth more to domestic demand," he said.

Chinese Vice Premier Wang Qishan said the two sides stressed the importance of taking strong measures to increase economic cooperation and trade. "The U.S. side pledged to facilitate exports of high-technology products from the United States to China," he reported. "The U.S. side is willing to step up cooperation with the Chinese side to work toward recognition of China's market economy status in an expeditious manner. The two sides will work together to support increasing investment in infrastructure, continue to advance negotiations on bilateral investment agreement, and enhance cooperation in trade finance," he added.
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## Obama Officials Faces Tough Choices on Model BIT

A July 29 public hearing on potential changes to the current model Bilateral Investment Treaty (BIT) the U.S. uses in investment treaties and free trade agreements sounded a lot like Goldilocks and the Three Bears. Some speakers said the current model BIT is too strong; some said it was too weak; and some said it was just right. Senior Obama administration officials will need to balance the demands from progressives for changes in the model to allow more exceptions from investment protections for environmental, natural resources and public interest concerns against business community calls for greater assurances that foreign investors will get fair and equitable treatment in BIT-signing countries. A review of the model BIT is being conducted by State and the USTR's office, with a decision on any changes expected this fall.

Sharply different views about foreign investment were seen in statements by Todd Tucker of Public Citizen's Global Trade Watch and Stephen Canner of the U.S. Council for International Business (USCIB). "The public is asking: as our domestic infrastructure is literally collapsing under our feet, why is the U.S. government promoting policies which incentivize investment abroad rather than directing it to crucial needs here at home?" Tucker testified. "BITs serve [countries] well by serving as an advertisement that the country is a good place to do business," Canner said. Critics of the BITs and foreign investment see the rules as giving undue advantages to foreign predatory investors and hurting the public interest, the environment and

domestic workers. The international business community contends the treaties protect legitimate investment from politically motivated governments and corrupt foreign courts. The structure of the model BIT is taking on more importance as the U.S. prepares to enter BIT negotiations with China, Russia India, Brazil and Vietnam.

> Rep. Kevin Brady (R-Texas) was in the "don't-touch-current-model" camp. "Now is not the time to weaken protection for U.S. companies abroad," he told the hearing. "It would be unwise to alter the current model treaty," he said. The 2004 model BIT "addressed most, if not all, of the criticism to be heard today," Brady argued. Faced with potential changes to the model that might weaken investment protections, the business community might end up supporting this view.

Tucker quoted presidential candidate Barack Obama's support for amending NAFTA and BITs to assure protection for labor and environmental rights and "to make clear that fair laws and regulations written to protect citizens in any of the three countries cannot be overridden simply at the request of foreign investors." Among the changes Tucker advocated is new language in the model BIT to say "a Party shall not be prevented from adopting or maintaining measures relating to financial services it employs for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system."

Sarah Anderson of the Institute for Policy Studies recommended amending the model to include an exception that would allow governments to impose capital controls during an economic crisis. William Warren of the Forum for Democracy and Trade, whose members include state and local governments officials, said BITs should not impede the sovereign rights of governments. In particular, the model should shun ideological proposals based on "very radical property rights" protections. USCIB's Canner recommended strengthening BITs to assure the free transfer of capital in and out of countries. Capital controls just "cover up bad government policies," he argued.

Business community support for strengthening BIT protections was offered by Calman Cohen, president of the Emergency Committee for American Trade, a trade group representing many multinational firms. "The Model BIT should be revised to strengthen the provisions on fair and equitable treatment, full protection and security and compensation for expropriation by requiring such treatment without linking it to customary international law," he testified. The linkage to customary international law, which was added in 2004, provides a minimal level of protection, lower than provided under U.S. law and the BITs of most other capital exporting nations, he explained. A second change should modify the fair and equitable treatment standard to clarify that both procedural and equity protections are covered by this obligation. He proposed adopting the standard in the Administrative Procedure Act which protects against government action that is "arbitrary, capricious, [or] an abuse of discretion."

## BIS Stays Denial Order After Micei Files Appeal in Court

In two rare and perhaps unprecedented moves, Micei International of Skopje, Macedonia has filed suit in federal court to block a BIS denial order, and BIS has stayed the order pending the outcome of the case. In motions filed May 19 and May 30, Micei asked the D.C. U.S. Circuit Court to stay the denial order, set aside a default ruling issued against the firm by an administrative law judge (ALJ) and to vacate the BIS denial order based on the ALJ's decision.

