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Locke Directs BIS to Conduct Study of Export Controls

Commerce Secretary Gary Locke isn't waiting for the nomination and confirmation of a new under secretary for the Bureau of Industry and Security (BIS) to turn his attention to export control issues. He has already directed BIS to study the current system and find ways to target controls better. "I have instructed Commerce's Bureau of Industry and Security to initiate a review of our export controls," Locke told the Washington International Trade Association (WITA) July 22. He said export controls was one of his top five priorities.

"The review will focus on improving the system by targeting our controls at those state and non-state actors who would seek to do us harm, while ensuring that the traditional control lists keep pace with technological developments," Locke told WITA. "Most important, I've asked the bureau to consider new ways to make the system more responsive, transparent, and efficient to reflect the realities of the global marketplace," he said.

Locke noted the recent report from the National Research Council, which said the U.S. export control system is broken. "Our export control system seeks to make us safer by preventing sensitive items from falling into the hands of those who seek to do us harm," Locke noted. "But we must adapt to America's changing security needs without inhibiting the competitiveness of U.S. companies and institutions," he added.

The lengthy delays in getting visas for foreign visitors coming to the U.S. on business and the denial of some visas also have drawn Locke's attention. "The United States often makes it too difficult for foreign company executives to enter here to do business – a shortcoming that has had a tangible cost for American businesses by shutting out some of their best customers," he said. Locke cited industry complaints about lost sales because Chinese buyers who were invited to attend a trade show were denied visas "even though many of them have previously visited the United States on buying missions without incident." While the process has improved, "I have also created an interagency task force with the State Department that will keep national security paramount while further improving the visa process," he announced.

Cotton Nations Press for Attention in Doha Talks

Trade ministers from four cotton-producing countries in Africa came to Washington the week of July 20 to plea for more attention to cotton issues in Doha Round negotiations, but they left with little to show for their visit. The ministers had hoped to meet with U.S. Trade Represent-



ative (USTR) Ron Kirk, but Kirk was in Singapore for an Asia-Pacific Economic Cooperation (APEC) Forum meeting. As a result, their meeting with Kirk has been put off until the first week in August when Kirk will be in Kenya for an African trade meeting.

The officials from Benin, Burkina Faso, Chad and Mali — collectively known as the Cotton Four (C-4) — complained that the U.S. and European Union (EU) have refused to negotiate on the cotton issue or to respond to a proposal the C-4 made on cutting subsidies for cotton. They noted that the World Trade Organization (WTO) ministerial declaration in Hong Kong in 2005 said cotton should be treated in an ambitious, expeditious and specific way in the round. “It is clear we need proposals from the other parties to advance the negotiations,” said Burkina Faso Trade Minister Mamadou Sanou.

The C-4 countries have made it clear that they are prepared to block any final Doha deal, if their demands are not dealt with satisfactorily. “There will be no solution to the Doha Round without a solution to cotton,” Sanou told reporters July 22, speaking through a translator. “Our objective is not to block. We make no *a priori* conditions,” he added. He said the C-4 are prepared to negotiate and open a dialogue, but they don’t want to wait until the end of the round. The U.S. has put off talks on cotton until it sees what it will get overall in the Doha agriculture talks. Sanou also said he expects agriculture modalities and cotton to be discussed at the coming WTO ministerial at the end of November.

U.S. cotton growers argue that U.S. cotton production has fallen sharply along with U.S. subsidies and the problem now is the increase in production in China and India. “U.S. production is down by 40% from five years ago,” said Mark Lange, president of the National Cotton Council in a statement. “Clearly, countries such as India and China, who have seen significant expansion in their cotton acres, have more distortive practices and policies as their producers expand in the face of rising prices for competing crops. Any Doha agreement is going to have to address these issues for the C-4 to realize any benefits,” he added.

The C-4 dismiss this contention. “The argument they make we consider to be a short-term solution,” Sanou said. “The reductions are not fixed; prices are not going to stay high,” he added. “It is a temporary improvement of the situation. What we are here looking for is a systemic solution that makes sure that in the future the situation does not occur again,” he said.

BIS Acknowledges Foreign Availability of Machine Tools

BIS has again come late to the dance and still may not have arrived with the release July 21 of a report conceding that highly controlled five-axis machine tools are already available in China and Taiwan and current U.S. controls are “placing U.S. exporters at a competitive disadvantage.” The machine tool industry has been saying this for more than a decade, as China has become the largest machine tool market in the world and European machine tool firms, especially in France and Italy, have taken market share from American firms in China. The Chinese market for machine tools has grown from being about half the size of the U.S. market in 2000 to being three times as large in 2006, with an estimated value of \$12 billion.

With BIS’ recognition that there is foreign availability of this equipment outside of controlled sources, industry is now asking when and how BIS intends to change its regulations and licensing policies. Even with the report, the Pentagon is expected to continue to resist liberalization of controls. “DoD still believes the U.S. [equipment] is superior and monopolistic,” said Paul Freedenberg, director of government relations for the Association for Manufacturing Technology.

The BIS study reviewed the foreign availability of machine tools under Export Control Classification Numbers (ECCN) 2B001.b.2 and 2B001.c.2. These ECCNs cover five-axis simultaneous control mills, grinders, mill/turns, and machining centers. China and Taiwan “both have an indigenous capability to produce five-axis simultaneous control machine tools with linear

positioning accuracies comparable to the United States,” the study found. “U.S. export license processing times, especially to China, are longer than those of other Wassenaar Arrangement members, placing U.S. exporters at a competitive disadvantage,” it said. “Compared with other exporting countries of this technology, the United States is losing market share to its European and Asian competitors, particularly South Korea,” the report added.

The report recommended amending the Export Administration Regulations (EAR) to ease the export of these machines and to work to get international agreement in the Wassenaar Arrangement and Nuclear Suppliers Group to modify multilateral controls. While the U.S. could take some unilateral actions to speed export licensing, decontrol of these machines would require agreement in Wassenaar, a process that could take two years or more, if the U.S. could agree internally on a position to take to other regime members. U.S. manufacturers would like to see BIS create a new License Exemption for certain machine tools that would allow license-free export to most destinations, including China, for machines that are less accurate than the most advanced ones.

Court Supports ITA Power to Use Offsets in Dumping Cases

The International Trade Administration (ITA) has broad discretion to decide how to calculate dumping margins and to change the rules applied to “zeroing” in antidumping cases, Court of International Trade (CIT) Judge Judith Barzilay ruled July 20 (slip op. 09-74). Her ruling also endorsed ITA’s authority to use Sections 123 and 129 of the Uruguay Round Agreements Act to amend U.S. regulations to bring them into compliance with WTO dispute-settlement rulings. Barzilay’s ruling in *U.S. Steel v. U.S.* is the latest court decision addressing the use of zeroing in antidumping cases and the use of “offsetting” as an alternative mechanism for calculating dumping margins. It also dealt with efforts by Washington to comply with WTO rulings.

“Most important, Commerce does not offend the central aim of the antidumping laws by interpreting Section 1677(35)(A)-(B) to permit offsetting,” she wrote. The antidumping laws are intended to protect domestic industries from foreign goods sold with injurious effect in the U.S. at prices below the fair market value of those goods in their home market. “However, these principles are meant to level the playing field between foreign and domestic manufacturers of like merchandise, not give an unfair advantage to the domestic industry,” she declared.

“Congress’s intent and purpose on the issue of offsetting cannot be unambiguously ascertained under the several antidumping laws. Therefore, the court must afford deference to Commerce’s interpretation of the statutes at issue so long as the agency’s reading is permissible,” Barzilay ruled. “In reaching the Section 123 determination, Commerce worked within the framework established by Congress to accord U.S. practices with the nation’s international trade obligations,” she also stated, upholding ITA’s authority to amend rules to meet WTO requirements.