This may be the first court challenge of the BIS administrative settlement process and an ALJ's determination under the Export Administration Regulations (EAR) since the *Iran Air* case in 1993 (see **WTTL**, July 5, 1993, page 1). The suit also is a test of BIS' authority to use the International Emergency Economic Powers Act (IEEPA) to impose a denial of exporting privileges. The BIS stay of its order apparently moots Micei's plea to the Circuit Court for a stay. On May 14, BIS had imposed a $126,000 fine and a five-year denial of exporting privileges on Micei because it had dealings with Yuri Montgomery, a Macedonian who was the subject of

an earlier, separate denial order. Micei had been charged with exporting an array of products, including boots, shirts and EAR99 items. BIS based its order on an opinion by ALJ Michael Devine, who ruled that Micei had defaulted in the ALJ hearing proceedings because it had not properly responded to a proposed BIS Charging Letter and had not participated in the case.

> Micei has hired attorney Clif Burns of Bryan Cave to represent it in its suit. "In its June 30 filing with the D.C. Circuit, Micei made a number of assertions and presented documentary materials that were not part of the Stay Petition it had filed with BIS," the agency's July 24 stay order notes. "BIS is continuing to evaluate and investigate questions surrounding the accuracy and foundation of those assertions, but nonetheless does not wish further delay in addressing and resolving the merits of Micei's petition for review," it adds. "In addition, Micei has recently hired new U.S.-based counsel and there are some indications that Micei may be prepared to more meaningfully engage on the issue," BIS states.

## * * * Briefs * * *

USTR: USTR Ron Kirk tried to quash speculation that he might return to Texas to run for Senate seat being vacated by Sen. Kay Bailey Hutchinson (R-Texas), who has said she will leave Senate to run for governor of Texas. "I am happy where I am," Kirk told reporters July 31. "I am not going to resign to run for the senate now or anytime in the future. My life in politics is over," he said.

ENVIRONMENTAL EXPORTS: BIS is undertaking assessment of competitiveness of U.S. environmental products industry, including makers of solar panels, wind turbines and batteries. Study will also look at impact export controls have on these firms.

MAGNESIA CARBON BRICKS: Resco Products, Inc, July 29, filed antidumping and countervailing duty complaints at ITC and ITA against imports of magnesia carbon bricks from China and antidumping complaint against imports from Mexico.

EX-IM BANK: Bank July 16 announced new program to buy back Ex-Im guaranteed medium- and long-term export loans from banks to give banks more liquidity. "The Ex-Im Bank 'take-out' option will enable banks to offer much more competitive financing terms to their borrowers who wish to buy U.S. exports," said Ex-Im Senior Vice President John A. McAdams. If guaranteed lender exercises take-out option, Ex-Im will buy, and guaranteed lender will transfer to Bank, any loans covered by take-out option and all related transaction documents in exchange for payment of loan purchase price, Ex-Im explained. Bank will charge annual fee to lender for this option and additional fee if option is exercised.

FCPA: Helmerich & Payne entered deferred prosecution agreement with Justice July 30 and agreed to pay $1 million penalty to settle charges that it violated FCPA with payments of bribes to government officials in Argentina and Venezuela. "The agreement recognizes H&P's voluntary disclosure and thorough self-investigation of the underlying conduct, the cooperation provided by the company to the Department, and the extensive remedial efforts undertaken by the company," Justice statement said. In separate settlement with SEC, H&P agreed to pay $375,681 in disgorgement of profits and pre-judgment interest.

MORE FCPA: Avery Dennison of Pasedena, Calif., has entered settlements with SEC to resolve charges that it violated FCPA in connection with illegal payments its Reflectives Division of Avery (China) Co. Ltd. paid or authorized in kickbacks, sightseeing trips and gifts to Chinese government officials from 2002 to 2005. Firm agreed to cease-and-desist order barring future violations of FCPA books and records requirements. In administrative settlement, firm agreed to disgorge $273,213 plus $45,257 in prejudgement interest. In civil action in D.C. U.S. District Court it agreed to pay $200,000 civil fine.

POULTRY: WTO Dispute-Settlement Body July 31 created panel to hear Chinese complaint against U.S. restrictions on imports of poultry from China. Chinese object to provision in 2009 Omnibus Appropriations Act which says "none of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from the People's Republic of China." U.S. said it was disappointed by Chinese action. "As we have stated, nothing in the measure identified by China prevents the relevant U.S. authorities from continuing to work together to reach an objective, science-based response to China's request for a declaration of equivalence with respect to poultry products," U.S. statement asserted. "We also remain concerned with the way in which China has framed its panel request. In particular, we must point out again that the request appears both to include measures that were not consulted upon or do not exist and to make claims under a covered agreement pursuant to which consultations were neither requested nor held," it added.