Correction – Exporters Face Problems with Routed Transactions

In the July 13 issue of WTTL, the article on BIS recordkeeping requirements for Electronic Export Information (EEI) filed in the Automated Export System (AES) did not correctly explain concerns exporters have voiced about Census Bureau advice on “routed transactions” (see WTTL, July 13, page 3). At a recent meeting of the BIS Regulations and Procedures Technical Advisory Committee (RAPTAC), member Catherine Thornberry of Export Procedures Company, Inc. identified problems exporters may have obtaining copies of their AES records when they are named as the U.S. Principle Party in Interest (USPPI) on the EEI. Thornberry noted that when the Foreign Principle Party in Interest (FPPI) arranges a shipment, Census assumes that also links the responsibility for the EEI filing to the FPPI and instructs freight forwarders that the Power of Attorney (POA) must be obtained from the FPPI and the EEI must be designated as a “routed export transaction.” Thus, when an “F” Incoterm is implemented in a

contract, Census assumes the EEI filing responsibility is assigned to the U.S. agent of the FPPI, even though the contract would state otherwise. When this occurs, the USPPI may not be able to obtain a copy of the EEI since when it is marked as “routed” the USPPI relinquishes authority over the EEI, Thornberry explained. In addition, Census is institutionalizing a new document requirement that when the FPPI arranges the shipment, the FPPI must provide a POA or written authorization to the USPPI for the USPPI to file the EEI. Again, under the “F” Incoterms, this extra administrative burden is unnecessary and troublesome, Thornberry argued.

Also, even if the USPPI relinquishes authority over the EEI under the Foreign Trade Regulations (FTR), the USPPI could still have responsibility under the Export Administration Regulations (EAR) or International Traffic in Arms Regulations (ITAR), she cautioned. The best way to determine if an EEI should be marked as “routed” is to look to the assignment of responsibilities in the contract or purchase order to determine if the USPPI or FPPI has been assigned the responsibility for export clearance, she advised.

President’s Tariff Declaration Powers Can’t Be Challenged

The president’s authority to modify the Harmonized Tariff Schedule of the U.S. and the International Trade Commission’s (ITC) advice on the implementation of such changes cannot be challenged in court, CIT Judge Judith Barzilay ruled July 20 in a precedent-setting decision. “For the first time, the court must determine whether a challenge to the president’s modification of the HTSUS falls within its exclusive subject matter jurisdiction under Section 1581(I),” she noted in a suit brought by Target department stores against the tariff classification for certain “festive” household products (slip op. 09-75).

“The problem with plaintiffs’ complaints is that Congress did not bestow on the ITC the authority to make such a decision,” she noted. “The authority to modify the HTSUS lies with the president, who may do so, at his complete discretion, based on the recommendations by the ITC,” she ruled.

* * * Briefs * * *

ENTITY LIST: BIS in July 21 Federal Register amended Entity List to add 13 persons and remove three. Among entities removed was Karachi CBW Research Institute, University of Karachi’s Husein Ebrahim Jamal Research Institute of Chemistry, which was cited in BIS charges against Bruker AXS in settlement for alleged export of analytical x-ray instrument without license (see Brief below).

EXPORT ENFORCEMENT: After making voluntary self-disclosure, Bruker AXS, Inc., of Madison, Wis., agreed to pay \$7,500 civil fine in settlement with BIS to settle two charges related to alleged export of analytical x-ray equipment without license to Karachi CBW Research Institute, University of Karachi’s Husein Ebrahim Jamal Research Institute of Chemistry in Pakistan, which was on BIS Entity List.

TIRES: Coalition of tire importers wrote to USTR Ron Kirk July 21, asking for meeting to discuss pending decision on safeguard action against tire imports from China (see **WTTL**, July 6, page 2). Letter claims “adopting the ITC recommendation will cause the American economy to shed 25,000 jobs, mostly in the tire distribution and retail sectors. For every job ‘saved’ by this protection, up to 25 jobs will be lost.”

MEXICAN TRUCKS: New coalition called Alliance to Keep U.S. Jobs has been formed with 150 companies, trade groups and law firms to lobby for lifting of restrictions on entry of Mexican trucks into U.S. Group claims Mexican retaliation has “hampered U.S. firms’ ability to sell some \$2.4 billion worth of manufactured and agricultural products bound for Mexico.”

INDIA: DDTC posted notice July 23 to clarify implementation of U.S.-India Technology Safeguards Agreement signed July 20, permitting launch of civil or non-commercial satellites containing U.S. ITAR-controlled components on Indian space launch vehicles. “For the purposes of this policy, ‘civil or non-commercial satellites’ does not include commercial satellites (communications or otherwise). Commercial satellites will continue to be subject to a presumption of denial,” it declared.